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Contents

Federal Register

Vol. 89, No. 104

Wednesday, May 29, 2024

Agricultural Marketing Service

PROPOSED RULES

Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program, 46335–46336

Agriculture Department

See Agricultural Marketing Service

See Forest Service

Census Bureau

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Business Enterprise Research and Development Survey, 46359–46360
Emergency Economic Information Collections, 46360–46361

Centers for Disease Control and Prevention

NOTICES

Award of a Single Source Cooperative Funding Agreement: Universidad del Valle de Guatemala, 46400–46401

Centers for Medicare & Medicaid Services

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46401–46402

Children and Families Administration

NOTICES

Hearings, Meetings, Proceedings, etc.:
Tribal Consultation, 46402

Coast Guard

RULES

Safety Zone:
Captain of the Port Northern Great Lakes Zone, 46328
Delaware River, Philadelphia, PA, 46328–46330
Saginaw Memorial Cup Fireworks, Saginaw River; Saginaw, MI, 46326–46328
Special Local Regulation:
Marine Events within the Eleventh Coast Guard District—Great Western Tube Float, 46325–46326

Commerce Department

See Census Bureau

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

Delaware River Basin Commission

RULES

Regulatory Program Fees and Water Charges Rates, 46322–46323

Drug Enforcement Administration

NOTICES

Importer, Manufacturer or Bulk Manufacturer of Controlled Substances; Application, Registration, etc.:
Pharmaron Manufacturing Services (US) LLC; Correction, 46420

Education Department

RULES

Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program:
Correction, 46330–46331

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Providing Reading Interventions for Students in Middle School Toolkit Evaluation, 46377–46378
William D. Ford Federal Direct Loan Program Promissory Notes and Related Forms, 46376–46377

Energy Department

See Federal Energy Regulatory Commission

NOTICES

Hearings, Meetings, Proceedings, etc.:
Environmental Management Site-Specific Advisory Board, Paducah, 46378
Request for Information:
Advanced Technology Vehicles Manufacturing Loan Program, 46378–46382

Environmental Protection Agency

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Background Checks for Contractor Employees, 46394
Drug Testing for Contractor Employees; Renewal, 46395
Environmental Justice Thriving Communities Technical Assistance Centers Program: Post-Award Reporting and Public Outreach, 46395–46396
General Administrative Requirements for Assistance Programs, 46392–46393
Materials Management, 46393–46394
School Integrated Pest Management Awards Program, 46396–46397

Executive Office for Immigration Review

RULES

Efficient Case and Docket Management in Immigration Proceedings, 46742–46795

Federal Aviation Administration

RULES

Accepted Means of Compliance:
Airworthiness Standards: Normal Category Airplanes, 46309–46319

Airworthiness Directives:

Airbus SAS Airplanes, 46319–46322

PROPOSED RULES

Airspace Designations and Reporting Points:

Langtry, TX, 46339–46340

Airworthiness Directives:

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes, 46336–46339

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Representatives of the Administrator, 46571
Safety Team Website, 46570–46571

Federal Communications Commission**PROPOSED RULES**

National Suicide Hotline Act, 46340–46352

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46397–46398
Hearings, Meetings, Proceedings, etc., 46398

Federal Deposit Insurance Corporation**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46398–46400

Federal Emergency Management Agency**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Property Acquisition and Relocation for Open Space, 46412–46413
Request for Federal Assistance—How to Process Mission Assignments in Federal Disaster Operations, 46413–46414

Federal Energy Regulatory Commission**RULES**

Applications for Permits to Site Interstate Electric Transmission Facilities, 46682–46740

NOTICES

Application:

Texas Gas Transmission, LLC, Gulf Pipeline Co., LLC, 46390–46392
Transcontinental Gas Pipe Line Co., LLC, 46385–46387
Combined Filings, 46382–46383, 46387–46389
Environmental Issues:
Colorado Interstate Gas Co., LLC, Proposed Totem Enhanced Deliverability Project, 46383–46385
Records Governing Off-the-Record Communications, 46388–46389
Standards for Business Practices of Interstate Natural Gas Pipelines; Correction, 46390

Federal Financial Institutions Examination Council**NOTICES**

Hearings, Meetings, Proceedings, etc.:
Appraisal Subcommittee, 46400

Federal Motor Carrier Safety Administration**NOTICES**

Hearings, Meetings, Proceedings, etc.:
Truck Leasing Task Force, 46571–46572

Fish and Wildlife Service**RULES**

Endangered and Threatened Species:
Critical Habitat for the Coastal Distinct Population Segment of the Pacific Marten, 46576–46616

NOTICES

Federal Land Managers' Air Quality Related Values Work Group; Final Addendum to 2010 Phase 1 Report, 46416–46417
Permits; Applications, Issuances, etc.:
Endangered and Threatened Species, 46414–46416

Food and Drug Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
De Novo Classification Process (Evaluation of Automatic Class III Designation), 46402–46404

Platform Technology Designation Program, 46406–46408
Final Debarment Order:

Maria Anzures-Camarena, 46404–46406

Withdrawal of Approval of Drug Application:

Bayer HealthCare Pharmaceuticals, Inc., et al., 46406

Foreign Assets Control Office**RULES**

Cuban Assets Control, 46323–46325

Foreign-Trade Zones Board**NOTICES**

Approval of Subzone Status:
Stoltzfus Logistics International, LLC, Atglen, PA, 46362
Proposed Production Activity:
Big Mountain Paper Inc., (Disposable Diapers/Underwear/Pads and Wet Wipes), Foreign-Trade Zone 64, Jacksonville, FL, 46361–46362

Forest Service**NOTICES**

Land Management Plan:
Bridger-Teton National Forest; Revision, 46358–46359

Health and Human Services Department

See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

NOTICES

Delegation of Authority, 46409

Homeland Security Department

See Coast Guard
See Federal Emergency Management Agency

Housing and Urban Development Department**PROPOSED RULES**

HOME Investment Partnerships Program:
Program Updates and Streamlining, 46618–46680

Interior Department

See Fish and Wildlife Service
See Land Management Bureau
See National Park Service
See Ocean Energy Management Bureau

International Trade Administration**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Circular Welded Carbon Steel Pipes and Tubes from Thailand, 46365–46366
Sodium Hexametaphosphate from the People's Republic of China, 46362–46363
Approved Trade Mission, 46366–46370
Hearings, Meetings, Proceedings, etc.:
Advisory Committee on Supply Chain Competitiveness, 46370
Sales at Less Than Fair Value; Determinations, Investigations, etc.:
Certain Paper Shopping Bags from Cambodia, 46363–46365

International Trade Commission**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Oil Country Tubular Goods from Argentina, Mexico, and Russia, 46419–46420

Justice Department

See Drug Enforcement Administration

See Executive Office for Immigration Review

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application to Register as an Importer of United States Munitions Import List Articles, 46421
Licensing Questionnaire, 46421–46422
Prohibited Persons Questionnaire, 46420–46421
Residency and Citizenship, 46422–46423

Labor Department

See Occupational Safety and Health Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Claim for Consequential Illness Benefits under the Energy Employees Occupational Illness Compensation Program Act, 46424
Fire Protection in Shipyard Employment Standard, 46423–46424

Land Management Bureau**NOTICES**

Hearings, Meetings, Proceedings, etc.:
Western Oregon Resource Advisory Council, 46417–46418

National Institutes of Health**NOTICES**

Hearings, Meetings, Proceedings, etc.:
National Cancer Institute, 46409
National Institute of Allergy and Infectious Diseases, 46409–46411
National Institute of Mental Health, 46410
National Institute of Neurological Disorders and Stroke, 46411
National Institute on Drug Abuse, 46410–46411
Office of the Director, 46409

National Oceanic and Atmospheric Administration**RULES**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
Reef Fish Resources of the Gulf of Mexico; Amendment 56; Correction, 46333
Fisheries of the Exclusive Economic Zone off Alaska:
Cook Inlet Salmon; Amendment 16; Correction, 46333–46334

PROPOSED RULES

International Fisheries:
Western and Central Pacific Fisheries for Highly Migratory Species; Changes to Purse Seine Fish Aggregating Device Closure Periods, 46352–46357

NOTICES

Hearings, Meetings, Proceedings, etc.:
Evaluation of Old Woman Creek National Estuarine Research Reserve, 46375–46376
Fisheries of the South Atlantic; Southeast Data, Assessment, and Review, 46373

New England Fishery Management Council, 46372–46375
Taking or Importing of Marine Mammals:
Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, 46370–46372

National Park Service**NOTICES**

Federal Land Managers' Air Quality Related Values Work Group; Final Addendum to 2010 Phase 1 Report, 46416–46417

National Science Foundation**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46425–46426
Meetings; Sunshine Act, 46425

Nuclear Regulatory Commission**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Licenses and Radiation Safety Requirements for Irradiators, 46426–46427

Occupational Safety and Health Administration**NOTICES**

Hearings, Meetings, Proceedings, etc., 46424–46425

Ocean Energy Management Bureau**NOTICES**

Environmental Assessments; Availability, etc.:
Wind Energy Research Lease on the Atlantic Outer Continental Shelf Offshore Maine, 46418–46419

Postal Regulatory Commission**NOTICES**

New Postal Products, 46427–46428

Securities and Exchange Commission**NOTICES**

Self-Regulatory Organizations; Proposed Rule Changes:
Cboe BZX Exchange, Inc., 46428–46441, 46462–46476, 46478–46493, 46499–46511, 46514–46527, 46543–46556
Nasdaq BX, Inc., 46493–46499
Nasdaq GEMX, LLC, 46476–46478
Nasdaq ISE, LLC, 46512–46514
New York Stock Exchange LLC, 46527–46528
NYSE Arca, Inc., 46441–46462, 46533–46543
The Nasdaq Stock Market LLC, 46528–46533, 46556–46570

Small Business Administration**NOTICES**

Disaster Declaration:
Texas, 46570

Substance Abuse and Mental Health Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 46411–46412

Transportation Department

See Federal Aviation Administration

See Federal Motor Carrier Safety Administration

NOTICES

Hearings, Meetings, Proceedings, etc.:
Transforming Transportation Advisory Committee,
46572–46573

Treasury Department

See Foreign Assets Control Office

Veterans Affairs Department**RULES**

Update to Delegations of Authority to Certain Officials,
46331–46333

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:
Loan Guaranty: Processing Assumptions of VA-
Guaranteed Home Loans, 46573

Separate Parts In This Issue**Part II**

Interior Department, Fish and Wildlife Service, 46576–
46616

Part III

Housing and Urban Development Department, 46618–46680

Part IV

Energy Department, Federal Energy Regulatory
Commission, 46682–46740

Part V

Justice Department, Executive Office for Immigration
Review, 46742–46795

Reader Aids

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

To subscribe to the Federal Register Table of Contents
electronic mailing list, go to [https://public.govdelivery.com/
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CFR PARTS AFFECTED IN THIS ISSUE

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

7 CFR**Proposed Rules:**

175.....46335

8 CFR

1001.....46742

1003.....46742

1239.....46742

1240.....46742

14 CFR

23.....46309

39.....46319

Proposed Rules:

39.....46336

71.....46339

18 CFR

50.....46682

380.....46682

401.....46322

420.....46322

24 CFR**Proposed Rules:**

91.....46618

92.....46618

570.....46618

982.....46618

31 CFR

515.....46323

33 CFR

100.....46325

165 (3 documents) 46326,
46328

34 CFR

682.....46330

685.....46330

38 CFR

2.....46331

47 CFR**Proposed Rules:**

52.....46340

50 CFR

17.....46576

622.....46333

679.....46333

Proposed Rules:

300.....46352

Rules and Regulations

Federal Register

Vol. 89, No. 104

Wednesday, May 29, 2024

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. FAA–2024–0969]

Accepted Means of Compliance (MOC); Airworthiness Standards: Normal Category Airplanes

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

ACTION: Notice of availability (NOA).

SUMMARY: This document announces the availability of ASTM International (ASTM) consensus standards for use as an FAA-accepted means of compliance (MOC) to the applicable airworthiness standards for normal category airplanes. The FAA accepts ASTM F3264–23, “Standard Specification for Normal Category Aeroplanes Certification,” with changes identified in this document.

DATES: Acceptance of the means of compliance is effective on May 29, 2024.

FOR FURTHER INFORMATION CONTACT: Hieu Nguyen, Federal Aviation Administration, Policy and Standards Division, GA, Airplanes, Rotorcraft and Emerging Aircraft Section, AIR–62B,

901 Locust Street, Room 301, Kansas City, Missouri 64106; telephone: (316) 946–4123; facsimile: (316) 946–4107; email: hieu.nguyen@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

Under the provisions of the National Technology Transfer and Advancement Act of 1995¹ and Office of Management and Budget (OMB) Circular A–119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” effective January 27, 2016, the FAA participates in the development of consensus standards for use as a means of carrying out its policy objectives where appropriate.

Consistent with the Small Airplane Revitalization Act of 2013, the FAA has been working with industry and other stakeholders through the ASTM F44 Committee on General Aviation Aircraft to develop consensus standards as a MOC in certificating small airplanes under part 23.²

In part 23, amendment 23–64 (81 FR 96572), published on December 30, 2016,³ the final rule stated the FAA would publish an NOA of those consensus standards in the **Federal Register** when the Administrator accepts the consensus standards as an acceptable MOC. The FAA reviewed the published ASTM consensus standards developed by the ASTM F44 Committee

on General Aviation Aircraft as the basis for a MOC to 65 sections of part 23, amendments 23–64 and 23–65. In some cases, the Administrator found sections of ASTM F3264–23, without changes, are accepted as an MOC for the airworthiness requirements of part 23, amendments 23–64 and 23–65. In other cases, the MOC, while based on ASTM consensus standards, include additional FAA provisions necessary to comply with the airworthiness requirements of part 23, amendments 23–64 and 23–65.

Part 23, amendment 23–64, established airworthiness requirements based on the safety requirements outlined in amendment 23–63, except in areas that address loss of control and icing, where the FAA increased the safety level. Depending on the details of a design, the applicant may require use of a different MOC beyond those accepted by this NOA. For example, novel airplane designs, such as unmanned airplanes or vertical takeoff and landing airplanes, may be outside the scope of this NOA, and applicants may need to propose alternative MOC applicable to their designs accepted under § 23.2010.

Means of Compliance Accepted

The FAA accepts only the revisions of the standards referenced in ASTM F3264–23, “Standard Specification for Normal Category Aeroplanes Certification,” as a means of compliance for part 23, amendments 23–64 and 23–65, with the changes identified in table 1. For ease of use, table 2 was added to provide a side-by-side view, linking the applicable part 23 regulation to the ASTM F3264–23 section.

¹ Ref Public Law 104–113 as amended by Public Law 107–107.

² Ref Public Law 113–53.

³ See <https://www.federalregister.gov/documents/2016/12/30/2016-30246/revision-of-airworthiness-standards-for-normal-utility-acrobatic-and-commuter-category-airplanes>.

TABLE 1—PART 23 ACCEPTED MOC BASED ON ASTM CONSENSUS STANDARDS ^{4 5}

ASTM No. as identified in F3264–23	ASTM document title	Changes required for FAA acceptance ⁴	Additional information ⁵
F2490–20	Standard Guide for Aircraft Electrical Load and Power Source Capacity Analysis.	None.	
F3061/F3061M–22b	Standard Specification for Systems and Equipment in Aircraft.	The tables defining applicability of requirements in sections 4, 10, 13, and 17 are not accepted. Applicability will be determined by the Policy and Standards Division. Replace 17.3.1.1 with the following: (a) Each electrical or electronic system that performs a function, the failure of which would prevent the continued safe flight and landing of the airplane, must be designed, and installed such that— (1) The function at the airplane level is not adversely affected during and after the time the airplane is exposed to lightning; and (2) The system recovers normal operation of that function in a timely manner after the airplane is exposed to lightning unless the system's recovery conflicts with other operational or functional requirements of the system. Replace 17.3.1.2 with the following: (b) Each electrical and electronic system that performs a function, the failure of which would significantly reduce the capability of the airplane or the ability of the flight crew to respond to an adverse operating condition, must be designed and installed such that the system recovers normal operation of that function in a timely manner after the airplane is exposed to lightning. Remove 17.3.1.3. Replace 10.4.2, 10.4.3, 10.4.4 Level 1 with Level 4.	The tables defining applicability found in F3061/F3061M–22b sections 4, 10, 13, and 17 are not accepted. Applicability will be determined by the Policy and Standards Division. Aircraft certification levels are as defined in 14 CFR 23.2005. F3061/F3061M–22b does not contain means for showing compliance to § 23.2310, <i>Buoyancy for seaplanes and amphibians</i>. If applying for certification of a seaplane or amphibian, applicants may use the provisions of §§ 23.751, 23.755, and 23.757 at amendment 23–63 as a means of complying with § 23.2310 or may obtain FAA acceptance of a different MOC in accordance with § 23.2010.
F3062/F3062M–20	Standard Specification for Aircraft Powerplant Installation.	None.	
F3063/F3063M–21	Standard Specification for Aircraft Fuel Storage and Delivery.	None.	
F3064/F3064M–21	Standard Specification for Aircraft Powerplant Control, Operation, and Indication.	None.	
F3065/F3065M–21a	Standard Specification for Aircraft Propeller System Installation.	None.	
F3066/F3066M–18	Standard Specification for Aircraft Powerplant Installation Hazard Mitigation.	None.	
F3082/F3082M–22	Standard Specification for Weights and Centers of Gravity of Aircraft.	None.	
F3083/F3083M–20a	Standard Specification for Emergency Conditions, Occupant Safety and Accommodations.	Replace 4.1.6 with the following: Powerplant and ESS mounts and supporting structures must withstand 18.0 g forward for powerplants and ESS installed behind and above the seating compartment.	
F3093/F3093M–21	Standard Specification for Aeroelasticity Requirements.	None.	
F3114–21	Standard Specification for Structures.	None.	
F3115/F3115M–23	Standard Specification for Structural Durability for Small Aeroplanes.	None	If the applicant proposes to use F3115/F3115M–20 sections 4.3 or 6.3.2, the Policy and Standards Division will be involved as the standard is applied during projects to review the approach to determining similarity (F3115/F3115M–20 section 4.3) and criteria defining obvious damage (F3115/F3115M–20 section 6.3.2). If the applicant proposes to use F3115/F3115M–23 sections 4.1.3 or 4.3.3.2, the Policy and Standards Division will be involved as the standard is applied during projects to review the approach to determining similarity (F3115/F3115M–23 section 4.1.3) and criteria defining obvious damage (F3115/F3115M–23 section 4.3.3.2).

TABLE 1—PART 23 ACCEPTED MOC BASED ON ASTM CONSENSUS STANDARDS ^{4 5}—Continued

ASTM No. as identified in F3264–23	ASTM document title	Changes required for FAA acceptance ⁴	Additional information ⁵
F3116/F3116M–18e2	Standard Specification for Design Loads and Conditions.	Replace: Section 4.1.4 with: “Appendix X1 through Appendix X4 provides, within the limitations specified within the appendix, a simplified MOC with several of the requirements set forth in sections 4.2 to 4.26 and 7.1 to 7.9 that can be applied as one (but not the only) means to comply. If the simplified methods in appendix X1 through X3 are used, they must be used together in their entirety.” Replace: Section X1.1.1 with: “The methods provided in this appendix provide one possible means (but not the only possible means) of compliance and can only be applied to Level 1 and Level 2 low speed airplanes.” Replace: Section X2.1.1 with: “The methods provided in this appendix provide one possible means (but not the only possible means) of compliance and can only be applied to Level 1 and Level 2 low speed airplanes.” Replace: Section X3.1.1 with: “The methods provided in this appendix provide one possible means (but not the only possible means) of compliance and can only be applied to Level 1 and Level 2 low speed airplanes.” Replace: Section X4.1.1 with: “The methods provided in this appendix provide one possible means (but not the only possible means) of compliance and can only be applied to Level 1 low speed airplanes.”	
F3117/F3117M–23a	Standard Specification for Crew Interface in Aircraft.	None.	
F3120/F3120M–20	Standard Specification for Ice Protection for General Aviation Aircraft.	None.	
F3173/F3173M–21a	Standard Specification for Aircraft Handling Characteristics.	None.	
F3174/F3174M–21	Standard Specification for Establishing Operating Limitations and Information for Aeroplanes.	None.	
F3179/F3179M–22e1	Standard Specification for Performance of Aircraft.	None.	
F3180/F3180M–21	Standard Specification for Low-Speed Flight Characteristics of Aircraft.	The FAA does not universally accept all alternatives contained in F3180/F3180M–21. FAA previously and continues to accept F3180/F3180M–16.	Applicants are encouraged to propose elements of F3180/F3180M–21, or other means, for development of their project MOC to § 23.2150 in accordance with § 23.2010.
F3227/F3227M–22	Standard Specification for Environmental Systems in Aircraft.	None.	
F3228–21	Standard Specification for Flight Data and Voice Recording in Small Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3228–21 are not accepted. Applicability will be determined by the Policy and Standards Division.
F3229/F3229M–17	Standard Practice for Static Pressure System Tests in Small Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3229/F3229M–17 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3230–21a	Standard Practice for Safety Assessments of Systems and Equipment in Small Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3230–21a is not accepted. Applicability will be determined by the Policy and Standards Division.
F3231/F3231M–23	Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3231/F3231M–23 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3232/F3232M–20	Standard Specification for Flight Controls in Small Aircraft.	None.	
F3233/F3233M–21	Standard Specification for Flight and Navigation Instrumentation in Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3233/F3233M–21 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3234/F3234M–21	Standard Specification for Exterior Lighting in Small Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3234/F3234M–21 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3235–22	Standard Specification for Aircraft Storage Batteries.	Remove: Section 4.2	If applying for certification of an airplane with installed lithium batteries, applicants may use the guidance provided by RTCA DO–311A or may obtain FAA acceptance of a different MOC in accordance with § 23.2010.

TABLE 1—PART 23 ACCEPTED MOC BASED ON ASTM CONSENSUS STANDARDS ^{4 5}—Continued

ASTM No. as identified in F3264–23	ASTM document title	Changes required for FAA acceptance ⁴	Additional information ⁵
		Remove: Table 1	Aircraft Type Code compliance matrix table found in F3235–22 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3236–21a	Standard Specification for High Intensity Radiated Field (HIRF) Protection in Small Aircraft.	Remove: Table 1	Aircraft Type Code compliance matrix table found in F3236–21a is not accepted. Applicability will be determined by the Policy and Standards Division.
F3239–22a	Standard Specification for Aircraft Electric Propulsion Systems.	The FAA does not universally accept F3239–22a due to inexperience with the standard.	Applicants are encouraged to consider proposing F3239–22a for development of their MOC for electric propulsion systems on a project-by-project basis. Any MOC proposed must establish a level of safety equivalent to certified reciprocating and turbine propulsion systems and receive acceptance by the FAA in accordance with § 23.2010.
F3254–22	Standard Specification for Aircraft Interaction of Systems and Structures.	Figures 2, 3, and 4 Replace: “Remote” with: “10–5”. Replace: “Extremely Improbable” with: “10–8” for Level 1, 2 and 3 airplanes and with “10–9” for Level 4 airplanes”.	Other proposed probabilities will be considered by the FAA on a case-by-case basis.
F3309/F3309M–21	Standard Practice for Simplified Safety Assessment of Systems and Equipment in Small Aircraft.	None.	
F3316/F3316M–19	Standard Specification for Electrical Systems for Aircraft with Electric or Hybrid-Electric Propulsion.	FAA does not universally accept F3316/F3316M–19 due to inexperience with the standard.	Applicants are encouraged to consider proposing F3316/F3316M–19 for development of their MOC for electrical systems installed on airplanes with electric or hybrid-electric propulsion systems on a project-by-project basis. Applicants may obtain FAA acceptance of a different MOC in accordance with § 23.2010.
		Remove: Table 1	Aircraft Type Code compliance matrix table found in F3316/F3316M–19 is not accepted. Applicability will be determined by the Policy and Standards Division.
F3331–18	Standard Practice for Aircraft Water Loads.	None.	
F3367–21a	Standard Practice for Simplified Methods for Addressing High-Intensity Radiated Fields (HIRF) and Indirect Effects of Lightning on Aircraft.	Replace: paragraph 5.1.1 with: “Systems that are part of the Type Certificated Engine must be installed in accordance with the engine manufacturer’s requirements. The minimum HIRF and lightning qualification in accordance with sections 8 and 9 of this ASTM practice should be met at the aircraft level, except for engine control systems in Level 1 and 2 airplanes which should meet the following: HIRF: DO–160, section 20–R for both radiated and conducted susceptibility. Lightning: Utilize guidance in AC 33.28–3. For metallic fuselage DO–160G, section 22–A3J3L3 (shielded) and A3H3L3 (unshielded). For composite fuselage DO–160G, section 22–B3K3L3 (shielded) and B3H3L3 (unshielded). Use of lower HIRF and lightning induced voltage & current levels may be acceptable for electronic engine control systems if substantiated at the airplane level (by test in the proposed installation or similar) when exposed to external HIRF environment per AC 20–158 (latest revision) and lightning per AC20–136 (latest revision); using shielding and grounding of the electronic engine control system and accessories in the given installation.”	
F3380–19	Standard Practice for Structural Compliance of Very Light Aeroplanes.	None.	
F3396/F3396M–20	Standard Practice for Aircraft Simplified Loads Criteria.	None.	
F3397/F3397M–21	Standard Practice for Aeroplane Turbine Fuel System Hot Weather Operations.	None.	
F3408/F3408M–21	Standard Specification for Aircraft Emergency Parachute Recovery Systems.	None.	
F3432–20a	Standard Practice for Powerplant Instruments.	None.	
F3498–21	Standard Practice for Developing Simplified Fatigue Load Spectra.	None.	

TABLE 1—PART 23 ACCEPTED MOC BASED ON ASTM CONSENSUS STANDARDS ^{4 5}—Continued

ASTM No. as identified in F3264–23	ASTM document title	Changes required for FAA acceptance ⁴	Additional information ⁵
F3532–22	Standard Practice for Protection of Aircraft Systems from Intentional Unauthorized Electronic Interactions.	None.	

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
Subpart B—Flight		
§ 23.2100 Weight and center of gravity ..	5.1 Weight/Mass and Center of Gravity	5.1.1 F3082/F3082M–22 Standard Specification for Weights and Centers of Gravity of Aircraft 5.1.2 F3114–21 Standard Specification for Structures.
§ 23.2105 Performance data	5.2 Performance Data	5.2.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2110 Stall speed	5.3 Stall Speed	5.3.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2115 Takeoff performance	5.4 Takeoff Performance	5.4.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2120 Climb requirements	5.5 Climb Requirements	5.5.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2125 Climb information	5.6 Climb Information	5.6.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2130 Landing	5.7 Landing	5.7.1 F3179/F3179M–22e1 Standard Specification for Performance of Aircraft.
§ 23.2135 Controllability	5.8 Controllability	5.8.1 F3173/F3173M–21a Standard Specification for Aircraft Handling Characteristics.
§ 23.2140 Trim	5.9 Trim	5.9.1 F3173/F3173M–21a Standard Specification for Aircraft Handling Characteristics.
§ 23.2145 Stability	5.10 Stability	5.10.1 F3173/F3173M–21a Standard Specification for Aircraft Handling Characteristics.
§ 23.2150 Stall characteristics, stall warning, and spins.	5.11 Stall Characteristics, Stall Warning, and Spins.	5.11.1 F3180/F3180M–21 Standard Specification for Low-Speed Flight Characteristics of Aircraft.
§ 23.2155 Ground and water handling characteristics.	5.12 Ground and Water Handling Characteristics.	5.12.1 F3173/F3173M–21a Standard Specification for Aircraft Handling Characteristics.
§ 23.2160 Vibration, buffeting, and high-speed characteristics.	5.13 Vibration, Buffeting, and High-Speed Characteristics.	5.13.1 F3173/F3173M–21a Standard Specification for Aircraft Handling Characteristics.
§ 23.2165 Performance and flight characteristics requirements for flight in icing conditions.	5.14 Performance and Flight Characteristics Requirements for Flight in Icing Conditions.	5.14.1 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft.
Subpart C—Structures		
§ 23.2200 Structural design envelope	6.1 Structural Design Envelope	6.1.1 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions 6.1.1.1 F3396/F3396M–20 Standard Practice for Aircraft Simplified Loads.
§ 23.2205 Interaction of systems and structures.	6.2 Interaction of Systems and Structure.	6.2.1 F3254–22 Standard Specification for Aircraft Interaction of Systems and Structures.
§ 23.2210 Structural design loads	6.3 Structural Design Loads	6.3.1 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions 6.3.1.1 F3396/F3396M–20 Standard Practice for Aircraft Simplified Loads 6.3.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2215 Flight load conditions	6.4 Flight Load Conditions	6.4.1 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions 6.4.1.1 F3396/F3396M–20 Standard Practice for Aircraft Simplified Loads.
§ 23.2220 Ground and water load conditions.	6.5 Ground and Water Load Conditions	6.5.1 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions 6.5.1.1 F3331–18 Standard Practice for Aircraft Water Loads.
§ 23.2225 Component loading conditions	6.6 Component Loading Conditions	6.6.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.6.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft 6.6.2 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions. 6.6.2.1 F3396/F3396M–20 Standard Practice for Aircraft Simplified Loads.
§ 23.2230 Limit and ultimate loads	6.7 Limit and Ultimate Loads	6.7.1 F3114–21 Standard Specification for Structures. 6.7.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.

⁴ The MOC are intended for traditional part 23 airplanes, not for novel designs. Novel designs require evaluation and possible modification of the MOC.

⁵ You may find additional information on the FAA Small Airplane Issues List (SAIL) here: https://www.faa.gov/aircraft/air_cert/design_approvals/small_airplanes/small_airplanes_regs/.

⁶ The ASTM F3264–23 section(s) provides a means of compliance intended to be used on projects for traditional part 23 airplanes, not for novel designs. Novel designs require evaluation and possible modification of the means of compliance.

⁷ Changes required for FAA acceptance and additional information per table 1 still applies to table 2. The FAA does not accept the Aircraft Type

Code compliance matrix tables included in F3228–21, F3229/F3229M–17, F3230–21a, F3231/F3231M–23, F3233/F3233M–21, F3234/F3234M–21, F3235–22, F3236–21a, and F3316/F3316M–19. The tables defining applicability found in F3061/F3061M–22b sections 4, 10, 13, and 17 are not accepted. Applicability will be determined by the Policy and Standards Division.

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)—Continued

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
§ 23.2235 Structural strength	6.8 Structural Strength	6.8.1 F3114–21 Standard Specification for Structures. 6.8.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2240 Structural durability	6.9 Structural Durability	6.9.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.9.2 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation 6.9.3 F3115/F3115M–23 Standard Specification for Structural Durability for Small Aeroplanes. 6.9.3.1 F3380–19 Standard Practice for Structural Compliance of Very Light Aeroplanes 6.9.3.2 F3498–21 Standard Practice for Developing Simplified Fatigue Load Spectra. 6.9.4 F3116/F3116M–18e2 Standard Specification for Design Loads and Conditions.
§ 23.2245 Aeroelasticity	6.10 Aeroelasticity	6.10.1 F3093/F3093M–21 Standard Specification for Aeroelasticity Requirements.
§ 23.2250 Design and construction principles.	6.11 Design and Construction Principles	6.11.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.11.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 6.11.2 F3114–21 Standard Specification for Structures. 6.11.2.1 F3380–19 Standard Practice for Structural Compliance of Very Light Aeroplanes. 6.11.3 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2255 Protection of structure	6.12 Protection of Structure	6.12.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.12.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 6.12.2 F3114–21 Standard Specification for Structures. 6.12.2.1 F3380–19 Standard Practice for Structural Compliance of Very Light Aeroplanes. 6.12.3 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 6.12.4 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2260 Materials and processes	6.13 Materials and Processes	6.13.1 F3114–21 Standard Specification for Structures. 6.13.1.1 F3380–19 Standard Practice for Structural Compliance of Very Light Aeroplanes. 6.13.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2265 Special factors of safety	6.14 Special Factors of Safety	6.14.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.14.2 F3114–21 Standard Specification for Structures. 6.14.2.1 F3380–19 Standard Practice for Structural Compliance of Very Light Aeroplanes.
§ 23.2270 Emergency conditions	6.15 Emergency Conditions	6.15.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 6.15.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 6.15.2 F3083/F3083M–20a Standard Specification for Emergency Conditions, Occupant Safety and Accommodations. 6.15.3 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
Subpart D—Design and Construction		
§ 23.2300 Flight control systems	7.1 Flight Control Systems	7.1.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 7.1.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 7.1.2 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 7.1.3 F3117/F3117M–23a Standard Specification for Crew Interface.
§ 23.2305 Landing gear systems	7.2 Landing Gear Systems	7.2.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft.
§ 23.2310 Buoyancy for seaplanes and amphibians.	7.3 Buoyancy for Seaplanes and Amphibians.	7.3.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft.
§ 23.2315 Means of egress and emergency exits.	7.4 Means of Egress and Emergency Exits.	7.4.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 7.4.2 F3083/F3083M–20a Standard Specification for Emergency Conditions, Occupant Safety and Accommodations.

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)—Continued

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
§ 23.2320 Occupant physical environment.	7.5 Occupant Physical Environment	7.5.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 7.5.1.1 F3227/F3227M–22 Standard Specification for Environmental Systems in Small Aircraft. 7.5.2 F3083/F3083M–20a Standard Specification for Emergency Conditions, Occupant Safety and Accommodations 7.5.3 F3114–21 Standard Specification for Structures. 7.5.4 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft.
§ 23.2325 Fire protection	7.6 Fire Protection	7.6.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft 7.6.1.1 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 7.6.1.2 F3234/F3234M–21 Standard Specification for Exterior Lighting in Small Aircraft. 7.6.1.3 F3316/F3316M–19 Standard Specification for Electrical Systems for Aircraft with Electric or Hybrid-Electric Propulsion. 7.6.2 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 7.6.3 F3083/F3083M–20a Standard Specification for Emergency Conditions, Occupant Safety and Accommodations. 7.6.4 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2330 Fire protection in designated fire zones and adjacent areas.	7.7 Fire Protection in Designated Fire Zones and Adjacent Areas.	7.7.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 7.7.1.1 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 7.7.2 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 7.7.3 F3114–21 Standard Specification for Structures.
§ 23.2335 Lightning protection	7.8 Lightning Protection	7.8.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft.
Subpart E—Powerplant		
§ 23.2400 Powerplant installation	8.1 Powerplant Installation	8.1.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.1.2 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 8.1.3 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.1.3.1 F3432–20a Standard Practice for Powerplant Instruments. 8.1.4 F3065/F3065M–21a Standard Specification for Aircraft Propeller System Installation. 8.1.5 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.1.6 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
§ 23.2405 Automatic power or thrust control systems.	8.2 Power or Thrust Control Systems ...	8.2.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.2.2 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.2.2.1 F3432–20a Standard Practice for Powerplant Instruments. 8.2.3 F3065/F3065M–21a Standard Specification for Aircraft Propeller System Installation. 8.2.4 F3117/F3117M–23a Standard Specification for Crew Interface.
§ 23.2410 Powerplant installation hazard assessment.	8.3 Powerplant Installation Hazard Assessment.	8.3.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 8.3.2 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.3.3 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 8.3.4 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.3.4.1 F3432–20a Standard Practice for Powerplant Instruments. 8.3.5 F3065/F3065M–21a Standard Specification for Aircraft Propeller System Installation. 8.3.6 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.3.7 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 8.3.8 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
§ 23.2415 Powerplant ice protection	8.4 Powerplant Installation Ice Protection.	8.4.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.4.2 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 8.4.3 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.4.4 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)—Continued

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
§ 23.2420 Reversing systems	8.5 Reversing Systems	8.5.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.5.2 F3065/F3065M–21a Standard Specification for Aircraft Propeller System Installation. 8.5.3 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems
§ 23.2425 Powerplant operational characteristics.	8.6 Powerplant Operational Characteristics.	8.6.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.6.2 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.6.2.1 F3432–20a Standard Practice for Powerplant Instruments. 8.6.3 F3065/F3065M–21a Standard Specification for Aircraft Propeller System Installation 8.6.4 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.6.5 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft 8.6.6 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
§ 23.2430 Fuel systems	8.7 Fuel and Energy Storage and Distribution Systems.	8.7.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.7.2 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 8.7.2.1 F3397/F3397M–21 Standard Practice for Aeroplane Turbine Fuel System Hot Weather Operations 8.7.3 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.7.3.1 F3432–20a Standard Practice for Powerplant Instruments. 8.7.4 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.7.5 F3114–21 Standard Specification for Structures. 8.7.6 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
§ 23.2435 Powerplant induction and exhaust systems.	8.8 Powerplant Induction, Exhaust, and Support Systems.	8.8.1 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 8.8.2 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
§ 23.2440 Powerplant fire protection	8.9 Powerplant Installation Fire Protection.	8.9.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft 8.9.2 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation 8.9.3 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 8.9.4 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 8.9.4.1 F3432–20a Standard Practice for Powerplant Instruments. 8.9.5 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 8.9.6 F3239–22a Standard Specification for Aircraft Electric Propulsion Systems.
Subpart F—Equipment		
§ 23.2500 Airplane level systems requirements.	9.1 Systems and Equipment Function—Requirements.	9.1.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.1.1.1 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 9.1.1.1(a) F3235–22 Standard Specification for Aircraft Storage Batteries. 9.1.1.2 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 9.1.1.3 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.1.1.3(a) F3229/F3229M–17 Standard Practice for Static Pressure System Tests in Small Aircraft. 9.1.1.4 F3316/F3316M–19 Standard Specification for Electrical Systems for Aircraft with Electric or Hybrid-Electric Propulsion. 9.1.2 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 9.1.2.1 F3432–20a Standard Practice for Powerplant Instruments. 9.1.3 F3066/F3066M–18 Standard Specification for Aircraft Powerplant Installation Hazard Mitigation. 9.1.4 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 9.1.5 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft. 9.1.6 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)—Continued

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
§ 23.2505 Function and installation	9.2 Equipment Function and Installation Requirements.	9.2.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.2.1.1 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 9.2.1.1(a) F3235–22 Standard Specification for Aircraft Storage Batteries. 9.2.1.2 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 9.2.1.3 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.2.1.4 F3316/F3316M–19 Standard Specification for Electrical Systems for Aircraft with Electric or Hybrid-Electric Propulsion. 9.2.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2510 Equipment, systems, and installations.	9.3 Equipment, Systems, and Installation.	9.3.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.3.1.1 F3230–21a Standard Practice for Safety Assessments of Systems and Equipment in Small Aircraft. 9.3.1.2 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.3.1.3 F3227/F3227M–22 Standard Specification for Environmental Systems in Small Aircraft. 9.3.1.4 F3309/F3309M–21 Standard Practice for Simplified Safety Assessment of Systems and Equipment in Small Aircraft. 9.3.1.5 F3532–22 Standard Practice for Protection of Aircraft Systems from Intentional Unauthorized Electronic Interactions. 9.3.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2515 Electrical and electronic system lightning protection.	9.4 Electrical and Electronic System Lightning Protection.	9.4.1 F3061/F3061M–22b22b2322b Standard Specification for Systems and Equipment in Small Aircraft. 9.4.1.1 F3367–21a Standard Practice for Simplified Methods for Addressing High-Intensity Radiated Fields (HIRF) and Indirect Effects of Lightning on Aircraft.
§ 23.2520 High-intensity Radiated Fields (HIRF) protection.	9.5 High Intensity Radiated Fields (HIRF) Protection.	9.5.1 F3061/F3061M–22b22b2322b Standard Specification for Systems and Equipment in Small Aircraft. 9.5.1.1 F3236–21a Standard Specification for High Intensity Radiated Field (HIRF) Protection in Small Aircraft. 9.5.1.2 F3367–21a Standard Practice for Simplified Methods for Addressing High-Intensity Radiated Fields (HIRF) and Indirect Effects of Lightning on Aircraft.
§ 23.2525 System power generation, storage, and distribution.	9.6 System Power Generation, Storage, and Distribution.	9.6.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.6.1.1 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 9.6.1.1(a) F2490–20 Standard Guide for Aircraft Electrical Load and Power Source Capacity Analysis. 9.6.1.2 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.6.1.3 F3316/F3316M–19 Standard Specification for Electrical Systems for Aircraft with Electric or Hybrid-Electric Propulsion. 9.6.1.3(a) F2490–20 Standard Guide for Aircraft Electrical Load and Power Source Capacity Analysis. 9.6.2 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 9.6.3 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft.
§ 23.2530 External and cockpit lighting ..	9.7 External and Cockpit Lighting	9.7.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.7.1.1 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.7.1.2 F3234/F3234M–21 Standard Specification for Exterior Lighting in Small Aircraft. 9.7.2 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 9.7.3 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft.
§ 23.2535 Safety equipment	9.8 Safety Equipment	9.8.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.8.2 F3083/F3083M–20a Standard Specification for Emergency Conditions, Occupant Safety and Accommodations. 9.8.3 F3117/F3117M–23a Standard Specification for Crew Interface.
§ 23.2540 Flight in icing conditions	9.9 Flight in Icing Conditions	9.9.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.9.1.1 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 9.9.2 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft.
§ 23.2545 Pressurized systems elements.	9.10 Pressurized System Elements	9.10.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 9.10.1.1 F3229/F3229M–17 Standard Practice for Static Pressure System Tests in Small Aircraft.

TABLE 2—SIDE-BY-SIDE VIEW OF PART 23 REGULATIONS AND ASTM F3264–23 SECTION(S)—Continued

Part 23 amendments 23–64 and 23–65 regulation(s)	ASTM F3264–23 section(s)1A ⁶	ASTM F3264–23 subsection(s)1A ⁷
§ 23.2550 Equipment containing high-energy rotors.	9.11 Equipment Containing High-Energy Rotors.	9.11.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft.
Subpart G—Flight crew interface and Other Information		
§ 23.2600 Flightcrew interface	10.1 Flight crew Compartment Interface	10.1.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 10.1.1.1 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 10.1.2 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 10.1.3 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 10.1.4 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 10.1.4.1 F3432–20a Standard Practice for Powerplant Instruments. 10.1.5 F3114–21 Standard Specification for Structures. 10.1.6 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 10.1.7 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2605 Installation and operation	10.2 Installation and Operation Information.	10.2.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 10.2.1.1 F3227/F3227M–22 Standard Specification for Environmental Systems in Small Aircraft. 10.2.1.2 F3231/F3231M–23 Standard Specification for Electrical Systems for Aircraft with Combustion Engine Electrical Power Generation. 10.2.1.3 F3232/F3232M–20 Standard Specification for Flight Controls in Small Aircraft. 10.2.1.4 F3233/F3233M–21 Standard Specification for Flight and Navigation Instrumentation in Aircraft. 10.2.2 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 10.2.3 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 10.2.4 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 10.2.4.1 F3432–20a Standard Practice for Powerplant Instruments. 10.2.5 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 10.2.6 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft. 10.2.7 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2610 Instrument markings, control markings, and placards.	10.3 Instrument Markings, Control Markings, and Placards.	10.3.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 10.3.2 F3063/F3063M–21 Standard Specification for Aircraft Fuel and Energy Storage and Delivery. 10.3.3 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 10.3.4 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft. 10.3.5 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
§ 23.2615 Flight, navigation, and powerplant instruments.	10.4 Flight, Navigation, and Powerplant Instruments.	10.4.1 F3061/F3061M–22b Standard Specification for Systems and Equipment in Small Aircraft. 10.4.2 F3062/F3062M–20 Standard Specification for Aircraft Powerplant Installation. 10.4.3 F3064/F3064M–21 Standard Specification for Aircraft Powerplant Control, Operation, and Indication. 10.4.3.1 F3432–20a Standard Practice for Powerplant Instruments. 10.4.4 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft.
§ 23.2620 Airplane flight manual	5.15 Operating Limitations	5.15.1 F3174/F3174M–21 Standard Specification for Establishing Operating Limitations and Information for Aeroplanes. 5.15.2 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.
	10.5 Airplane Flight Manual	10.5.1 F3117/F3117M–23a Standard Specification for Crew Interface in Aircraft. 10.5.2 F3174/F3174M–21 Standard Specification for Establishing Operating Limitations and Information for Aeroplanes. 10.5.3 F3120/F3120M–20 Standard Specification for Ice Protection for General Aviation Aircraft. 10.5.4 F3408/F3408M–21 Standard Specification for Aircraft Emergency Parachute Recovery Systems.

The MOC accepted by this NOA provide one means, but not the only means of complying with part 23 regulatory requirements. Applicants who desire to use an MOC reflected by

other revisions to ASTM standards not previously accepted may seek guidance and possible acceptance from the FAA for the use of those MOC on a case-by-case basis. Applicants may propose an

alternative MOC for FAA review and possible acceptance.

Editorial, Reapproval, Revision, or Withdrawal

ASTM policy is that a consensus standard should be reviewed in its entirety by the responsible subcommittee and must be balloted for reapproval, revision, or withdrawal, within five years of its last approval date. When an ASTM standard is *reapproved*, that reapproval is denoted by the year in parentheses (e.g., F2427–05a (2013)). This date indicates the completion of a review cycle with no technical changes made to the standard. In addition, ASTM issues *editorial changes* denoted by a superscript epsilon in the standard designation (e.g., F3235–17^{e1}). This epsilon indicates information was corrected, and it did not change the meaning or intent of a standard. Since *reapprovals* and *editorial changes* do not change the technical content of standards, then any standard FAA-accepted by this NOA that is later *reapproved* or *editorially changed* by ASTM, is also considered FAA-accepted and without the need for an updated NOA.

ASTM *revises* a standard to make changes to its technical content. Revisions are identified by a hyphen after the document number, which is followed by the last two numbers of the year of acceptance or of last revision. If the standard is revised again during the same year, this is indicated by adding an “a” for the second revision, “b” for the third revision, etc. Since *revisions* change the technical content, *revisions* to consensus standards serving as the basis for an MOC accepted by this NOA will not be automatically accepted and will require further FAA acceptance for the revisions to be an accepted MOC.

Availability

ASTM F3264–23, “Standard Specification for Normal Category Aeroplanes Certification,” is available online at <https://www.astm.org/READINGLIBRARY/>. ASTM copyrights these consensus standards and charges the public a fee for service. Individual downloads or reprints of a standard (single or multiple copies, or special compilations, and other related technical information) may be obtained online or by contacting ASTM by telephone: (610) 832–9585; facsimile: (610) 832–9555; or through email: service@astm.org. To inquire about consensus standard content and/or membership or about ASTM Offices abroad, contact Joe Koury, Staff Manager for Committee F44 on General Aviation Aircraft by telephone: (610) 832–9804 or through email: jkoury@astm.org.

Issued in Kansas City, Missouri, on May 21, 2024.

Patrick Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2024–11596 Filed 5–28–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA–2024–0221; Project Identifier AD–2023–01233–T; Amendment 39–22762; AD 2024–11–01]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2021–21–02, which applied to certain Airbus SAS Model A318, A319, A320, A321, A330–200, A330–200 Freighter, A330–300, A330–800, A330–900, A340–200, A340–300, A340–500, A340–600, and A380–800 series airplanes. AD 2021–21–02 required replacing certain parts manufacturer approval (PMA) Ni–Cd batteries with serviceable Ni–Cd batteries or maintaining the electrical storage capacity of those PMA Ni–Cd batteries during airplane storage or parking. This AD was prompted by a determination that the on-wing preservation procedures originally provided in that AD did not ensure the expected preservation of the battery capacity. This AD adds airplanes to the applicability and requires replacing each affected part with a serviceable part before release to service of an airplane after a storage or parking period, as applicable. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective July 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–0221; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200

New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email dan.rodina@faa.gov.

SUPPLEMENTARY INFORMATION:**Background**

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2021–21–02, Amendment 39–21762 (86 FR 62898, November 15, 2021) (AD 2021–21–02). AD 2021–21–02 applied to certain Airbus SAS Model A318, A319, A320, A321, A330–200, A330–200 Freighter, A330–300, A330–800, A330–900, A340–200, A340–300, A340–500, A340–600, and A380–800 series airplanes. The NPRM published in the **Federal Register** on February 9, 2024 (89 FR 9074). The NPRM was prompted by a determination that the on-wing preservation procedures originally provided in that AD did not ensure the expected preservation of the battery capacity. In the NPRM, the FAA proposed to add Model A300 series airplanes; Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes); Model A310 series airplanes; and Model A350–941 and –1041 airplanes to the applicability. The FAA proposed that the superseding AD would retain none of the requirements of AD 2021–21–02. The FAA proposed to require replacing each affected part with a serviceable part before release to service of an airplane after a storage or parking period, as applicable. The FAA is issuing this AD to address reduced battery endurance performance, which could possibly result in failure to supply the minimum essential electrical power during abnormal or emergency conditions.

Discussion of Final Airworthiness Directive**Comments**

The FAA received comments from Air Line Pilots Association, International (ALPA), who supported the SNPRM/NPRM without change.

The FAA received additional comments from American Airlines (AA) and United Airlines (UAL). The following presents the comments received on the NPRM and the FAA’s response to each comment.

Request for Clarification of Terms

AAL requested clarification of “parking and storage” as intended by

the proposed AD. The commenter asked whether “parking and storage” included extended heavy maintenance checks, such as an S-check that is abnormally extended beyond the 6-month time-limit due to inspection findings or material sourcing issues, or extended downtime for aircraft repair or modification such as a large repair for aircraft tug collision damage or a large-scale interior modification.

The FAA agrees to clarify. It is the responsibility of the operator to apply the relevant instructions provided in the aircraft maintenance manual (AMM) related to extended heavy maintenance checks or downtime for aircraft repair or modification. A dedicated preservation regime shall be defined in line with the maintenance activity requirements (for example, the need to keep batteries connected), based upon the applicable AMM parking and storage procedures. If a battery meets the definition of a “serviceable part” as specified in paragraphs (g)(2) and (3) of this AD, then the requirement to replace after “parking and storage” does not apply because it is not an affected part. However, if the battery meets the definition of an “affected part” as specified in paragraph (g)(1) of this AD, the requirement to replace after “parking and storage” does apply.

Request for One AD in the Future

UAL requested that in the future an attempt is made to include PMA parts

during “initial release” as opposed to having two ADs (UAL stated “no change to this AD”).

The FAA recognizes the efficiency of a single AD, but in the future, may or may not issue separate ADs when PMA parts and non-PMA parts (i.e., original equipment manufacturer (OEM) parts) are involved, depending on potential implementation issues and what is in the best interest of safety.

Comment on Duplicative Applicability

UAL stated that Docket FAA–2024–0029 indicated it applied to the PMA batteries, as does the NPRM.

The FAA acknowledges that the NPRM that published in the **Federal Register** on January 22, 2024 (89 FR 3897), for Docket FAA–2024–0029, inadvertently referred to PMA batteries. However, in the final rule, AD 2024–08–08, Amendment 39–22741 (89 FR 35695, May 2, 2024) (AD 2024–08–08), the FAA removed references to PMA batteries. Only this AD is applicable to PMA batteries.

Updated Reference to Related AD

Note 1 to paragraph (h) of the proposed AD specifies that airplanes on which a battery is replaced with a serviceable non-PMA Ni-Cd battery are affected by AD 2021–20–08, Amendment 39–21746 (86 FR 57025, October 14, 2021), which provides requirements for non-PMA Ni-Cd batteries. However, the FAA has

superseded AD 2021–20–08 with AD 2024–08–08. AD 2024–08–08 adds airplanes to the applicability and requires replacement of certain affected parts (i.e., certain non-PMA Ni-Cd batteries) with serviceable parts as a precondition for return to service of airplanes from storage or parking, as specified in European Union Aviation Safety Agency (EASA) AD 2023–0196, dated November 10, 2023. You may examine the AD docket for AD 2024–08–08 at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–0029. The FAA has added a reference to AD 2024–08–08 to Note 1 to paragraph (h) of this AD.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Costs of Compliance

The FAA estimates that this AD affects 1,814 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacements	5 work-hours × \$85 per hour = \$425	\$0	\$425	\$770,950

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

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

For the reasons discussed above, I certify that this AD:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2021–21–02, Amendment 39–21762 (86 FR 62898, November 15, 2021); and

■ b. Adding the following new AD:

2024–11–01 Airbus SAS: Amendment 39–22762; Docket No. FAA–2024–0221; Project Identifier AD–2023–01233–T.

(a) Effective Date

This airworthiness directive (AD) is effective July 3, 2024.

(b) Affected ADs

This AD replaces AD 2021–21–02, Amendment 39–21762 (86 FR 62898, November 15, 2021) (AD 2021–21–02).

(c) Applicability

This AD applies to Airbus SAS airplanes identified in paragraphs (c)(1) through (14) of this AD, certificated in any category, equipped with any parts manufacturer approval (PMA) part approved for the type design nickel cadmium (Ni-Cd) batteries having a part number identified in Figure 1 to the introductory text of paragraph (c) of this AD.

Figure 1 to the introductory text of paragraph (c) – Ni-Cd battery

Airplane Model	Battery Part Number	Time Limits (months)
A318, A319, A320, and A321	2758 or 416526 (equivalent to 285CH)	6
A330 and A340	4059, 405CH, or 505CH	6
A350	505CH2	12
A380	505CH2	12
A300, A300-600, A310, and A300F4-608ST	2520	6

(1) Model A300 B4–2C, B4–102, B4–103, B4–120, B4–203, and B4–220 airplanes.

(2) Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes.

(3) Model A300 B4–605R and B4–622R airplanes.

(4) Model A300 C4–203, C4–605R variant F, and C4–620 airplanes.

(5) Model A300 F4–203, F4–605R, F4–608ST, and F4–622R airplanes.

(6) Model A310–203, –203C, –204, –221, –222, –304, –308, –322, –324, and –325 airplanes.

(7) Model A318–111, –112, –121, and –122 airplanes.

(8) Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes.

(9) Model A320–211, –212, –214, –215, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes.

(10) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –251NX, –252N, –252NX, –253N, –253NX, –271N, –271NX, –272N, and –272NX airplanes.

(11) Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, –343, –743L, –841, and –941 airplanes.

(12) Model A340–211, –212, –213, –311, –312, –313, –541, –542, –642, and –643 airplanes.

(13) Model A350–941 and A350–1041 airplanes.

(14) Model A380–841, –842, and –861 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Unsafe Condition

This AD was prompted by a report that repetitive disconnection and reconnection of certain Ni-Cd batteries during airplane

parking or storage could lead to a reduction in capacity of those batteries. The unsafe condition, if not addressed, could lead to reduced battery endurance performance and possibly result in failure to supply the minimum essential electrical power during abnormal or emergency conditions.

(f) Compliance

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

(g) Definitions

(1) For the purposes of this AD, an “affected PMA Ni-Cd battery” is defined as any PMA Ni-Cd battery approved for a Ni-Cd battery identified in Figure 1 to the introductory text of paragraph (c) of this AD, all serial numbers, except those which are a serviceable PMA Ni-Cd battery as defined in paragraph (g)(2) of this AD.

(2) For the purposes of this AD, a “serviceable PMA Ni-Cd battery” is defined as a PMA Ni-Cd battery approved for a Ni-Cd battery identified in Figure 1 to the introductory text of paragraph (c) of this AD, all serial numbers, which was fully (re)charged at constant current and, after (re)charging, was not stored on wing during a period exceeding the applicable “Time Limit” specified in Figure 1 to the introductory text of paragraph (c) of this AD. Periodical, regular, and overhaul checks of a PMA Ni-Cd battery that include the battery (re)charge at constant current are acceptable methods to demonstrate that the battery was (re)charged.

(3) For the purposes of this AD, a “serviceable non-PMA Ni-Cd battery” is defined as a type design Ni-Cd battery having a part number identified in Figure 1 to the introductory text of paragraph (c) of this AD, all serial numbers, which was fully (re)charged at constant current and, after

(re)charging, was not stored on wing during a period exceeding the applicable “Time Limit” specified in Figure 1 to the introductory text of paragraph (c) of this AD. Periodical, regular, and overhaul checks of a non-PMA Ni-Cd battery that include the battery (re)charge at constant current are acceptable methods to demonstrate that the battery was (re)charged.

(h) Replacement

Before release to service of an airplane after a storage or parking period, as applicable, replace each affected PMA Ni-Cd battery with a serviceable PMA Ni-Cd battery or a serviceable non-PMA Ni-Cd battery.

Note 1 to paragraph (h): Airplanes on which a battery is replaced with a serviceable non-PMA Ni-Cd battery are affected by AD 2024–08–08, Amendment 39–22741 (89 FR 35695, May 2, 2024), which provides requirements for non-PMA Ni-Cd batteries.

(i) Parts Installation Limitation

As of the effective date of this AD, release to service of an airplane is allowed, provided all PMA Ni-Cd batteries approved for a Ni-Cd battery identified in Figure 1 to the introductory text of paragraph (c) of this AD that are installed on that airplane are fully (re)charged at constant current and, after (re)charging, were not stored on wing during a period exceeding the applicable “Time Limit” specified in Figure 1 to the introductory text of paragraph (c) of this AD.

(j) 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 manager of the certification office, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: 9-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.

(k) Related Information

For more information about this AD, contact Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206-231-3225; email dan.rodina@faa.gov.

(l) Material Incorporated by Reference

None.

Issued on May 21, 2024.

Suzanne Masterson,

Deputy Director, Integrated Certificate Management Division, Aircraft Certification Service.

[FR Doc. 2024-11587 Filed 5-28-24; 8:45 am]

BILLING CODE 4910-13-P

DELAWARE RIVER BASIN COMMISSION

18 CFR Parts 401 and 420

Regulatory Program Fees and Water Charges Rates

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: Notice is provided of the Commission’s regulatory program fees and schedule of water charges for the fiscal year beginning July 1, 2024.

DATES: This final rule is effective July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Elba L. Deck, CPA, Director of Finance and Administration, (609) 477-7201.

SUPPLEMENTARY INFORMATION: The Delaware River Basin Commission (“DRBC” or “Commission”) is a Federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and on behalf of the Federal Government, the North Atlantic Division Commander of the U.S. Army Corps of Engineers.

In accordance with 18 CFR 401.43(c), on July 1 of every year, the Commission’s regulatory program fees as set forth in tables 1, 2 and 3 of that section are subject to an annual adjustment, commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia published by the U.S. Bureau of Labor Statistics during that year. Pursuant to 18 CFR 420.41(c), the same indexed adjustment applies to the Commission’s schedule of water charges for consumptive and non-consumptive withdrawals of surface water within the basin. The referenced April 12-month

CPI for 2024 showed an increase of 4.08%. Commensurate adjustments are thus required.

This document is made in accordance with 18 CFR 401.43(c) and 420.41(c), which provide that a revised fee schedule will be published in the **Federal Register** by July 1. The revised fees also may be obtained by contacting the Commission during business hours or by checking the Commission’s website, www.drbc.gov.

List of Subjects

18 CFR Part 401

Administrative practice and procedure, Project review, Water pollution control, Water resources.

18 CFR Part 420

Water supply.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends 18 CFR part 401 and 420 as set forth below:

PART 401—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted.

■ 2. In § 401.43, revise tables 1, 2 and 3 to read as follows:

§ 401.43 Regulatory program fees.

* * * * *

TABLE 1 TO § 401.43—DOCKET APPLICATION FILING FEE

Project type	Docket application fee	Fee maximum
Water Allocation	\$511 per million gallons/month of allocation, ¹ not to exceed \$19,171. ¹ Fee is doubled for any portion to be exported from the basin.	Greater of: \$19,171 ¹ or Alternative Review Fee.
Wastewater Discharge	Private projects: \$1,278; ¹ Public projects: \$639 ¹	Alternative Review Fee.
Other	0.4% of project cost up to \$10,000,000 plus 0.12% of project cost above \$10,000,000 (if applicable), not to exceed \$95,854 ¹ .	Greater of: \$95,854 ¹ or Alternative Review Fee.

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 2 TO § 401.43—ANNUAL MONITORING AND COORDINATION FEE

	Annual fee	Allocation
Water Allocation	¹ \$383 ¹ 575 ¹ 831 ¹ 1,054 ¹ 1,278	<4.99 mgm. 5.00 to 49.99 mgm. 50.00 to 499.99 mgm. 500.00 to 9,999.99 mgm. > or = to 10,000 mgm.
	Annual fee	Discharge design capacity
Wastewater Discharge	¹ \$383 ¹ 780 ¹ 1,048 ¹ 1,278	<0.05 mgd. 0.05 to 1 mgd. 1 to 10 mgd. >10 mgd.

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 3 TO § 401.43—ADDITIONAL FEES

Proposed action	Fee	Fee maximum
Emergency Approval Under 18 CFR 401.40	\$5,000	Alternative Review Fee.
Late Filed Renewal Surcharge	\$2,000.	
Modification of a DRBC Approval	At Executive Director's discretion, Docket Application Fee for the appropriate project type.	Alternative Review Fee.
Name change	¹ \$1,278.	
Change of Ownership	¹ \$1,917.	

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

PART 420—BASIN REGULATIONS—WATER SUPPLY CHARGES

■ 3. The authority citation for part 420 continues to read as follows:

Authority: Delaware River Basin Compact, 75 Stat. 688.

■ 4. In § 420.41, revise paragraphs (a) and (b) to read as follows:

§ 420.41 Schedule of water charges.

* * * * *

(a) \$102 per million gallons for consumptive use, subject to paragraph (c) of this section; and

(b) \$1.02 per million gallons for non-consumptive use, subject to paragraph (c) of this section.

* * * * *

Dated: May 21, 2024.

Pamela M. Bush,

Assistant General Counsel and Commission Secretary.

[FR Doc. 2024–11661 Filed 5–28–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 515

Cuban Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is amending the Cuban Assets Control Regulations (the "Regulations") to further implement elements of the policy announced by the Administration on May 16, 2022, to increase support for the Cuban people. Among other things, these amendments increase support for internet freedom for the Cuban people and independent Cuban private sector entrepreneurs by expanding authorizations for internet-based services and a range of financial transactions. These amendments also include several additional or updated

cross references and one updated definition.

DATES: This rule is effective May 29, 2024.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website: www.treas.gov/ofac.

Background

The Department of the Treasury issued the Cuban Assets Control Regulations, 31 CFR part 515 (the "Regulations"), on July 8, 1963 under the Trading With the Enemy Act (50 U.S.C. 4301–41). OFAC has amended the Regulations on numerous occasions. As with prior amendments, OFAC has ensured that these amendments are consistent with the Cuban Liberty and Democracy Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. 6021–6091 and other applicable authorities. Most recently, on June 9, 2022, OFAC amended the Regulations to implement certain policy measures announced by the Administration on May 16, 2022 to increase support for the Cuban people. In this document, OFAC, in consultation with the Department of State, is taking additional actions to further implement the Administration's Cuba policy measures announced on May 16, 2022, as set forth in more detail below.

Internet-Based Services. OFAC is amending § 515.578(a)(1) to provide additional examples of authorized services incident to the exchange of communications over the internet and to include and expand certain services to support the exchange of such communications. For example, OFAC's amendment to § 515.578(a)(1) clarifies that cloud-based services may be

exported to Cuba to support the exchange of communications over the internet. OFAC is amending § 515.578(a)(2) to expand the authorization for services (including training) to install, repair, or replace certain items, including by removing the requirement that referenced items fall within specific export control classification parameters. OFAC is retaining the requirement in § 515.578(a)(2) that for services (including training) related to any items subject to the Export Administration Regulations, 15 CFR parts 730 through 774, such items must be licensed or otherwise authorized by the Department of Commerce for exportation or reexportation to Cuba. OFAC is also amending § 515.578(d) and (e) to authorize the export or reexport of Cuban-origin software and mobile applications, respectively, from the United States to third countries.

Definition of Independent Private Sector Entrepreneurs. OFAC is amending § 515.340 by replacing the term "self-employed individual" with the term "independent private sector entrepreneur" and limiting the term to exclude a Cuban national who is a prohibited official of the Government of Cuba, as defined in § 515.337, or a member of the Cuban Communist Party, as defined in § 515.338. The term continues to include self-employed individuals (*cuentapropistas*), such as owners or employees of a private business or a sole proprietorship, but the amended definition now also includes cooperatives and other private businesses wholly owned by or consisting solely of such individuals. OFAC is also amending § 515.340 to specify that private businesses or sole proprietorships of up to 100 employees are covered by the term "independent private sector entrepreneur." OFAC is also replacing the term "independent Cuban entrepreneurs" with "independent private sector entrepreneurs" in § 515.582, replacing the term "self-employed individuals" with "independent private sector entrepreneurs" and adding farms of up to 100 employees as an example of

private businesses in § 515.570, and making conforming changes to § 515.421.

U.S. Bank Accounts for Independent Private Sector Entrepreneurs. OFAC is amending § 515.584(h) to authorize independent private sector entrepreneurs in Cuba, as defined in § 515.340, to maintain and use a U.S. bank account to conduct authorized or exempt transactions.

“U-Turn” Transactions. OFAC is amending § 515.584(d) to reinstate an authorization for “U-turn” transactions to help the Cuban people, including independent private sector entrepreneurs, by facilitating remittances and payments for authorized transactions in the Cuban private sector. This amendment allows any banking institution, as defined in § 515.314, that is a person subject to U.S. jurisdiction to process funds transfers in which Cuba or a Cuban national has an interest if the funds transfers originate and terminate outside the United States, provided that neither the originator nor the beneficiary is a person subject to U.S. jurisdiction. Transactions through the U.S. financial system that do not meet these criteria, including all transactions where the originator or beneficiary is a person subject to U.S. jurisdiction, remain prohibited unless otherwise authorized or exempt under the Regulations. OFAC is also amending § 515.584(e) to authorize the unblocking and return of any transfer that would have been authorized pursuant to the reinstated authorization. OFAC is making a conforming change by adding a reference to § 515.584(d) in the note to § 515.209.

Telecommunications-Related Transactions Reporting Requirements. OFAC is amending § 515.542(g) to replace the current fax or mail reporting requirement with a requirement to email reports to *OFACReport@treasury.gov*. OFAC is also adding a sentence to § 515.542(g) to clarify that the reporting requirement in paragraph (g) applies to entities engaging in transactions to provide telecommunication services pursuant to paragraph (b), (c), or (d), and not banking institutions, as defined in § 515.314, processing payments on behalf of such providers.

Educational Activities. OFAC is amending § 515.565(a) to correct a typographical error in the June 9, 2022 amendment to the Regulations and restore language in the general license in § 515.565(a) authorizing transactions beyond the travel-related transactions set forth in § 515.560(c).

Public Participation

Because the Regulations involve a foreign affairs function, the provisions of Executive Order 12866 of September 30, 1993, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993), and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the Regulations are contained in 31 CFR part 501 (the “Reporting, Procedures and Penalties Regulations”) and § 515.572. Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control numbers 1505–0164, 1505–0167, and 1505–0168. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in 31 CFR Part 515

Administrative practice and procedure, Banks, banking, Blocking of assets, Cuba, Credit, Foreign trade, internet, Penalties, Reporting and recordkeeping requirements, Sanctions, Services.

For the reasons set forth in the preamble, OFAC amends 31 CFR part 515 as follows:

PART 515—CUBAN ASSETS CONTROL REGULATIONS

■ 1. The authority citation for part 515 continues to read as follows:

Authority: 22 U.S.C. 2370(a), 6001–6010, 7201–7211; 31 U.S.C. 321(b); 50 U.S.C. 4301–4341; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); 22 U.S.C. 6021–6091; Pub. L. 105–277, 112 Stat. 2681; Pub. L. 111–8, 123 Stat. 524; Pub. L. 111–117, 123 Stat. 3034; E.O. 9989, 13 FR 4891, 3 CFR, 1943–1948 Comp., p. 748; Proc. 3447, 27 FR 1085, 3 CFR, 1959–1963 Comp., p. 157; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614.

Subpart B—Prohibitions

§ 515.209 [Amended]

■ 2. Amend § 515.209 in note 1 to the section by adding “§ 515.584(d) relating to funds transfers or” before the text “§ 515.584(g)”.

Subpart C—General Definitions

- 3. Amend § 515.340 by:
 - a. Revising the section heading;
 - b. In the introductory text, removing “*self-employed individual* means a Cuban national who is” and adding in its place “*independent private sector entrepreneur* means a Cuban national who is not a prohibited official of the Government of Cuba, as defined in § 515.337, or a prohibited member of the Cuban Communist Party, as defined in § 515.338, and is”;
 - c. Revising and republishing paragraph (a);
 - d. In paragraph (c), removing the word “or” after the semicolon;
 - e. In paragraph (d), removing the period and adding in its place “; or”; and
 - f. Adding paragraph (e).

The revisions and addition read as follows:

§ 515.340 Independent private sector entrepreneur.

* * * * *

(a) An owner, including a self-employed individual (*cuentapropista*), or employee of a small private business entity, private cooperative, or a sole proprietorship located in Cuba, in each case of up to 100 employees;

* * * * *

(e) A private cooperative or small private business entity located in Cuba of up to 100 employees that is owned only by individuals described in paragraphs (a) through (d) of this section.

Subpart D—Interpretations

§ 515.421 [Amended]

■ 4. Amend § 515.421 in paragraph (b)(2) by removing “Cuban” and adding in its place “private sector”.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

■ 5. Amend § 515.542 in paragraph (g) by:

- a. Removing “faxed to 202/622–6931 or mailed to the Office of Foreign Assets Control, Attn: Regulatory Affairs Division, 1500 Pennsylvania Avenue NW, Annex, Washington, DC 20220” and adding in its place “emailed to *OFACReport@treasury.gov*”; and
- b. Adding a sentence at the end of the paragraph.

The addition reads as follows:

§ 515.542 Mail and telecommunications-related transactions.

* * * * *

(g) * * * The reporting requirement in this paragraph (g) applies only to the

non-banking institution entity subject to U.S. jurisdiction relying upon paragraph (b), (c), or (d) of this section to provide telecommunications services.

* * * * *

§ 515.565 [Amended]

■ 6. Amend § 515.565 in paragraph (a) introductory text by adding “transactions, including” after “engage in”.

§ 515.570 [Amended]

■ 7. Amend § 515.570 in paragraph (g)(3) by:

■ a. Adding “in Cuba, including farms of up to 100 employees” after “businesses”; and

■ b. Removing “by self-employed individuals” and adding in its place “of Cuba by independent private sector entrepreneurs”.

■ 8. Amend § 515.578 by:

■ a. Revising paragraphs (a)(1) and (2);

■ b. In paragraph (a)(3):

■ i. Removing “The” at the beginning of the sentence and add in its place “To the extent not authorized by § 515.533 or § 515.560, the”; and

■ ii. Removing “(2)(i)–(iii)” and add in its place “(a)(2)”.
■ c. Redesignating Note to § 515.578(b)(2) as Note 3 to § 515.578(b)(2);

■ d. Revising paragraphs (d) and (e); and

■ e. Redesignating the note at the end of the section as Note 5 to § 515.578.

The revisions read as follows:

§ 515.578 Exportation, reexportation, and importation of certain internet-based services; importation of software.

(a) * * *

(1) *Certain internet-based services.* The exportation or reexportation, directly or indirectly, from the United States or by a person subject to U.S. jurisdiction to Cuba of the following services:

(i) Services incident to the exchange of communications over the internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, blogging, web hosting provided that it is not for the promotion of tourism, domain name registration services, social media platforms, collaboration platforms, video conferencing, e-gaming and e-learning platforms, automated translation, web maps, and user authentication services; and

(ii) Services to support the exchange of communications over the internet, such as software design, business consulting, information technology management services, and cloud-based services, to support services described in paragraph (a)(1)(i) of this section.

(2) *Services related to certain exportations and reexportations.* To the extent not authorized by § 515.533, the exportation or reexportation of services, including training, to install, repair, or replace items related to communications, or items used to develop software that improves the free flow of information or that will support private sector activities in Cuba consistent with the export or reexport licensing policy of the Department of Commerce, provided that any such item subject to the Export Administration Regulations, 15 CFR parts 730 through 774, is licensed or otherwise authorized by the Department of Commerce for exportation or reexportation to Cuba.

* * * * *

(d) *Software.* The importation into the United States, and the exportation or reexportation from the United States to third countries, of Cuban-origin software is authorized.

(e) *Mobile applications.* (1) The importation into the United States, and the exportation or reexportation from the United States to third countries, of Cuban-origin mobile applications is authorized.

Note 4 to § 515.578(e)(1): This paragraph (e)(1) does not authorize U.S.-owned or -controlled firms in third countries to import goods of Cuban origin into the authorized trade zone. See § 515.559.

(2) The employment of Cuban nationals to develop mobile applications is authorized.

* * * * *

§ 515.582 [Amended]

■ 9. Amend § 515.582 by:

■ a. In the section heading and introductory text, removing “Cuban” and adding in its place “private sector”; and

■ b. In the introductory text, removing “entrepreneurs as” and adding in its place “entrepreneurs, as defined in § 515.340. The list of goods and services eligible for importation under this section is”.

■ 10. Amend § 515.584 by:

■ a. In paragraph (d), removing “reject” and adding in its place “process”;

■ b. In paragraph (e), in the first sentence, adding “paragraph (d) of this section,” after “processed pursuant to” and adding a comma after “§ 515.562(b)”;

■ c. Adding a heading to paragraph (h) and redesignating the text of paragraph (h) as paragraph (h)(1); and

■ d. Adding paragraph (h)(2).

The additions read as follows:

§ 515.584 Certain financial transactions involving Cuba.

* * * * *

(h) *Opening and maintaining bank accounts for certain Cuban nationals.*

* * *

(2) Any banking institution, as defined in § 515.314, that is a person subject to U.S. jurisdiction is authorized to open and maintain accounts solely in the name of a Cuban national who is an independent private sector entrepreneur, as defined in § 515.340, for the purposes of conducting transactions authorized pursuant to, or exempt from the prohibitions of, this part.

Bradley T. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2024–11618 Filed 5–28–24; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2024–0403]

Special Local Regulation; Marine Events Within the Eleventh Coast Guard District—Great Western Tube Float

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Great Western Tube Float special local regulation on the waters of Parker, Arizona on June 8, 2024. This special local regulation is necessary to provide for the safety of the participants, crew, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1102 will be enforced from 7 a.m. until 5 p.m., on June 8, 2024 for the location described in Item No. 9 in Table 1 to § 100.1102.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email MarineEventsSD@uscg.mil.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1102 for the

Great Western Tube Float in Parker, AZ for the location described in Table No. 1 to § 100.1102, Item No. 9 of that section, from 7 a.m. to 5 p.m. on June 8, 2024. This action is being taken to provide for the safety of life on the navigable waterway during the race. Our regulation for recurring marine events on the Colorado River, between Davis Dam (Bullhead City, Arizona) and Headgate Dam (Parker, Arizona), § 100.1102, Table 1 to § 100.1102, Item No. 9, specifies the location of the regulated area for the Great Western Tube Float, which encompasses portions of the Colorado River. Under the provisions of § 100.1102, persons and vessels are prohibited from entering, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

J.W. Spittler,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2024-11665 Filed 5-28-24; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2024-0372]

RIN 1625-AA00

Safety Zone; Saginaw Memorial Cup Fireworks, Saginaw River; Saginaw, MI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters on the Saginaw River, Saginaw, MI. The safety zone is

necessary and intended to protect personnel, vessels, and the marine environment from potential hazards associated with fireworks displays created by the Saginaw Spirit organization. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Detroit, or his designated representative.

DATES: This rule is effective from 10 p.m. on May 24, 2024 through 10:30 p.m. on June 1, 2024. The rule will be enforced from 10 p.m. through 10:30 p.m. on both May 24, 2024 and June 1, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2024-0372 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Tracy Girard, Waterways Department, Sector Detroit, Coast Guard; telephone (313) 568-9564, email Tracy.M.Girard@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event sponsor notified the Coast Guard with insufficient time to publish an NPRM and immediate action is necessary to protect personnel, vessels, and the marine environment on the Saginaw River. It is impracticable and contrary to the public interest to publish a NPRM because we must establish this safety zone by May 24, 2024.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for

making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with a fireworks display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Detroit (COTP) has determined that potential hazards associated with fireworks displays will be a safety concern for anyone within a 200-yard radius of the launch site. The likely combination of recreational vessels, darkness punctuated by bright flashes of light, and fireworks debris falling into the water presents risks of collisions which could result in serious injuries or fatalities. This rule is necessary to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone from 10 p.m. through 10:30 p.m. on May 24, 2024 and June 1, 2024. The safety zone will encompass all U.S. navigable waters of the Saginaw River within a 200-yard radius of the fireworks launch site located 43°26.225’ N, 083°56.46’ W, in Saginaw, MI. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the fireworks display. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Detroit or his designated representative. The Captain of the Port Detroit or his designated representative may be contacted via VHF Channel 16.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under

Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the safety zone. Vessel traffic will be able to safely transit around this safety zone which would impact a small, designated area of the Saginaw River for approximately one hour during the evening when vessel traffic is normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF-FM Marine Channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not

individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only 1 hour that will prohibit entry within 200-yard radius of where the fireworks display will be conducted. It is categorically excluded from further review under paragraph L[60] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

- 2. Add § 165.T09–0372 to read as follows:

§ 165.T09–0372 Saginaw Memorial Cup Fireworks, Saginaw River; Saginaw, MI.

(a) *Location.* The following area is a temporary safety zone: all U.S. navigable waters of the Saginaw River within a within a 200-yard radius of the fireworks launch site located at position 43°26.225′ N, 083°56.46′ W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Enforcement Period.* This regulation will be enforced from 10 p.m. through 10:30 p.m. on May 24, 2024 and June 1, 2024. The Captain of the Port Detroit, or a designated representative may suspend enforcement of the safety zone at any time.

(c) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol

Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Detroit (COTP) in the enforcement of the safety zone.

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit or his designated representative.

(2) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Detroit or his designated representative. The COTP Detroit or his designated representative may be contacted via VHF Channel 16.

K.F. Brandstaetter,

Commander, U.S. Coast Guard, Acting Captain of the Port, Detroit.

[FR Doc. 2024–11763 Filed 5–28–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2024–0374]

Safety Zones; Recurring Safety Zones in Captain of the Port Northern Great Lakes Zone

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce various safety zones for maritime events in the Captain of the Port Northern Great Lakes. Enforcement of these safety zones is necessary to protect the safety of life and property on the navigable waters immediately prior to, during, and immediately after this event. During the period, the Coast Guard will enforce restrictions upon, and control movement of, vessels in a specified area immediately prior to, during, and immediately after events. During each enforcement period, vessels must stay out of the established safety zone and may only enter with permission from the designated representative of the Captain of the Port Northern Great Lakes.

DATES: The regulations listed in 33 CFR 165.918 will be enforced for the safety zones identified in the **SUPPLEMENTARY INFORMATION** section below for the dates and times specified.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication, call or email Waterways Management division, LT Rebecca Simpson, Coast Guard Sector Northern Great Lakes, U.S. Coast Guard; telephone 906–635–3223, email ssmprevention@uscg.mil.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zones in 33 CFR 165.918 as per the time, dates, and locations indicated below:

(1) Jordan Valley Freedom Festival Fireworks (East Jordan, MI) from 10 p.m. through 10:30 p.m. on June 22, 2024. This notice also includes alternative rain dates one day after any affected event.

(2) Grand Marais Splash In (Grand Marais, MI) from 1 p.m. through 4 p.m. on June 15, 2024.

Under the provisions of 33 CFR 165.918, entry into, transiting, or anchoring within the safety zones during an enforcement period is prohibited unless authorized by the Captain of the Port Northern Great Lakes or his designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Northern Great Lakes via channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of Port Northern Great Lakes or his designated representatives. While within the safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.918 and 5 U.S.C. 552 (a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Sault Sainte Marie determines that the safety zone need not be enforced for the full duration stated in this notification he or she may suspend such enforcement and notify the public of the suspension via Broadcast Notice to Mariners and grant general permission to enter the respective safety zone.

Dated: May 23, 2024.

J.R. Bendle,

Captain, U.S. Coast Guard, Captain of the Port Northern Great Lakes.

[FR Doc. 2024–11774 Filed 5–28–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0401]

RIN 1625–AA00

Safety Zone; Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Delaware River within a 500-yard radius of the EX–USS NEW JERSEY during active dead ship tow operations from Philadelphia, PA to Paulsboro, NJ, and then to Camden, NJ. The temporary safety zone, which will only be enforced during active towing operations, is needed to protect personnel, vessels, and the marine environment from potential hazards created by the dead ship tow. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Delaware Bay (COTP).

DATES: This rule is effective from 12:01 a.m. May 29, 2024, through 11:59 p.m. June 30, 2024, but it will only be subject to enforcement during active dead ship tow operations.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2024–0401 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email MST1 Dylan Caikowski, Waterways Management U.S. Coast Guard; telephone 215–271–4814, email SecDelBayWWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule under authority in 5 U.S.C. 553(b)(B). This statutory provision authorizes an agency to issue a rule without prior notice and

opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” The Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable to publish an NPRM, consider comments, and publish a final rule by May 29, 2024, when the temporary safety zone will be needed.

Also, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because there are fewer than 30 days remaining before the temporary safety zone must be in effect.

III. Legal Authority and Need for Rule

A dead ship tow evolution consists of a towing vessel(s) moving a ship that is not under its own command and not using its own propelling machinery. The COTP has determined that potential hazards associated with the EX-USS NEW JERSEY dead ship tow, such as the vessel having limited maneuverability, and having no main propulsion, will be a safety concern for anyone within a 500-yard radius of the vessel during the towing operations. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the temporary safety zone while the vessel is being towed. The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034.

IV. Discussion of the Rule

This rule establishes a temporary safety zone which will be in effect from May 29, 2024, through June 30, 2024, but which will only be enforced during active dead ship tow operations. The temporary safety zone will cover all navigable waters within 500-yards of the EX-USS NEW JERSEY. The duration of the temporary safety zone, and the periods during which it will be enforced, have been and will be, respectively, tailored to protect personnel, vessels, and the marine environment in these navigable waters while tow operations are active to minimize impacts on other uses of the waterway to those which are necessary. No vessel or person will be permitted to enter the temporary safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking.

Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration, the fact that the temporary safety zone will only be enforced when protections are actually needed, and the location of the temporary safety zone. This rule will impact a 500-yard radius around the EX-USS NEW JERSEY, and only during active dead ship tow operations.

B. Impact on Small Entities

Because Coast Guard has determined that this final rule is exempt from notice and comment rulemaking requirements, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply to this action.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone lasting from May 29, 2024, through June 30, 2024, that will prohibit entry within 500-yards of the EX-USS NEW JERSEY only during active dead ship tow operations. It is categorically excluded from further

review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

- 2. Add § 165.T05-0401 to read as follows:

§ 165.T05-0401 Safety Zone; Delaware River, Philadelphia, PA.

(a) *Location.* The following area is a safety zone: All navigable waters on a section of the Delaware River between Philadelphia, PA and Camden, NJ, within 500-yards of the EX-USS NEW JERSEY, from surface to bottom.

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

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

(2) To seek permission to enter, contact the COTP or the COTP's representative via VHF-FM channel 16 or via phone at or 215-271-4807. Those

in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period:* This section will be enforced during active dead ship tow operations, which will occur between 12:01 a.m., May 29, 2024, and 11:59 p.m., June 30, 2024. Notification of an enforcement period will be released via broadcast notice to mariners.

Dated: May 21, 2024.

Kate F. Higgins-Bloom,

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

[FR Doc. 2024-11679 Filed 5-28-24; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF EDUCATION

34 CFR Parts 682 and 685

[Docket ID ED-2023-OPE-0004]

RIN 1840-AD81

Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program; Correction

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations; correction.

SUMMARY: On July 10, 2023, the Department of Education (Department) published in the **Federal Register** final regulations amending regulations related to income-driven repayment. This document corrects technical errors in the regulations and preamble. This document does not contain any substantive changes to the regulations.

DATES: Effective July 1, 2024.

FOR FURTHER INFORMATION CONTACT:

Bruce Honer, U.S. Department of Education, 400 Maryland Avenue SW, 5th Floor, Washington, DC 20202. Telephone: (202) 987-0750. Email: Bruce.Honer@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION: On July 10, 2023, the Department published in the **Federal Register** a final rule amending regulations related to income-driven repayment (88 FR 43820). Those final regulations contain technical errors, which we are correcting.

Waiver of Proposed Rulemaking, Negotiated Rulemaking, and Delayed Effective Date

In accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553, the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(3)(B)). There is good cause to waive rulemaking here as unnecessary.

Rulemaking is “unnecessary” in those situations in which “the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.” *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001), *quoting* U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 31 (1947) and *South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D.S.C. 1983). The regulatory changes in this document are necessary to correct technical errors and do not establish any new substantive rules and do not make substantive changes to this regulation. Therefore, the Department has determined that publication of a proposed rule is unnecessary under 5 U.S.C. 553(b)(3)(B).

In addition, under section 492 of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1098a), all regulations proposed by the Department for programs authorized under title IV of the HEA are subject to negotiated rulemaking requirements. Section 492(b)(2) of the HEA provides that negotiated rulemaking may be waived for good cause when doing so would be “impracticable, unnecessary, or contrary to the public interest.” There is likewise good cause to waive the negotiated rulemaking requirement in this case, since, as explained above, notice and comment rulemaking is unnecessary.

The APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). As previously stated, because the regulatory changes correct errors, there is good cause to waive the delayed effective date in the APA and make the corrections effective July 1, 2024.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain

this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Corrections

In FR Doc. 2023–13112, published in the **Federal Register** on July 10, 2023 (88 FR 43820), we make the following technical corrections:

1. On page 43871, in table 3.1, in the third column, correct the first sentence to read as follows:

“Stating that a Direct Consolidation loan disbursed on or after July 1, 2025, that repaid a Direct parent PLUS loan, a FFEL parent PLUS loan, or a Direct Consolidation Loan that repaid a consolidation loan that included a Direct parent PLUS or FFEL parent PLUS loan may only chose the ICR plan.”

■ 2. On page 43901, starting in the first column, in instruction 6, in § 685.209, correct paragraphs(c)(5)(i), (c)(5)(i)(B), and (c)(5)(iii) to read as follows:

§ 685.209 [Corrected]

* * * * *

(c) * * *

(5)(i) Except as provided in (c)(5)(ii) or (c)(5)(iii) of this section, a borrower may enroll under the ICR plan only if the borrower—

* * * * *

(B) Was repaying a loan under the ICR plan on July 1, 2024. A borrower who was repaying under the ICR plan on or after July 1, 2024, and changes to a different repayment plan in accordance with § 685.210(b) may not re-enroll in the ICR plan unless they meet the

criteria in paragraph (c)(5)(ii) or (c)(5)(iii).

* * * * *

(iii) A borrower who has a Direct Consolidation Loan disbursed on or after July 1, 2025, which repaid a Direct parent PLUS loan, a FFEL parent PLUS loan, or a Direct Consolidation Loan that repaid a consolidation loan that included a Direct parent PLUS or FFEL parent PLUS loan may not choose any IDR plan except the ICR plan.

■ 3. On page 43902, in the second column, in instruction 6, correct § 685.209 by removing paragraphs (g)(1)(i)(C) and (g)(1)(ii)(C) and adding paragraph (g)(1)(iii) to read as follows:

§ 685.209 [Corrected]

* * * * *

(g) * * *

(1) * * *

(iii) In cases where the borrower's monthly payment amount calculated under paragraphs (f)(1) through (3) of this section or the borrower's adjusted monthly payment as calculated under paragraphs (g)(1)(i) or (g)(1)(ii) of this section is—

(A) Less than \$5, the monthly payment is \$0; or

(B) Equal to or greater than \$5 but less than \$10, the monthly payment is \$10.

* * * * *

■ 4. On page 43904, in the second column, in instruction 6, in § 685.209, correct paragraph (m)(2) to read as follows:

§ 685.209 [Corrected]

* * * * *

(m) * * *

(2) The borrower has approved the disclosure of tax information under paragraph (l)(1) of this section;

* * * * *

Miguel A. Cardona,

Secretary of Education.

[FR Doc. 2024–11300 Filed 5–28–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 2

RIN 2900–AS09

Update to Delegations of Authority to Certain Officials

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulation governing the Secretary's delegations of

authority to reflect relevant nomenclature changes to the names of positions and groups within the Office of General Counsel.

DATES: This rule is effective May 29, 2024.

FOR FURTHER INFORMATION CONTACT:

Michael Gibbs, Executive Director, Management, Planning, and Analysis, Office of General Counsel (026), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–4995. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: Title 38 of the Code of Federal Regulations, chapter I, part 2 governs Delegations of Authority and includes 38 CFR 2.6 “Secretary's delegations of authority to certain officials (38 U.S.C. 512).” Paragraph (e) of this regulation governs delegations of authority to certain officials within the Office of General Counsel and is amended to reflect changes to the names of certain Office of General Counsel offices and positions, including Chief Counsels, and law groups, including the Revenue Law Group and the Torts Law Group.

Administrative Procedure Act

This final rule is a rule of agency procedure and practice that does not impose new rights, duties, or obligations on affected individuals but, rather, explains that the Secretary delegates authority to certain employees occupying or acting in positions designated in the regulation and identifies the ways in which those employees are authorized to act on behalf of the Agency. Therefore, it is exempt from the prior notice-and-comment and delayed-effective-date requirements of 5 U.S.C. 553. *See* 5 U.S.C. 553(b)(A) and (d)(3). This rule merely updates information regarding the delegation of authority for Office of General Counsel officials, the employees who may serve in those roles, and the names of certain offices and positions in the Office of General Counsel.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The initial and final regulatory flexibility analyses requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary hereby certifies that this final

rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. This rule will affect only: (1) Office of General Counsel employees who are identified as officials who have been delegated authority under the regulation, and (2) VA employees seeking decisions or actions from those Office of General Counsel officials who have been delegated authority to act on behalf of the Agency as described in the regulation. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not satisfying the criteria under 5 U.S.C. 804(2).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and Tribal governments, or on the private sector.

List of Subjects in 38 CFR Part 2

Authority delegations (Government agencies).

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on May 20, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 2 as follows:

PART 2—DELEGATIONS OF AUTHORITY

- 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 302, 552a; 38 U.S.C. 501, 512, 515, 1729, 1729A, 5711; 44 U.S.C. 3702, and as noted in specific sections.

- 2. Amend § 2.6 by revising paragraphs (e)(1) through (3), (e)(4) introductory text, and (e)(5) through (11) to read as follows:

§ 2.6 Secretary's delegations of authority to certain officials (38 U.S.C. 512).

* * * * *

(e) * * *

(1) The General Counsel is delegated authority to serve as the Regulatory Policy Officer for the Department in accordance with Executive Order 12866. The General Counsel, the Principal Deputy General Counsel, the Deputy General Counsels, and the Director of the Office of Regulation Policy and Management are delegated authority to manage, direct, and coordinate the Department's rulemaking activities, including the revision and reorganization of regulations, and to perform all functions necessary or appropriate under Executive Order

12866 and other rulemaking requirements.

(Authority: 38 U.S.C. 501, 512)

(2) Under the provisions of 38 U.S.C. 515(b), the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for Legal Operations, the Chief Counsel, Torts Law Group, or those authorized to act for them, are authorized to consider, ascertain, adjust, determine, and settle tort claims cognizable thereunder and to execute an appropriate voucher and other necessary instruments in connection with the final disposition of such claims.

(3) Under the provisions of "The Federal Medical Care Recovery Act," 42 U.S.C. 2651, *et seq.* (as implemented by 28 CFR part 43), authority is delegated to the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for General Law, and Chief Counsel, Revenue Law Group, or those authorized to act for them, to collect in full, compromise, settle, or waive any claim and execute the release thereof; however, claims in excess of \$100,000 may be compromised, settled, or waived only with the prior approval of the Department of Justice.

(4) Under the Federal Claims Collection Act of 1966, 31 U.S.C. 3711, *et seq.*, authority is delegated to the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for General Law and Chief Counsel, Revenue Law Group, or those authorized to act for them, to:

* * * * *

(5) Pursuant to the provisions of the Military Personnel and Civilian Employees' Claim Act of 1964, 31 U.S.C. 3721, as amended, the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for Legal Operations and Chief Counsel, Torts Law Group, or those authorized to act for them, are authorized to settle and pay a claim for not more than \$40,000 made by a civilian officer or employee of the Department of Veterans Affairs for damage to, or loss of, personal property incident to his or her service. (Pub. L. 97-226)

(6) Under the provisions of 38 U.S.C. 7316(e), authority is delegated to the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for Legal Operations, the Chief Counsel, Torts Law Group, to hold harmless or provide liability insurance for any person to whom the immunity provisions of section 7316 apply, for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment in the exercise

of his or her duties in or for the Veterans Health Administration, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third person against the United States, provided by sections 1346(b) and 2672 of title 28, United States Code, for such damage or injury.

(7) The General Counsel, the Principal Deputy General Counsel, the Deputy General Counsels and those authorized to act for them, are authorized to conduct investigations, examine witnesses, take affidavits, administer oaths and affirmations, and certify copies of public or private documents on all matters within the jurisdiction of the General Counsel.

(8) The General Counsel or the Principal Deputy General Counsel, acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans' benefits under laws administered by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 501, 512)

(9) Under the provisions of 38 U.S.C. 1729(c)(1), authority is delegated to the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for General Law, the Chief Counsel, Revenue Law Group, or those authorized to act for them, to collect in full, compromise, settle, or waive any claim and execute the release thereof.

(Authority: 31 U.S.C. 3711(a)(2); 38 U.S.C. 501, 512).

(10) Except as prescribed in paragraph (g)(3) of this section, the General Counsel, the Principal Deputy General Counsel, the Deputy General Counsel for General Law, and the Chief Counsel, Information and Administrative Law Group, are authorized to make final Departmental decisions on appeals under the Freedom of Information Act, the Privacy Act, and 38 U.S.C. 5701, 5705 and 7332.

(Authority: 38 U.S.C. 512)

(11) All authority delegated in this paragraph to Chief Counsels will be exercised by them under the supervision of and in accordance with instructions issued by the General Counsel.

* * * * *

[FR Doc. 2024-11715 Filed 5-28-24; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 240506-0129]

RIN 0648-BM46

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico; Amendment 56; Correction

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

ACTION: Final rule; correction.

SUMMARY: NMFS corrects the final rule published on May 10, 2024, to implement Amendment 56 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Amendment 56). The final rule excluded a reference to the recreational annual catch target in the recreational accountability measures for gag. This correction fixes that omission.

DATES: This correction is effective on June 1, 2024.

FOR FURTHER INFORMATION CONTACT: Jack McGovern, NMFS Southeast Regional Office, phone: 727-204-5518, email: john.mcgovern@noaa.gov.

SUPPLEMENTARY INFORMATION: In the final rule to implement Amendment 56 (89 FR 40419, May 10, 2024), NMFS modified the recreational accountability measures (AMs) in 50 CFR 622.41(d)(2)(ii) and (iii) to reflect the changes in Amendment 56. However, NMFS mistakenly omitted reference to the recreational annual catch target (ACT) in § 622.41(d)(2)(iii), which describes the recreational AMs that are applicable if recreational landings exceed the recreational annual catch limit (ACL) and gag in the Gulf of Mexico is overfished based on the most recent Status of U.S. Fisheries Report to Congress. Under those circumstances, NMFS reduces both the recreational ACL and ACT for the following fishing year by the amount of the recreational ACL overage in the previous fishing year. In the final rule preamble on page 40422 and in response to *Comment 23* on page 40430, NMFS correctly described the recreational AMs and corrects the final rule accordingly.

Federal Register Correction

Effective June 1, 2024, in rule document 2024-10208 at 89 FR 40419 in the issue of May 10, 2024, on page 40436, in the second column, in

amendatory instruction 5, paragraph (d)(2)(iii) is corrected to read as follows:

§ 622.41 [Corrected]

* * * * *

(d) * * *

(2) * * *

(iii) In addition to the measures specified in paragraph (d)(2)(ii) of this section, if the NMFS SRD estimates that gag recreational landings have exceeded the applicable ACL specified in paragraph (d)(2)(i) of this section and gag is overfished based on the most recent Status of U.S. Fisheries Report to Congress, the following measure will apply. The AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to reduce the recreational ACL and ACT for that following year by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

* * * * *

Dated: May 23, 2024.

Samuel D. Rauch III,

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

[FR Doc. 2024-11698 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 240417-0111]

RIN 0648-BM42

Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Amendment 16; Correction

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

ACTION: Final rule; correction.

SUMMARY: On April 30, 2024, NMFS published a final rule to implement amendment 16 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone off Alaska. The final rule included an incorrect length for drift gillnet gear and an unclear heading title. These corrections fix these errors.

DATES: Effective on May 30, 2024.

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907-586-7228.

SUPPLEMENTARY INFORMATION: The NMFS final rule to implement amendment 16 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone off Alaska (89 FR 34718, April 30, 2024) included an incorrect length for drift gillnet gear at § 679.118(f)(1) of 200 fathoms (1.1 kilometer). NMFS is now correcting the final rule to reflect the correct drift gillnet gear length of 200 fathoms (365.76 meters).

Further, the heading at § 679.115(b)(5) incorrectly described the requirement to submit information in an eLandings delivery report as only applying to a Registered Salmon Receiver. NMFS is now modifying the heading for consistency with the following regulations to clarify that the eLandings delivery report requirement under § 679.115(b)(5) applies to both Registered Salmon Receivers and

managers of salmon shoreside processors.

Correction

In FR Doc. 2024–08664, published April 30, 2024, at 89 FR 34718, the following corrections are made:

■ 1. On page 34762, in the first column, the introductory text of § 679.115(b)(5) is corrected to read as follows:

§ 679.115 [Corrected]

* * * * *

(b) * * *
(5) *Information submitted in an eLandings landing report.* The manager and a Registered Salmon Receiver that receives salmon from a vessel issued an SFPP 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)(A) through (C) of this section:

* * * * *

■ 2. On page 34764, in the third column, § 679.118(f)(1) is corrected to read as follows:

§ 679.118 [Corrected]

* * * * *

(f) * * * (1) *Size.* Drift gillnet gear must be no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and have a mesh size of no greater than 6 inches (15.24 cm).

* * * * *

Dated: May 22, 2024.
Samuel D. Rauch III,
*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*
[FR Doc. 2024–11724 Filed 5–28–24; 8:45 am]
BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 89, No. 104

Wednesday, May 29, 2024

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 175

[Doc. No. AMS-LP-24-0012]

RIN 0581-AE29

Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notification; request for information.

SUMMARY: The U.S. Department of Agriculture (USDA) is seeking public input to support the preparation of proposed regulations intended to implement the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program (the Program), particularly related to the criteria used to evaluate protocols and identification of specific protocols that should be considered for inclusion in the Program. The purpose of the Program is to facilitate farmer, rancher, and private forest landowner participation in voluntary carbon markets. This request for information provides an important step toward developing a meaningful Program consistent with the Growing Climate Solutions Act (GCSA).

DATES: Comments must be received by June 28, 2024 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit comments concerning this document by either of the following methods:

- *Federal Rulemaking Portal:* Go to <https://www.regulations.gov> and enter “AMS-LP-24-0012” in the Search field. Select the Documents tab, then select the ‘Comment’ button in the list of documents. Comments should reference the document number and the date and page number of this issue of the **Federal Register**.

- *Email:* Please submit any email responses to Sasha.Strohm@usda.gov.

All comments submitted in response to this document will be included in the record, will be made available to the public, and can be viewed at: <https://www.regulations.gov>. Please be advised that the identity of the individuals or entities submitting the comments will be made available to the public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Sasha Strohm, Program Manager, at 202-720-5705, or via email at Sasha.Strohm@usda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

USDA is preparing to establish the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program (the Program), authorized under the provisions of the Growing Climate Solutions Act (GCSA), which was signed into law on December 29, 2022, as part of the Consolidated Appropriations Act of 2023 (Pub. L. 117-328, div. HH, title I, section 201). The purpose of the Program is to facilitate farmer, rancher, and private forest landowner participation in voluntary carbon markets.

In establishing the Program, USDA will (1) publish a list of, and documents relating to, widely accepted protocols that are designed to ensure consistency, reliability, effectiveness, efficiency, and transparency of voluntary environmental credit markets; (2) publish descriptions of widely accepted qualifications possessed by covered entities that provide technical assistance to farmers, ranchers, and private forest landowners; (3) publish a list of qualified technical assistance providers and third-party verifiers; and (4) provide information to assist farmers, ranchers, and private forest landowners in accessing voluntary environmental credit markets.

Prior to publication of this request for information (RFI) and as directed by the GCSA, USDA completed an analysis of voluntary carbon markets and published a report, “A General Assessment of the Role of Agriculture and Forestry in U.S. Carbon Markets”.¹ The report concluded that voluntary carbon

¹ <https://www.usda.gov/sites/default/files/documents/USDA-General-Assessment-of-the-Role-of-Agriculture-and-Forestry-in-US-Carbon-Markets.pdf>.

markets offer a promising tool to achieve greenhouse gas (GHG) reductions from the agricultural and forestry sectors. However, farmers, ranchers, and private forest landowners face barriers to accessing voluntary carbon markets due to market confusion, high costs, and project requirements. A full discussion on how the Program will address barriers and facilitate producer participation in voluntary carbon markets is available in the report, “USDA Intent to Establish the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program”.²

This RFI seeks public input on options for implementing the Program. Specifically, USDA seeks input on (1) options for interpreting and applying criteria used to evaluate protocols that are designed to ensure consistency, reliability, effectiveness, efficiency, and transparency; (2) information pertaining to specific protocols to be evaluated for inclusion in the program; (3) qualifications needed by covered entities who serve as technical assistance providers to farmers, ranchers, or private forest landowners; and (4) qualifications needed by covered entities who serve as third-parties who conduct verification of processes described in protocols for voluntary environmental credit markets. The information obtained will be considered in determining the next step, which could include a proposed rule.

II. Request for Information

Commenters should refer to specific question numbers in their responses.

Question 1: How should USDA define the terms “consistency,” “reliability,” “effectiveness,” “efficiency,” and “transparency” (see 7 U.S.C. 6712(c)(1)(A)) for use in protocol evaluation?

Question 2: What metrics or standards should USDA use to evaluate a protocol’s alignment with each of the five criteria to be defined in Question 1? What should USDA consider as minimum criteria for a protocol to qualify for listing under the Program?

Question 3: In general, after a new protocol is published, how long does it take for a project to use the protocol and be issued credits (*i.e.*, what is the lag

² <https://www.usda.gov/sites/default/files/documents/GCSA-JustificationReport.pdf>.

time between protocol publication and first credit generation)?

Question 4: Which protocol(s) for generating voluntary carbon credits from agriculture and forestry projects should USDA evaluate for listing through the Greenhouse Gas Technical Assistance Provider and Third-Party Verifier Program?

Question 5: For any protocol(s) identified under Question 4:

(a) Has the protocol resulted in the generation and sale of credits? If yes, when was the most recent year and volume of credit generation and retirement? If not, is there evidence that the protocol will generate credits (e.g., projects are under development)?

(b) What is the average size (in acres, hectares, or another relevant unit) of projects using the protocol?

(c) What is the average credit issuance per unit land area (acre or hectare) for projects using the protocol, inclusive of credits that are contributed to a buffer pool?

(d) Does the protocol reduce the cost, paperwork, and/or reporting burden for smaller, diversified, or underserved farmers, ranchers, or private forest landowners, while maintaining reliability of offsets? If yes, how?

(e) Does the protocol allow multiple entities to aggregate into a single project? If yes, what are the parameters for aggregation and is there evidence that aggregation has successfully occurred?

(f) Does the registry administering the protocol use a fee structure that allows for aggregated entities to pay a single project fee, or does each entity need to pay a project fee?

(g) What are the verification requirements in the protocol, including recordkeeping requirements?

(h) Does the protocol require on-site verification? If yes, does the protocol require 100% on-site verification, or does the protocol specify a procedure for determining an on-site verification sample group? What is required as part of the on-site verification? Does the protocol allow remote verification methods/technologies (e.g., remote sensing)?

(i) Does the protocol include a risk management approach for determining which data inputs or project sites are required for third-party verification? If yes, what does the risk management approach require?

(j) Does the protocol allow for simplified measurement, monitoring, reporting, and verification (MMRV) processes? If yes, are there requirements or restrictions for using the simplified MMRV processes?

(k) What quantification methodology(ies) does the protocol require for quantification of emissions reductions and/or removals? What scientific evidence is available to support these methodologies?

(l) For protocols where models are required to quantify emissions, is there a process for model review and approval prior to use by prospective projects? Can approved models be used by any project or are they specific to a project developer?

(m) If models are allowed for quantification of emissions reductions, are models required to have gone through scientific review, parameterization, calibration, and validation to demonstrate performance for the practices on the relevant crops and/or species in the geography of the project? Does the protocol provide clear guidance on where eligible models can be applied?

(n) What does the protocol require or allow for determining a project baseline?

(o) How does the registry administering the protocol restrict the potential double counting of credits?

(p) Does the protocol require projects to quantify and report uncertainty associated with greenhouse gas calculations?

(q) Has the protocol generated credits which were later cancelled due to issues of credit integrity or validity?

(r) For project categories where reversals (i.e., the intentional or unintentional release of sequestered carbon for which credits have been issued) are possible, does the protocol contain procedures to maintain net GHG impact?

(s) Where is information about the protocol made publicly available?

Question 6: How should USDA evaluate technical assistance providers (TAP)? What should be the minimum qualifications, certifications, and/or expertise for a TAP to qualify for listing under the Program?

Question 7: Should the qualifications and/or registration process be different for entities and individuals that seek to register as a TAP?

Questions 8: What should be the minimum qualifications and expertise for a third-party verifier to qualify for registration under the Program?

(Authority: Pub. L. 117–328, div. HH, title I, section 201)

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–11424 Filed 5–28–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1470; Project Identifier MCAI–2023–01284–T]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by 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 certain MHI RJ Aviation ULC Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes. This proposed AD was prompted by a report that the electrical harnesses in the overhead bin above the class divider may have insufficient or no separation with the class divider mounting plate. This proposed AD would require inspecting the overhead bin electrical harnesses at the class dividers, and modifying the class divider mounting plate assembly or accomplishing a temporary repair if necessary; and, eventually modifying the class divider mounting plate assembly if a modification was not done after accomplishing the inspection, 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 July 15, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–1470; 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 Transport Canada material, 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 tc.canada.ca/en/aviation.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

FOR FURTHER INFORMATION CONTACT:

Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 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-2024-1470; Project Identifier MCAI-2023-01284-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 the 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](https://www.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 Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 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-2023-79, dated December 21, 2023 (Transport Canada AD CF-2023-79) (also referred to after this as the MCAI), to correct an unsafe condition on certain MHI RJ Aviation ULC Model CL-600-2C10 (Regional Jet Series 700, 701 & 702), CL-600-2D15 (Regional Jet Series 705), and CL-600-2D24 (Regional Jet Series 900) airplanes. The MCAI states that the electrical harnesses in the overhead bin above the class divider may have insufficient or no separation with the class divider mounting plate. This condition, if not corrected, could result in the electrical harnesses becoming chafed, which could affect the following aircraft systems: ordinance signs, emergency lights/signs, passenger oxygen, and passenger address and air conditioning systems.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2024-1470.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF-2023-79 specifies procedures for inspecting the left-hand and right-hand overhead bin electrical harnesses at the class divider for damage (e.g., chafing), and if damage is found, modifying the class divider mounting plate assembly to improve the overhead bin harnesses protection or accomplishing a temporary repair. Transport Canada AD CF-2023-79 also specifies procedures for eventually modifying the class divider mounting

plate assembly if a modification was not done after accomplishing the inspection (i.e., if a temporary repair was done or if no damage was found after accomplishing the inspection). This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA’s Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the Transport Canada AD CF-2023-79 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-2023-79 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF-2023-79 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-2023-79 for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2024-1470 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 246 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
3 work-hours × \$85 per hour = \$255	\$0	\$255	\$62,730.
Up to 9 work-hours × \$85 per hour = \$765	366	Up to 1,131	Up to 278,226.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS *

Labor cost	Parts cost	Cost per product
Up to 9 work-hours × \$85 per hour = \$765	\$366	Up to \$1,131.

* The FAA has received no definitive data on which to base the cost estimates for the on-condition optional temporary repair specified in this proposed AD.

Authority for This Rulemaking

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

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:

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.):
Docket No. FAA–2024–1470; Project Identifier MCAI–2023–01284–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by July 15, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC (type certificate previously held by Bombardier, Inc.) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes, certificated in any category, as identified in Transport Canada AD CF–2023–79, dated December 21, 2023 (Transport Canada AD CF–2023–79), except for Group 3 and Group 5 airplanes identified Transport Canada AD CF–2023–79.

Note 1 to paragraph (c): Group 3 airplanes that are modified as specified in Service Bulletin 670BA–25–110 become Group 2

airplanes as identified in Transport Canada AD CF–2023–79.

Note 2 to paragraph (c): Group 5 airplanes that are modified as specified in Service Bulletin 670BA–25–057 become Group 4 airplanes as identified in Transport Canada AD CF–2023–79.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by a report that the electrical harnesses in the overhead bin above the class divider may have insufficient or no separation with the class divider mounting plate. The FAA is issuing this AD to address possible chafing of the electrical harness with the class divider mounting plate. The unsafe condition, if not addressed, could result in the electrical harnesses becoming chafed, which could affect the following aircraft systems: ordinance signs, emergency lights/signs, passenger oxygen, and passenger address and air conditioning systems.

(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–2023–79.

(h) Exception To Transport Canada AD CF–2023–79

- (1) Where Transport Canada AD CF–2023–79 refers to its effective date or August 7, 2023 (the effective date of Transport Canada AD CF–2023–56, dated July 24, 2023), this AD requires using the effective date of this AD.
- (2) Where Transport Canada AD CF–2023–79 refers to hours air time, this AD requires using flight hours.
- (3) Where paragraph A. of Part I of Transport Canada AD CF–2023–79, specifies “and, modify as required,” for this AD,

replace that text with “and, before further flight, modify as required.”

(4) Where any MHIRJ service information referenced in Transport Canada AD CF–2023–79 differs from any Safran service information referenced in Transport Canada AD CF–2023–79, the MHIRJ service information takes precedence over the Safran service information because the initial revision of the Safran service information does not list all affected part numbers.

(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 manager of the International Validation Branch, mail it to the address identified in paragraph (j) of this AD. Information may be emailed to: 9-AVS-NYACO-COS@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 MHIRJ Aviation ULC’s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

For more information about this AD, contact Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email: 9-avs-nyaco-cos@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2023–79, dated December 21, 2023.

(ii) [Reserved]

(3) Transport Canada AD CF–2023–79, 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 Transport Canada AD on the Transport Canada website tc.canada.ca/en/aviation.

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the

availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations, or email fr.inspection@nara.gov.

Issued on May 15, 2024.

Victor Wicklund,

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

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BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–1556; Airspace Docket No. 24–ASW–12]

RIN 2120–AA66

Establishment of Class E Airspace; Langtry, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Langtry, TX. The FAA is proposing this action to support new instrument procedures at this airport.

DATES: Comments must be received on or before July 15, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–1556 and Airspace Docket No. 24–ASW–12 using any of the following methods:

Federal eRulemaking Portal: Go to www.regulations.gov and follow the online instruction for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

Hand Delivery or Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to Docket

Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: Raul Garza Jr., Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5874.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace extending upward from 700 feet above the surface at 4M Ranch Airfield, Langtry, TX, to support instrument flight rule (IFR) operations at this airport.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report

summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT post these comments, without edit, including any personal information the commenter provides, to www.regulations.gov as described in the system of records notice (DOT/ALL-14FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class E airspace is published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing to amend 14 CFR part 71 by:

Establishing Class E airspace extending upward from 700 feet above the surface within a 7.3-mile radius of 4M Ranch Airfield, Langtry, TX.

This action is to support new instrument procedures and IFR operations at this airport.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and

effective September 15, 2023, is amended as follows:

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

* * * * *

ASW TX E5 Langtry, TX [Establish]

4M Ranch Airfield, TX

(Lat 30°01'16" N, long 101°34'23" W)

That airspace extending upward from 700 feet above the surface within a 7.3-mile radius of 4M Ranch Airfield.

* * * * *

Issued in Fort Worth, Texas, on May 22, 2024.

Steven Phillips,

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

[FR Doc. 2024–11685 Filed 5–28–24; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 52

[WC Docket No. 18–336; FCC 24–45; FR ID 221857]

National Suicide Hotline Act of 2018

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes to require wireless carriers to implement one or more georouting solutions for calls to the 988 Suicide & Crisis Lifeline to ensure that calls are routed based on the geographic location for the origin of the call, rather than the area code and exchange associated with a wireless phone. The Commission also seeks comment on a variety of issues related to the implementation of a georouting solution for wireless calls, non-wireless calls, and text messages to the 988 Suicide & Crisis Lifeline.

DATES: Comments are due on or before June 28, 2024, and reply comments are due on or before July 29, 2024. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before July 29, 2024.

ADDRESSES: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's

Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). You may submit comments, identified by WC Docket No. 18–336, by any of the following methods:

- *Electronic Filers*: Comments may be filed electronically using the internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

- *Paper Filers*: Parties who choose to file by paper must file an original and one copy of each filing.

- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

- Until further notice, the Commission no longer accepts any hand or messenger delivered filings. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

- *Confidentiality*: Some information and materials requested by this *FNPRM* may be confidential and proprietary. Individuals and entities may request that confidential and proprietary information submitted to the Commission be withheld from public inspection consistent with § 0.459 of the Commission's rules.

- *People with Disabilities*: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT:

Merry Wulff, Attorney Advisor, Competition Policy Division, Wireline Competition Bureau, at MerryWulff@fcc.gov or at (202) 418–1084. For additional information concerning the Paperwork Reduction Act proposed information collection requirements contained in this document, send an email to PRA@fcc.gov or contact Nicole Ongele, Nicole.Ongele@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice of Proposed Rulemaking (FNPRM)* in WC Docket No. 18–336, FCC 24–45, adopted April 25, 2024, and released April 26, 2024. The full text of this document is available for public inspection at the following internet address: <https://docs.fcc.gov/public/attachments/FCC-24-45A1.pdf>.

Ex Parte Rules

This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment

rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible impact of the potential rule and policy changes contained in this *FNPRM*. The Commission invites the general public, particularly small businesses, to comment on the IRFA. Comments must be filed by the deadlines for comments on the *FNPRM* indicated on the first page of this document and must have a separate and distinct heading designating them as responses to the IRFA and must be filed in WC Docket No. 18–336.

Paperwork Reduction Act

This document may contain proposed new or revised information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Providing Accountability Through Transparency Act

The Providing Accountability Through Transparency Act, Public Law 118–9, requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. The required summary of this *FNPRM* is available at <https://www.fcc.gov/proposedrulemakings>.

Synopsis

1. In this *FNPRM*, we continue the Commission's work to provide meaningful access to the 988 Lifeline by proposing that we adopt rules requiring wireless carriers to implement a georouting solution for calls to the 988 Lifeline. We acknowledge and commend the work that the Substance Abuse and Mental Health Services Administration (SAMHSA) and Vibrant Emotional Health (Vibrant or Lifeline Administrator) have done to date to explore and test solutions, and seek to build on that effort by developing a record that will clarify the georouting

solutions that have been proposed, establish the work that remains for a solution to be deployed on wireless networks, and help us consider how to proceed towards requiring wireless carriers to implement one or more solutions. In so doing, we acknowledge that any georouting solution for 988 will require cooperation between the wireless carriers originating calls and the Lifeline Administrator that controls the call routing platform that receives them to implement a complete end-to-end solution. We, therefore, undertake a holistic review to ensure that any georouting solution deployed is compatible with the needs and systems of the 988 Lifeline, as determined by SAMHSA, and successfully connects callers in crisis with the local support they need.

Background

How Calls to 988 Are Currently Routed

2. Under current Commission rules, calls to 988 must first be routed to the existing toll free ten-digit access number for the 988 Lifeline (1–800–273–8255). When the Commission established 988, it found that such routing would be the most efficient means to enable 988 callers to reach the existing national suicide prevention hotline, and explained that routing to the 988 Lifeline's toll free number provided “considerable benefits” both for covered providers and the 988 Lifeline itself, which would enable faster implementation, lower costs to maintain 988 routing, and better service. Calls to the 988 Lifeline's toll free access number are terminated to a single aggregation point, specifically, an interactive voice response (IVR) where callers are provided with a menu of connection options. Veterans, service members, and their families may connect to the Veterans Crisis Line operated by the Department of Veterans Affairs by pressing “1.” Callers may also reach a Spanish language line by pressing “2” and specialized LGBTQI+ services by pressing “3”. All other calls are routed to one of over 200 regional crisis centers based on the area code and exchange of the caller's telephone number supplied by the originating service provider. In the event that a center is unable to answer, the call is routed to the Lifeline's national backup network. Routing to the appropriate crisis call center is handled by a centralized routing system overseen by the Lifeline Administrator and supported by a grant from SAMHSA.

Initial Efforts To Improve Routing for Calls to 988 From Wireless Phones

3. On April 15, 2021, the Wireline Competition Bureau transmitted a report to Congress examining the feasibility and costs of including automatic dispatchable location in calls to 988, as required by the National Suicide Designation Act of 2020. While the statute required the Commission to focus on location information conveyed with a 988 call, regardless of the technological platform used, the record developed for the preparation of the report evidenced an important distinction in how a caller's location can impact not only dispatchable location but also the routing path of the call to the most geographically appropriate crisis center (*i.e.*, georouting).

4. Georouting refers to technical solutions for directing calls based on a geographic location for the origin of the call without transmitting information about the caller's precise location. For example, calls to various N11 services, such as 211, 311, 511, and 811, are routed to call centers based on the geographic location of the cell tower that originates the call. By contrast, geolocation involves creating systems for the transmission of precise location information (*e.g.*, street address) of the caller that could be provided to first responders. As the Bureau's report to Congress highlighted, transmitting precise location information with calls to the 988 Lifeline presents a variety of technical, legal, and privacy concerns that would require significant investigation and time to resolve. For example, we recently adopted rules requiring CMRS providers to use device location information to route wireless 911 voice calls and real-time text (RTT) communications to 911, rather than the location of network elements such as cell cite or sector. The legal, technical, and privacy considerations of using precise location to route wireless 911 calls differ from those in the 988 context.

5. On May 24, 2022, the Commission, in coordination with the U.S. Department of Health and Human Services and the U.S. Department of Veterans Affairs, convened a forum on the challenges and opportunities related to geolocation for calls to the 988 Lifeline. During that forum, Intrado, a provider of public safety-related software systems and services, proposed a cell-based georouting solution to connect calls to 988 with local crisis call centers irrespective of a wireless phone's area code. The solution it presented would involve the creation of

a database that would match the cell tower originating the call to 988 with a ten-digit phone number associated with the nearest crisis center. That ten-digit number would then be used to route the call to a geographically appropriate crisis center rather than the area code and exchange for the caller's wireless phone.

6. Following the forum, Commission staff, SAMHSA, and the Lifeline Administrator engaged in regular discussions regarding the proposed Intrado solution and other efforts that may lead to more accurate routing of wireless calls to the 988 Lifeline. In June 2023, SAMHSA, the Lifeline Administrator, Intrado Life & Safety, and a wireless carrier began a proof of concept to test a modified version of Intrado's original cell-based georouting solution in a lab environment, *i.e.*, without using any actual caller data from live calls. The modified solution also relied on cell tower information, but routed calls by “overlay[ing] static wire center boundaries to create a ‘destination code’ representing the nearest crisis call center.” Commission staff regularly received briefings concerning the proof of concept, provided technical assistance and guidance in response to questions asked during those briefings, and received progress reports.

7. The proof of concept was completed during the summer of 2023 and resulted in calls being successfully routed in the testing environment from wireless handsets to the nearest crisis center irrespective of the area code associated with the handset. To build on that success, on September 28, 2023, the Chairwoman and HHS Assistant Secretary for Mental Health and Substance Use Dr. Miriam Delphin-Rittmon sent letters to AT&T, T-Mobile USA, Inc., Verizon, CTIA, Competitive Carriers Association (CCA), and Rural Wireless Association (RWA) urging wireless carriers to take the necessary steps to identify and develop a 988 georouting solution that could be deployed in their wireless networks. Commission staff subsequently held meetings with each recipient of the letters to discuss what steps have been taken in response to the Chairwoman's letters as well as any identified concerns in implementing a georouting solution. Commission staff also inquired about possible timeframes and what the Commission could do to support or assist the wireless industry's efforts.

Discussion

8. We seek to build on the progress made by all stakeholders to date to identify a georouting solution for the

988 Lifeline that will enhance the support and resources available to callers in crisis. Specifically, we propose to adopt a rule that would require wireless carriers to implement one or more georouting solutions for calls to the 988 Lifeline, and initiate this *FNPRM* to thoroughly and transparently consider georouting solutions that could be within the scope of that mandate, the costs and benefits of mandating a georouting solution, and the work that remains to implement a georouting solution in a timely manner. As discussed above, we reiterate that the proposals herein pertain to georouting solutions. We are not considering solutions to geolocation for the 988 Lifeline at this time.

Need To Mandate Georouting for Wireless Calls to the 988 Lifeline

9. We believe that requiring wireless carriers to use a georouting solution for the 988 Lifeline is essential to ensure that Americans have access to critical suicide prevention and crisis services when reaching the 988 Lifeline with a wireless device. Indeed, the record developed for the preparation of the 988 Geolocation Report evidenced a need for more accurate routing of calls to the 988 Lifeline to account for the fact that the majority of calls placed to the 988 Lifeline are from wireless phones, and the area codes of those phones often do not correspond to the location of the caller. The broader 988 record also indicated that such discrepancies may be more prevalent among certain groups, such as college students and individuals with ported numbers. According to mental health and crisis counseling experts, ensuring that calls are routed to a crisis center that is geographically appropriate based on the caller's location (rather than the area code of their phone) is critical to the 988 Lifeline's objective of providing life-saving resources to those in need of public health and safety resources. Routing individuals in crisis to local crisis centers also allows counselors to respond to regional cultural and economic factors as well as a community's unique stressors. Moreover, local crisis centers have important connections to local care resources that, when used, can reduce the risk of suicidality and future crises, and avert unnecessary use of emergency services and law enforcement.

10. We, therefore, seek comment on our proposal to mandate the use of one or more georouting solutions by wireless carriers originating calls to the 988 Lifeline to achieve these benefits. Some major stakeholders have already been exploring georouting solutions with

SAMHSA and the Lifeline Administrator, and we support voluntary efforts by carriers and our federal partners to deploy solutions in wireless networks in the near term. Indeed, we would welcome insights from wireless carriers that voluntarily deploy georouting solutions in their networks, as such information would inform our decision-making. The launch of this proceeding reflects our belief that a rule requiring wireless carriers to implement a georouting solution for the 988 Lifeline is necessary to ensure that the critical benefits of georouting are realized nationwide and within a reasonable period of time. We seek comment on that view and whether there would be any negative impacts to mandating the use of georouting solutions to connect callers to the 988 Lifeline with local crisis centers. We ask that commenters address any policy considerations or facts we should consider to evaluate whether a rule establishing a georouting mandate is needed.

Potential Georouting Solutions for Wireless Calls to the 988 Lifeline

11. We seek comment on potential georouting solutions for the 988 Lifeline. As noted above, Intrado proposed one potential solution during the May 2022 Geolocation Forum. SAMHSA, the Lifeline Administrator, Intrado Life & Safety, and a wireless carrier subsequently tested a modified georouting solution during the proof of concept completed during the summer of 2023. Since then, additional major carriers have voluntarily begun work to develop additional georouting solutions with SAMHSA and the Lifeline Administrator that may take different approaches to routing calls to crisis centers. We seek comment from wireless carriers on the viability of these and any other solutions that have been proposed to date, and the work that still needs to be done to timely deploy one or more of the solutions on wireless networks. We also seek data, documents, and other information that provide details about the current status of all proposed georouting solutions. In so doing, we invite stakeholders to comment on whether georouting solutions that have been developed to date by major carriers would be viable for smaller carriers, and any distinctions that need to be considered for smaller carriers when mandating the use of a georouting solution for the 988 Lifeline.

12. *Technical Specifications.* We seek information on the technical specifications for all proposed solutions, documented or otherwise, and diagrams showing how each solution would route

wireless calls to the 988 Lifeline and/or a description of the same. We also seek technical specifications and diagrams showing how wireless calls would be routed to geographically appropriate call centers once received by the routing platform administered by the Lifeline Administrator. Specifically, we seek comment on each functional step that would need to be completed to successfully route a call from a wireless carrier to a geographically appropriate crisis center, the specific entity that would or could perform each function, and the facilities and systems required to perform each function. For example, are there any parties beyond the wireless carriers originating the calls and the Lifeline Administrator responsible for terminating the calls that would need to perform any function, or provide any facility or service, for a call to be appropriately routed pursuant to a proposed solution? What specific functions would the Lifeline Administrator and/or its service providers need to perform to successfully terminate calls to geographically appropriate crisis centers once received by the 988 Lifeline's centralized routing platform? What specific facilities and systems would be needed to perform those functions? We ask that commenters address whether the technical and functional requirements of a particular georouting solution present legal or other barriers that could limit the adoption of the solution by other entities, and whether there are means to surmount or minimize those barriers. For instance, do any of the functional steps of a georouting solution involve proprietary elements that would limit whether and how other wireless carriers could implement it (e.g., by requiring a service or licensing agreement and/or paying a fee)? Lastly, it is our understanding that when a caller to the 988 Lifeline selects a specialized service (e.g., "1" for Department of Veterans Affairs; "2" for a Spanish language line; or "3" for specialized LGBTQI+ services) when connected to the 988 Lifeline's IVR, those calls will be directed to appropriate crisis centers based on those selections. We seek comment on whether georouting is necessary for these specialized services, and whether there are any unique considerations for routing calls that impact our proposals. Do the georouting solutions under development contemplate routing for such calls? Do stakeholders agree that georouting solutions are not needed when a caller to 988 selects a specialized service?

13. *Correlating the Caller's Location with Call Centers.* We seek comment on how each proposed solution identifies the caller's location and correlates that location with a geographically appropriate crisis call center. For instance, both the georouting solution originally proposed by Intrado at the May 2022 Forum and the modified Intrado Life & Safety solution tested by the proof of concept conducted during the summer of 2023 identified the location of the caller based on the cell tower that originated the call, and used the location of that cell tower to determine the closest crisis center. As noted above, calls to certain N11 services (e.g., 211) are also routed to call centers based on the geographic location of the cell tower that originates the call. We believe that a georouting solution that is based on cell tower information would best identify a caller's location and thus enable routing the call to a geographically appropriate crisis call center, and we seek comment on this belief. If commenters support alternative methods of identifying the caller's location, we ask that they specify those methods and provide any technical information needed to understand how the alternate means of identifying a caller's location would function in a georouting solution. We also seek comment on whether any means of identifying a caller's location may be impacted by the wireless handset that a caller uses to dial 988.

14. Once the caller's location has been determined, to complete the georouting path that location must be matched with a nearby crisis center. What geographic boundaries would be applied by each proposed solution to do so? For instance, the Intrado Life & Safety solution tested during the proof of concept used wire centers as the geographic boundary for associating the cell tower that originated the call with the nearest call center. We assume that other geographic boundaries could similarly be applied, e.g., determining the most geographically appropriate call center based on its proximity to the county in which the cell tower originating the call is located. We seek comment on the geographic boundaries that are utilized by the georouting solutions proposed to date, whether those boundaries comport with any requirements delineated by SAMHSA, the Lifeline Administrator, and state and territory 988 authorities for the network of 988 crisis centers, and whether the Commission should mandate the use of one or more particular geographic boundaries. Given that there are over 200 crisis call centers

across the United States, we ask that commenters address whether certain geographic boundaries are sufficiently granular to achieve the goal of connecting callers with local resources during a time of crisis and whether there are any geographic boundaries that would be overbroad. For instance, would using a state-level boundary be too broad where there are multiple crisis centers within a particular state? How should we factor in the growing number of crisis centers and their impact on the geographic boundary adopted for a georouting solution? Our understanding is that the 988 Lifeline's crisis centers are independently owned and operated and select their own coverage area, which may be based on zip code, area code, county, or state. How would a proposed georouting solution address established coverage areas for particular crisis centers (e.g., any crisis centers that must receive calls from specified counties)? We also seek comment on whether any geographic boundaries would be too granular in a manner that implicates privacy or other concerns. If different georouting solutions propose to use different geographic boundaries (e.g., one solution uses wire center while another uses county), should we allow different wireless carriers to implement one of multiple technically feasible options? Or would permitting wireless carriers to implement a number of geographic boundaries impact public interest and the public's expectation of routing to a "geographically appropriate" crisis call center? What other issues, data, and documents should be considered to assess how a proposed solution identifies a caller's location and matches that location to a geographically appropriate crisis call center, and whether that match achieves the public and mental health needs served by the 988 Lifeline? Are there any other factors that should be considered in determining whether routing to a particular crisis center would be appropriate?

15. *Required Routing Data and Transmission.* We seek comment on the routing data required to effectuate each proposed solution and how it would be transmitted. SAMHSA, as the agency with oversight of the Lifeline Administrator, must ultimately determine the routing data that it will deem acceptable and that it will require the 988 Lifeline's systems to be configured to read. What specific data would the currently contemplated solutions require wireless carriers to transmit when originating calls to the 988 Lifeline (e.g., a Federal Information Processing Standard code for a solution

utilizing county as a geographic boundary, a unique destination code for a solution using other parameters, any carrier-specific or other additional digits or data points) and how would wireless carriers pass that data through with the call? Would the routing information be entered into a particular field in the call header of a Session Initiation Protocol (SIP) message (e.g., in the Jurisdictional Identification Parameter, P-Asserted-Identity, or other field)? Would it be necessary to redefine an existing SIP header field or define a new one to transmit the data? Should a non-standardized field, such as an X-Header, be used to contain the data? Does any field used to transmit the routing data need to be identified as a mandatory SIP header field that is unchanged as the SIP message traverses security gateways from one network to another? Should solutions to support georouting avoid changes to the SIP header field by the Internet Engineering Task Force to avoid delays in deployment? We ask that commenters describe in detail the advantages and disadvantages of using a particular call header field to transmit any required routing information. We also ask that commenters address any privacy or other concerns implicated by the transmission of certain routing data with calls to the 988 Lifeline. For instance, what specific information would be received by the Lifeline Administrators and/or its service providers when the call is routed to the Lifeline's centralized routing platform and what, if anything, about the caller could be inferred from that data? Does the Lifeline Administrator have a preference for receiving certain routing data a certain way as the entity responsible for terminating calls to local crisis centers? If different wireless carriers wished to utilize different georouting solutions, transmitting different routing data via different call header fields, could the Lifeline Administrator accommodate that to perform the terminating end of each solution? If that were feasible, what would be the advantages and disadvantages of a multiple solution approach versus requiring all wireless carriers to transmit the same data with the same values in the same field?

16. *Technical Limitations.* We seek comment on the technological limitations of each solution that may prevent a call from being routed to a geographically appropriate crisis call center, if any. For instance, would a particular solution work if the caller is roaming or using Wi-Fi calling? Could the routing information entered into the

call header be stripped out if the call traverses a non-IP interconnection point? Does the impact of one or more intermediate providers affect the transmission of the call header to the Lifeline Administrator and/or its service providers? Are there different technical considerations for routing calls dialed directly to the 988 Lifeline's toll free access number and calls dialed to the 3-digit code? As wireless networks evolve and carriers retire older technologies, what impact, if any, would this have on the implementation of a georouting solution for the 988 Lifeline? Are there any technical limitations of the 988 Lifeline's systems that would prevent the Lifeline Administrator from being able to effectively implement the terminating end of a particular solution? Does the wireless handset that a caller uses to dial 988 present any technical limitations or challenges? If a particular wireless call is out-of-scope for a georouting solution, or the routing data transmitted with a call is or becomes unreadable for any reason, what would occur? We recognize that SAMHSA and the Lifeline Administrator are best suited to ensure that calls are routed properly and ultimately answered by a call center. From the perspective of the originating wireless carrier and its customers, would an out-of-scope call or call with unreadable routing data default to the current routing by area code or be redirected to a national back-up? Is it possible that the call would be disconnected? While the benefits of improving routing for 988 calls are clear, it is paramount that callers be connected with critical, life-saving help even if the closest crisis center cannot be identified or reached. We ask that commenters address the calls that would be successfully routed from originating wireless carriers to crisis centers pursuant to a proposed solution and those that may not be due to technological or other limitations, and explain how any calls that fall in the latter group will nonetheless be connected to an appropriate 988 crisis center. If there are states or territories that will be excluded from any georouting solution due to technical or facility limitations, in whole or in part, we ask that commenters identify those areas.

17. Infrastructure and System Considerations. We seek comment on any network infrastructure and system changes or upgrades that may be required at each step of the call path for wireless carriers to successfully implement the proposed georouting solutions. For example, would wireless carriers need to develop certain

technologies to support the proposed solutions? Would any network upgrades or programming changes be necessary? Are any specific upgrades necessary to the 988 Lifeline's routing platform and other facilities and systems that could impact the availability of a georouting solution to originating wireless carriers and their customers? Would any additional entities have to upgrade their infrastructure, facilities, and systems to perform their roles in a georouting solution, enable callers to the 988 Lifeline to benefit from a georouting solution, or to continue providing services to the 988 Lifeline after the implementation of a georouting solution? Are there any other considerations that impact when, whether, and how any needed infrastructure or system changes are implemented, such as administrative challenges or contractual issues?

18. Costs and Benefits. We seek comment on the costs and benefits of deploying one or more of the proposed solutions. What specific costs would be incurred by the wireless carriers originating calls, any necessary intermediaries, and the Lifeline Administrator responsible for terminating the calls? Would significant costs need to be incurred for network or system changes or upgrades? Are there ways to minimize the costs, especially on non-nationwide or small providers? Are there contracting costs or costs associated with accessing proprietary functions? Do any of the proposed georouting solutions otherwise raise compensation issues between any of the participants involved in the solutions, including, but not limited to, charges to wireless carriers, intermediaries, and/or the Lifeline Administrator to access elements of a georouting solution, charges assessed by entities interested in marketing a georouting solution to carriers as a service, or interconnection fees? If so, how would or should compensation issues be addressed?

19. What are the benefits of utilizing a particular routing solution? In requiring calls and texts to 988 to be routed to the Lifeline, the Commission found that enabling more Americans to access the 988 Lifeline's life-saving suicide prevention and mental health crisis services far surpassed the cost of implementation. In this next phase of improving routing to 988, we seek comment on the ways in which a georouting solution might further reduce suicides and future crises beyond our initial estimates. Is there a way of measuring or quantifying the impact that a georouting solution would have on the outcomes of calls to the 988 Lifeline? Are there any benefits that we

have not identified that could be realized from a georouting solution? Do the public interest benefits of routing callers in crisis to geographically appropriate crisis call centers outweigh any potential costs? We seek comment on whether there are unique circumstances or factors with respect to routing that would change this analysis. We also seek comment on the costs and benefits of wireless carriers implementing multiple georouting solutions with different geographic parameters and technical requirements.

20. Testing of Proposed Solutions. We seek comment from wireless carriers on the testing that has been completed for proposed georouting solutions, the results of the tests, and any work that is in progress to address any implementation or other issues discovered as a result of the tests. The ultimate goal of the coordination between SAMHSA, the Lifeline Administrator, and the Commission is to identify one or more georouting solutions that are compatible with the 988 Lifeline's systems and achieves the policy objectives of connecting callers in crisis with local support. We ask that wireless carriers address how any testing conducted demonstrates that a proposed solution achieves these objectives. How many tests have been conducted to date and with which carriers or other entities? What georouting solutions were the subjects of those tests and how did participants propose to route calls to geographically appropriate crisis centers? What technical specifications, assumptions, or other parameters were applied to the tests? Were any problems or challenges identified in connection with those tests? How have those problems or challenges been resolved or what are the proposals for resolving them? Has any testing indicated that one solution is technologically superior and/or closer to deployment? Has any testing indicated that a particular solution could be implemented in the wireless networks of multiple carriers with only minor adjustments, if any? Has the testing established that both the originating end and the terminating end of the georouting solution are viable, or has the testing focused on limited aspects of the solution? Will wireless carriers participate in any traffic studies conducted to evaluate georouting solutions, and if so, what data would be required to conduct those studies, what entities would be required to provide the data, and what would stakeholders hope to learn from those studies?

21. Timeline for Deployment. We seek comment on timelines for the deployment of one or more georouting

solutions. We ask that commenters specify the work that must still be completed by wireless carriers, SAMHSA, the Lifeline Administrator, and/or any third parties to implement a georouting solution for the 988 Lifeline and the timeline(s) for the completion of that work. We seek comment on whether both the originating functions that need to be performed by wireless carriers and the terminating functions that need to be performed by the Lifeline Administrator and its service providers will be deployed at the same time, and if not, when the two ends of the georouting solution in question will be in sync. We ask that commenters identify any technical, financial, operational, legal, or other factors that may influence the timeframe for deploying a particular solution. We also ask commenters to detail whether a particular georouting solution will be deployed immediately on a national basis or on an incremental basis (e.g., market-by-market), and in the case of the latter, the timeline for rolling out the solution to all states and territories.

22. Alternative Georouting Solutions. We seek comment on any alternative georouting solutions. We remind commenters, as noted above, that the United States continues to face a mental health crisis and reiterate our belief that implementing a georouting solution without delay to connect callers to 988 with geographically appropriate crisis call centers provides better care to those in crisis. Nevertheless, we seek comment on alternative georouting solutions that could be implemented by wireless carriers, including any concepts that have not yet been tested or developed. Are there solutions that build off the proof of concept or other proposals referenced herein that have not yet been presented to SAMHSA or the Lifeline Administrator? Are there ways to leverage existing routing technologies for 988 that have not been considered? If so, what are the functional steps and technical specifications for such solutions? Would it be more effective and efficient for a standards body, such as the Alliance for Telecommunications Industry Solutions, to examine the options for a georouting solution for the 988 Lifeline and issue standards that could be applied by wireless carriers? Should the work from other standards bodies, in addition to or in place of the internet Engineering Task Force and Alliance for Telecommunications Industry Solutions, be used to support georouting? Would that expedite or slow the deployment of a solution? Would any delay resulting from review by a

standards body be warranted if it resulted in a more broadly adopted standard? Rather than relying on the wireless industry to produce a standard, would it be more effective for the Lifeline Administrator and/or its service providers to produce written technical specifications for a georouting solution that SAMHSA has deemed acceptable for the 988 Lifeline, *i.e.*, have the Lifeline Administrator specify the routing information that must be transmitted with calls terminated to the 988 Lifeline and the way it needs to receive that information, and let the wireless carriers figure out how to comply? What information would need to be included in those technical specifications for wireless carriers to be able to develop a georouting solution that is compatible with the requirements set forth by the Lifeline Administrator?

23. Form of Rules. We seek comment on whether rules requiring wireless carriers to implement a georouting solution for the 988 Lifeline should specify one or more technical solutions that must be used or more generally require wireless carriers to implement a georouting solution within a certain period of time of the Lifeline Administrator announcing that it is: (a) prepared to implement the terminating function of one or more georouting solutions; and (b) able to provide technical specifications needed by wireless carriers to implement the originating functions. We seek comment on the merits of these two approaches or whether rules adopted by the Commission should take a different form.

24. We also seek comment on the interplay between a rule requiring wireless carriers to implement a georouting solution for the 988 Lifeline and the Commission's existing rules. Would our existing rules need to be modified, and if so how? For example, while the Commission's rules require originating service providers to route calls to the 988 Lifeline's current toll free access number, would a particular georouting solution require us to modify our rules to allow calls to be routed directly to the Lifeline's individual crisis call centers? We observe that the Commission's Wireline Competition Bureau granted a waiver to allow covered text providers to route covered 988 text messages to the 988 Lifeline using the short code protocol without translation to the Lifeline's current toll free access number, 1-800-273-8255 (TALK). Would a rule change be necessary for us to require wireless carriers to implement a georouting solution?

25. Non-Wireless Calls. As explained above, this *FNPRM* focuses on georouting solutions for wireless calls to the 988 Lifeline because of the established scenarios in which a caller's location may differ from the area code associated with the wireless phone, and the fact that the majority of calls placed to the 988 Lifeline are from wireless devices. We nevertheless invite comment on whether the 988 Lifeline's current method of routing calls by area code creates challenges for callers using other technologies, including but not limited to different variations of Voice over internet-Protocol (VoIP) technology. If so, have any georouting solutions been proposed for such calls? Are any unique challenges presented by the relevant technologies? We ask that commenters responding to this inquiry provide the same information and documents requested herein with respect to georouting solutions for wireless calls.

26. Texts to 988. Texting is an important mode of communication to the 988 Lifeline and has increasingly become the preferred means of communicating among certain demographic groups, many of whom are at risk for mental health crises. Pursuant to the Commission's rules, texts are required to be routed to the 988 Lifeline's ten-digit toll free access number like voice calls. We seek comment on the impact of the georouting solutions discussed above on texting to 988 and whether additional improvements are needed to route texts to geographically appropriate 988 crisis centers. In general, what are the challenges for implementing a georouting solution for texts to 988 and how do wireless carriers and other stakeholders propose to address those challenges? Would all technologies used to send texts be compatible with a particular georouting solution? What are the costs of implementing a georouting solution for texts to the 988 Lifeline, including any network infrastructure or system changes or upgrades necessary to implement a solution? What are the benefits of implementing a georouting solution for texts, and do they outweigh the costs? How long would it take to develop and deploy a georouting solution for texts? We ask that commenters responding to these inquiries provide the same technical, logistical, operational, economic, and practical information requested above for the georouting of voice calls to 988, and identify any relevant considerations that are unique to georouting texts, as opposed to calls, to 988.

Legal Authority

27. We tentatively conclude that we have the authority to adopt rules requiring wireless carriers to implement one or more georouting solutions for calls to the 988 Lifeline under Title II and Title III of the Communications Act of 1934, as amended (Act), and section 104 of the Twenty-First Century Communications and Video Accessibility Act (CVAA), and we seek comment on this proposal. In particular, we seek comment on whether and to what extent the Commission's Title III authority over wireless carriers confers authority for what we propose and seek comment on in this *FNPRM*, including sections 301, 303, 307, 309, and 316. As the Supreme Court has long recognized, Title III grants the Commission a "comprehensive mandate" regarding regulation of spectrum usage, and courts have routinely found that Title III provides the Commission with "broad authority to manage spectrum . . . in the public interest." As we explain above, we believe that requiring wireless carriers to implement a georouting solution for the 988 Lifeline will confer significant public interest benefits by connecting those experiencing a mental health crisis with local public safety and counseling resources that could save lives. We seek comment on this assessment.

28. We also seek comment on whether and to what extent our numbering authority under section 251(e) of the Act provides a source of authority for what we propose and seek comment on in this *FNPRM*. Section 251(e)(1) gives the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States." The Commission's exclusive jurisdiction over numbering policy enables the Commission to act flexibly and expeditiously on important numbering matters, which pursuant to section 251(e)(4) of the Act, includes the designation of 988 as the universal telephone number for the 988 Lifeline. We seek comment on whether this authority would extend to adopting rules requiring wireless carriers to route calls to the 988 Lifeline in a manner that would help to ensure that all Americans can receive efficient, swift access to, and reap the benefits of, critical suicide prevention and crisis services offered through the 988 Lifeline.

29. We seek comment on any other sources of authority that would authorize the Commission to require wireless carriers to implement a georouting solution for calls to the 988 Lifeline, including whether the Commission could invoke its ancillary

authority. To exercise ancillary jurisdiction "two conditions [must be] satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Routing calls to the 988 Lifeline involves communications by wire or radio and the use of equipment for purposes of facilitating transmission by wire or radio. The Commission previously found that imposing outage reporting requirements on covered 988 service providers was reasonably ancillary to our responsibility to ensure that the 988 Lifeline operates effectively. We believe that requiring the use of a georouting solution for the 988 Lifeline is necessary to carry out our responsibility for the proper functioning of the 988 Lifeline services under section 251(e)(4), and seek comment on whether doing so falls within the scope of the Commission's ancillary authority.

30. *Digital Equity*. The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality, invites comments on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well as the scope of the Commission's relevant legal authority.

Initial Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Second Further Notice of Proposed Rulemaking (FNPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the *FNPRM*. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or

summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

32. The *FNPRM* seeks to facilitate access to critical suicide prevention and crisis services by improving routing of wireless calls to the 988 Suicide & Crisis Lifeline (988 Lifeline). The 988 Lifeline is currently designed to route wireless calls to crisis centers based on a caller's area code and exchange. As a result, however, the 988 Lifeline may not route a wireless call to a crisis center nearest to the caller's physical location. This is particularly concerning given the increased prevalence of calls to the 988 Lifeline originating from wireless phones and the importance of providing help-seekers access to local resources.

33. The *FNPRM* proposes to adopt a rule that would require wireless carriers to implement one or more georouting solutions for calls to the 988 Lifeline, and seeks comment to thoroughly and transparently consider georouting solutions that could fall within the scope of that mandate and to identify any remaining work to implement a georouting solution. The *FNPRM* seeks comment on whether mandating the use of one or more georouting solutions by wireless carriers originating calls to the 988 Lifeline will achieve the benefits of enhancing access to critical support and resources. The *FNPRM* inquires about the viability of any potential georouting solutions proposed to date, including those proposed to SAMHSA and the Lifeline Administrator, and also seeks comment on any alternative georouting solutions. The Commission believes that a georouting solution based on cell tower information would best identify a caller's location and thus enable routing the call to a geographically appropriate crisis call center. The *FNPRM* seeks comment on this belief and on any other alternatives for identifying a caller's location and correlating that location with a geographically appropriate crisis call center. The *FNPRM* also seeks comment on the geographic boundaries used for any proposed georouting solution and asks whether the Commission should mandate the use of one or more particular geographic boundaries. For any georouting solutions, the *FNPRM* inquires about the technical specifications and limitations, required routing data and transmission methods, necessary infrastructure and system changes or upgrades, testing requirements, costs and benefits, and timelines for deployment. Additionally, the *FNPRM* seeks comment on any routing challenges and potential georouting solutions for non-wireless

calls. The *FNPRM* also seeks comment on the impact of georouting solutions on texting to the 988 Lifeline and asks whether additional improvements are needed to route texts to geographically appropriate 988 crisis centers. Lastly, the *FNPRM* requests comment on the form of rules requiring wireless carriers to implement a georouting solution for the 988 Lifeline and on the Commission's authority to adopt such rules.

Legal Basis

34. The legal basis for any action that may be taken pursuant to this *FNPRM* is contained in sections 1, 4(i), 4(j), 201, 218, 251(e), 301, 303, 307, 309(a), 316, 332, and 403 of the Communications Act of 1934, as amended.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

35. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the *FNPRM* seeks comment, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

36. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

37. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its

field." The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2022, there were approximately 530,109 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

38. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." U.S. Census Bureau data from the 2022 Census of Governments indicate there were 90,837 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,845 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 11,879 special purpose governments (independent school districts) with enrollment populations of less than 50,000. Accordingly, based on the 2022 U.S. Census of Governments data, we estimate that at least 48,724 entities fall into the category of "small governmental jurisdictions."

39. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.

40. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this

industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

41. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include both incumbent and competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were fixed local exchange service providers. Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

42. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal

Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

43. *Competitive Local Exchange Carriers (Competitive LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

44. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 127 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates that 109 providers have 1,500 or fewer employees. Consequently, using the

SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

45. *Local Resellers*. Neither the Commission nor the SBA have developed a small business size standard specifically for Local Resellers. Telecommunications Resellers is the closest industry with a SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year. Of that number, 1,375 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 207 providers that reported they were engaged in the provision of local resale services. Of these providers, the Commission estimates that 202 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

46. *Toll Resellers*. Neither the Commission nor the SBA have developed a small business size standard specifically for Toll Resellers. Telecommunications Resellers is the closest industry with a SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees. U.S.

Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year. Of that number, 1,375 firms operated with fewer than 250 employees.

Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 457 providers that reported they were engaged in the provision of toll services. Of these providers, the Commission estimates that 438 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

47. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 90 providers that reported they were engaged in the provision of other toll services. Of these providers, the Commission estimates that 87 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

48. *Wireless Carriers and Service Providers*. Wireless Telecommunications Carriers (*except Satellite*) is the closest industry with a SBA small business size standard applicable to these service providers. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that

reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

49. *Wireless Communications Services.* Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to Part 27 of the Commission's rules. Wireless Telecommunications Carriers (*except Satellite*) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

50. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.

51. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as

small under the SBA's small business size standard.

52. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (*except Satellite*). The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 331 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services. Of these providers, the Commission estimates that 255 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

53. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

54. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.

The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than \$25 million a year and 44 firms operated with revenue of \$25 million or more. Based on this data, the Commission estimates that a majority of firms in the industry are small.

55. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Based on industry data, there are about 420 cable companies in the U.S. Of these, only seven have more than 400,000 subscribers. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Based on industry data, there are about 4,139 cable systems (headends) in the U.S. Of these, about 639 have more than 15,000 subscribers. Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

56. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator. Based on industry data, only six cable system operators have more than 498,000 subscribers. Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on

whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

57. *Satellite Telecommunications.* This industry comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.” Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with \$38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than \$25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA’s small business size standard, a little more than half of these providers can be considered small entities.

58. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (e.g. dial-up ISPs) or Voice over internet Protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those

firms, 1,039 had revenue of less than \$25 million. Based on this data, the Commission estimates that the majority of “All Other Telecommunications” firms can be considered small.

59. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

60. *Semiconductor and Related Device Manufacturing.* This industry comprises establishments primarily engaged in manufacturing semiconductors and related solid state devices. Examples of products made by these establishments are integrated circuits, memory chips, microprocessors, diodes, transistors, solar cells and other optoelectronic devices. The SBA small business size standard for this industry classifies entities having 1,250 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 729 firms in this industry that operated for the entire year. Of this total, 673 firms operated with fewer than 250 employees. Thus under the SBA size standard, the majority of firms in this industry can be considered small.

61. *Software Publishers.* This industry comprises establishments primarily engaged in computer software publishing or publishing and reproduction. Establishments in this industry carry out operations necessary for producing and distributing computer software, such as designing, providing documentation, assisting in installation, and providing support services to software purchasers. These establishments may design, develop, and publish, or publish only. The SBA small business size standard for this industry classifies businesses having annual receipts of \$41.5 million or less as small. U.S. Census Bureau data for 2017 indicate that 7,842 firms in this

industry operated for the entire year. Of this number 7,226 firms had revenue of less than \$25 million. Based on this data, we conclude that a majority of firms in this industry are small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

62. The RFA requires Federal agencies to describe the impact of proposed rules on small entities. The *FNPRM* proposes to adopt a rule that would require small and other wireless carriers to implement one or more georouting solutions for calls to the 988 Lifeline. The Commission believes that a georouting solution based on cell tower information would best identify a caller’s location to enable routing to a geographically appropriate crisis call center and seeks comment on this conclusion. The *FNPRM* seeks comment on whether the Commission should mandate the use of one or more particular geographic boundaries. The *FNPRM* also seeks comment on routing challenges and potential georouting solutions for non-wireless calls and asks whether additional improvements are needed to route texts to geographically appropriate 988 crisis centers. Additionally, the *FNPRM* seeks comment on a number of aspects related to implementing any georouting solutions, including technical specifications and limitations, required routing data and transmission methods, necessary infrastructure and system changes or upgrades, testing requirements, timelines for deployment, and the Commission expects that small entities will incur costs to implement these changes. At this time the Commission does not have sufficient cost information to quantify compliance costs for small entities. However, we expect the comments received in response to the *FNPRM* to include information which should help the Commission further analyze the economic impact of various proposals on small entities, including but not limited to costs for professional services, before adopting final rules.

Steps Taken To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

63. The RFA requires an agency to describe any significant alternatives that could minimize impacts to small entities that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources

available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

64. In the *FNPRM*, the Commission seeks comment from all entities, including small entities, on the effect of deploying a georouting solution for wireless calls to the 988 Lifeline, and on alternative ways of implementing a georouting solution, including concepts that have yet to be tested or developed. For example, the *FNPRM* seeks comment on the costs and benefits of deploying a georouting solution for wireless calls to the 988 Lifeline. This includes whether rules requiring wireless carriers to implement a georouting solution for the 988 Lifeline should specify one or more technical solutions that must be used or more generally require wireless carriers to implement a georouting solution within a certain period of time of the Lifeline Administrator announcing that it is: (a) prepared to implement the terminating function of one or more georouting solutions; and (b) able to provide technical specifications needed by wireless carriers to implement the originating functions. Additionally, the *FNPRM* invites stakeholders to comment on whether georouting solutions that have been developed to date by major carriers would be viable for smaller carriers, and any distinctions that need to be considered for smaller carriers when mandating the use of a georouting solution for the 988 Lifeline. The *FNPRM* also inquires whether there are any ways to minimize costs incurred for network or system changes or upgrades, particularly for small providers. Small entities are encouraged to bring to the Commission’s attention any specific concerns they may have with the alternatives proposed in the *FNPRM*. We expect to take into account the economic impact on small entities, as identified in comments filed in response to the *FNPRM* and this IRFA, in reaching our final conclusions and promulgating rules in this proceeding.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

65. None.

Ordering Clauses

66. Accordingly, *it is ordered*, pursuant to sections 1, 4(i), 4(j), 201, 218, 251(e), 301, 303, 307, 309(a), 316, 332, and 403 of the Communications

Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 201, 218, 251(e), 301, 303, 307, 309(a), 316, 332, and 403, that this *FNPRM* is adopted.

67. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission’s rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the *FNPRM* on or before 30 days following publication in the **Federal Register**, and reply comments on or before 60 days following publication in the **Federal Register**.

68. *It is further ordered* that the Office of the Secretary, Reference Information Center *shall send* a copy of this *FNPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene Dortch,
Secretary.

[FR Doc. 2024–11761 Filed 5–28–24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 240522–0142]

RIN 0648–BM86

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Changes to Purse Seine Fish Aggregating Device Closure Periods

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS seeks comments on this proposed rule issued under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act). The proposed rule would implement a recent decision of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC or Commission). This decision shortens the duration of fish aggregating device (FAD) closure periods for the U.S. purse seine fishery. This action is necessary to satisfy the obligations of the United States under the Convention on the Conservation and

Management of Highly Migratory Species in the Western and Central Pacific Ocean (Convention), to which it is a formal signatory to the Convention (Contracting Party).

DATES: Comments on the proposed rule must be submitted in writing by June 13, 2024.

ADDRESSES: A plain language summary of this proposed rule is available at <https://www.regulations.gov/docket/NOAA-NMFS-2024-0057>. You may submit comments on this document, identified by NOAA–NMFS–2024–0057, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Visit <https://www.regulations.gov> and type NOAA–NMFS–2024–0057 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Sarah Malloy, Acting Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

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).

An initial regulatory flexibility analysis (IRFA) prepared under authority of the Regulatory Flexibility Act (RFA) is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this document.

Copies of the Regulatory Impact Review (RIR) and the documents prepared for National Environmental Policy Act (NEPA) purposes are available at <https://www.regulations.gov> or may be obtained from Sarah Malloy, Acting Regional Administrator, NMFS PIRO (see address above).

FOR FURTHER INFORMATION CONTACT: Rini Ghosh, NMFS PIRO, 808–725–5033.

SUPPLEMENTARY INFORMATION:

Background on the Convention

The Convention is focused on the conservation and management of

fisheries for highly migratory species (HMS). The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the Western and Central Pacific Ocean (WCPO). To accomplish this objective, the Convention established the Commission, which includes Members, Cooperating Non-members, and Participating Territories (collectively referred to here as members). The United States of America is a Member. American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI) are Participating Territories.

As a Contracting Party to the Convention and a Member of the Commission, the United States implements, as appropriate, conservation and management measures and other decisions adopted by the Commission. The WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the Commission. The WCPFC Implementation Act further provides that the Secretary of Commerce shall ensure consistency, to the extent practicable, of fishery management programs administered under the WCPFC Implementation Act and the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*), as well as other specific laws (see 16 U.S.C. 6905(b)). The Secretary of Commerce has delegated the authority to promulgate regulations under the WCPFC Implementation Act to NMFS. A map showing the boundaries of the area of application of the Convention (Convention Area), which comprises the majority of the WCPO, can be found on the WCPFC website at: www.wcpfc.int/doc/convention-area-map.

Background on the WCPFC Decision

This proposed rule would implement specific provisions of Conservation and Management Measure (CMM) 2023–01, “Conservation and Management Measure for Bigeye, Yellowfin, and Skipjack Tuna in the Western and Central Pacific Ocean.” The Commission adopted CMM 2023–01 at its twentieth regular annual session, in December 2023, and it went into effect in February 2024. The provisions of

CMM 2023–01 are described in more detail below.

CMM 2023–01 is the latest in a series of CMMs devoted to the conservation and management of tropical tuna stocks, particularly stocks of bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), and skipjack tuna (*Katsuwonus pelamis*). The stated purpose of CMM 2023–01 is to support fisheries for skipjack tuna, bigeye tuna, and yellowfin tuna in the Convention Area that benefit WCPFC members and their communities, and to do so in a way that is fair to all WCPFC members and addresses the special requirements of developing States and Participating Territories. CMM 2023–01’s provisions are based on specific objectives for each of the three tropical tuna stocks.

Many of the provisions of CMM 2023–01 have already been implemented by NMFS or will be implemented in separate rulemakings. This proposed rule would implement the provisions regarding FAD prohibition periods for U.S. purse seine vessels.

Under NMFS’ current regulations at 50 CFR 300.223(b)(2), the FAD prohibition periods are from July 1 through September 30, during each calendar year for the high seas and exclusive economic zones (EEZs) in the Convention Area, and from November 1 through December 31 during each calendar year solely on the high seas in the Convention Area. Thus, U.S. purse seine vessels are currently prohibited from setting on FADs for three months in EEZs and on the high seas in the Convention Area, and for an additional two months on the high seas in the Convention Area. Per 50 CFR 300.223, these FAD prohibition periods do not apply in the area of overlap between the WCPFC and the Inter-American Tropical Tuna Commission (IATTC).

Paragraph 13 of CMM 2023–01 reduces the 3-month FAD prohibition period for the EEZs and on the high seas in the Convention Area to one and a half months, running from July 1 to August 15 during each calendar year. This proposed rule would amend the regulations at 50 CFR 300.223(b)(2)(1) to revise the three-month FAD prohibition period for the EEZs and on the high seas to be July 1 through August 15 during each calendar year, consistent with CMM 2023–01.

Paragraph 14 of CMM 2023–01 reduces the additional two-month high seas FAD prohibition period to one month—either April, May, November, or December. Previously, WCPFC members could choose between implementing the two-month additional FAD prohibition period on the high seas in April and May or in November and

December. NMFS had previously determined that implementing the two-month additional FAD prohibition period in November and December would be more cost-effective than implementing the prohibition period in April and May. Regulations at 50 CFR 300.223(b)(2)(2) implement the additional two-month high seas FAD prohibition period in November and December. Based on the analysis in the IRFA and RIR for this proposed rule, NMFS concludes that continuing to implement the one month high seas FAD prohibition period late in the year would be more cost-effective for the fleet. NMFS proposes to implement the additional one-month high seas FAD prohibition period in December 2024 and in future calendar years. The American Tunaboat Association has also provided preliminary information indicating the U.S. purse seine fleet’s preference for a December closure in 2024. NMFS specifically requests comments on this aspect of the proposed rule and will make adjustments in the final rule as warranted.

CMM 2023–01 is in effect until February 15, 2027. However, as has been NMFS’s practice, the elements of the proposed rule would remain in effect until they are replaced or amended, to avoid a lapse in the management of the fisheries.

Proposed Action

The elements of the proposed rule are detailed below.

In accordance with CMM 2023–01, NMFS proposes to shorten the duration of the FAD prohibition period from July 1 through August 15 during each calendar year in the Convention Area between the latitudes of 20° N and 20° S (inclusive of the EEZs and high seas in the Convention Area and excluding the area of overlap between the WCPFC and the IATTC). Regarding the additional one-month FAD prohibition period on the high seas in the Convention Area, after considering the objectives of CMM 2023–01, the expected economic impacts on U.S. fishing operations and the nation as a whole, and expected environmental and other effects, NMFS expects that a high seas FAD prohibition period in December of each calendar year may be the most cost effective. Thus, NMFS is proposing to implement the high seas FAD prohibition period in December in 2024 and during each calendar year thereafter. NMFS specifically seeks public comment on this aspect of the proposed rule. A comparison of the options’ expected direct economic impacts on affected fishing businesses is

provided in the RIR. The RIR also includes discussion of potential impacts to the cannery in Pago Pago, American Samoa.

To the extent that the FAD closures under the proposed rule cause more fishing effort and/or catches, the delivery of more tuna from the U.S. purse seine fleet, and consequent reduced adverse economic impacts to the producers (fishing businesses), they could also bring reduced adverse impacts to business sectors with forward linkages to the producers, such as the cannery in Pago Pago that processes much of their catches.

NMFS also analyzed the environmental effects of the proposed action on living marine resources in the affected environment. NMFS published a supplemental environmental assessment (SEA) in 2021 that analyzed the the potential impacts of implementation of WCPFC tropical tunas measures through 2025. In the SEA, NMFS analyzed the impacts of the FAD prohibition periods of various lengths that were either shorter or longer in duration than the FAD prohibition periods under this proposed rule. The SEA considered that FAD prohibition periods might influence the overall composition of catch of the fishery, both in terms of species and fish sizes. If there is a transfer of effort to fishing on unassociated sets during the prohibition periods, catches would more likely consist of less bigeye tuna, and possibly more larger-sized yellowfin tuna and skipjack tuna. It is possible that shorter FAD prohibition periods could result in reduced mortality for some stocks. However, to the extent there is a shift in fishing patterns and practices, any effects on stocks are expected to be small compared to typical year-to-year interactions driven by changing oceanic and economic conditions. Indeed, many other factors affect these stocks, and it is unlikely that changes to the duration of FAD fishing alone would significantly impact their statuses. The WCPO stocks of the tuna species mostly likely to be caught while fishing on FADs—yellowfin tuna, bigeye tuna, and skipjack tuna—are all determined to be not overfished and not subject to overfishing. The SEA also considered impacts of FAD fishing on non-target species and protected resources and likewise determined that any reduction in interactions resulting from longer FAD prohibition periods would likely be small compared to typical year-to-year variations in such interactions. Based on the analyses in the SEA, NMFS concluded that the FAD prohibition periods would not

significantly impact living marine resources in the affected environment.

As currently defined in 50 CFR 300.211, a FAD is “any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.” Under this proposed rule, the regulatory definition of a FAD would not change. Although the definition of a FAD does not include a vessel, the restrictions during the FAD prohibition periods would include certain activities related to fish that have aggregated in association with a vessel, or drawn by a vessel, as described below.

The prohibitions applicable to these proposed FAD-related measures are in existing regulations at 50 CFR 300.223(b)(1)(i)–(v). Specifically, during the FAD prohibition periods in each calendar year, owners, operators, and crew of fishing vessels of the United States equipped with purse seine gear shall not do any of the following activities in the Convention Area (excluding the area of overlap between the WCPFC and IATTC) between 20° N latitude and 20° S latitude:

(1) Set a purse seine around a FAD or within 1 nautical mile (1,852 meters) of a FAD;

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous 8 hours, setting the purse seine in an area in which a FAD has been inspected or handled within the previous 8 hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel;

(3) Deploy a FAD into the water;

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: a FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and a FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water; or

(5) From a purse seine vessel or any associated skiffs, other watercraft or equipment, submerge lights under water, suspend or hang lights over the

side of the purse seine vessel, skiff, watercraft or equipment, or direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

These prohibitions would not apply during emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage.

The proposed rule also would make a technical correction regarding the area of application in 50 CFR 300.223(b)(3)(i) to explicitly state that the requirements regarding activating FADs apply in the Convention Area. The current regulatory text does not include the specific area of application.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this proposed rule is consistent with the WCPFC Implementation Act and other applicable laws, subject to further consideration after public comment.

Administrative Procedure Act (APA)

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action pursuant to APA section 553(c) (5 U.S.C. 553(c)), while also ensuring that the first revised FAD prohibition period is finalized before the end date of August 15, 2024. The Commission adopted CMM 2023–01 in December 2023, and NMFS has been diligently working on completing the rulemaking since that time. Rulemakings of this nature generally take approximately one-year to complete in order to satisfying the requirements of APA and other U.S. laws, and thus, in order to complete the rulemaking by August 15, 2024, NMFS is proceeding in an accelerated manner. Stakeholder and industry groups have been involved with the development of this action. Providing for more than 15 days advance notice and public comment on the proposed rule increases the risk that the existing regulations extending the FAD prohibition period through September 30th would remain in place causing unnecessary burden on the regulated community. Thus, in order to provide the public with the opportunity to comment on this proposed rule while ensuring that the agency has sufficient time to consider any public comments and publish a final rule that is effective by August 15, 2024, NMFS is providing the public

with a 15-day comment period on this proposed rule.

Coastal Zone Management Act (CZMA)

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of American Samoa, the CNMI, Guam, and the State of Hawaii. Determinations to Hawaii and each of the Territories were submitted on March 8, 2024, for review by the responsible state and territorial agencies under section 307 of the CZMA. The Hawaii Coastal Zone Management Program responded on March 12, 2024, stating that because the U.S. WCPO purse seine fishery operates outside the jurisdiction of its enforceable policies, it would not be reviewing the consistency determination. Guam requested supplemental information that NMFS provided on March 28, 2024.

Executive Order 12866

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

Regulatory Flexibility Act (RFA)

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. The IRFA includes analysis of two no-action alternatives in comparison to the proposed action. The first no-action alternative is no FAD closure periods in place at all. The second no-action alternative is maintaining the status quo, as included in the current regulations at 50 CFR 300.223(b)(2), which is the three-month FAD closures in the full Convention Area and the separate two-month FAD closure just on the high seas in the Convention Area.

A detailed description of the proposed rule, why it is being considered as well as its objectives, and the legal basis for the proposed rule are contained in the **SUMMARY** section of the preamble and in other sections of this **SUPPLEMENTARY INFORMATION** section of the preamble. The analysis follows:

Estimated Number of Small Entities Affected

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 114111) 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 proposed rule would apply to owners and operators of U.S. commercial purse seine fishing vessels used to fish for HMS in the Convention Area. Based on the number of U.S. purse seine vessels with WCPFC Area Endorsements, which are required to fish on the high seas in the Convention Area, the estimated numbers of affected purse seine fishing vessels is 13.

Based on limited financial information about the affected fishing fleets, and using individual vessels as proxies for individual businesses, NMFS believes 80 percent of the vessels in the purse seine fleet are small entities as defined by the RFA (*i.e.*, they are independently owned and operated and not dominant in their fields of operation, and have annual receipts of no more than \$11.0 million). Within the purse seine fleet, analysis of average revenue, by vessel, for 2020–2022 reveals that average annual revenue among vessels in the fleet was about \$7 million (NMFS unpublished data combined with price data from the Pacific Island Forum Fisheries Agency and https://investor.thaiunion.com/raw_material.html accessed on June 12, 2023), and 12 participating vessels qualified as small entities, with estimated vessel revenue of less than \$11 million (based on the average revenue across the most recent 3 years for which data is available).

Recordkeeping, Reporting, and Other Compliance Requirements

The reporting, recordkeeping and other compliance requirements of this proposed rule are described earlier in the Proposed Action sub-section of the **SUPPLEMENTARY INFORMATION** section of the preamble. The classes of small entities subject to the requirements and the types of professional skills necessary to fulfill the requirements are described below.

The FAD restrictions being implemented under the proposed rule would not establish any new reporting or recordkeeping requirements. The new requirement would be for affected vessel owners and operators to comply with the FAD restrictions described earlier in the **SUPPLEMENTARY INFORMATION** section of the preamble, including FAD prohibition periods throughout the Convention Area from July 1 through August 15 in each calendar and FAD prohibition periods just on the high seas in the Convention Area from December 1 through December 31 in each calendar

year. The proposed rule would reduce the current FAD prohibitions periods by 50 percent in terms of duration.

Fulfillment of the element's requirements is not expected to require any professional skills that the vessel owners and operators do not already possess. The costs of complying with the requirements are described below to the extent possible.

The proposed FAD restrictions would substantially constrain the manner in which purse seine fishing could be conducted in the specified areas and periods in the Convention Area compared to the no-action alternative of no closure periods in place at all; in those areas and during those periods, vessels would be able to set only on free, or "unassociated," schools.

With respect to the one and a half month FAD closure throughout the Convention Area, assuming that sets would be evenly distributed through the year, the number of annual FAD sets would be expected to be about 87.5 percent of the number that would occur without a seasonal FAD closure, and 12.5 percent more than during the existing three-month FAD closure. This is calculated by assuming FAD setting would occur at the same rate throughout the year and that a one and half month closure would lead to FAD setting for 10.5 out of 12 months of the year instead of for the full 12 months (*i.e.*, 87.5 percent of the year). The existing 3-month closure currently leads to FAD setting for 9 out of 12 months of the year instead of the full 12 months (*i.e.*, 75 percent of the year).

With respect to the additional one-month high seas FAD closure, the effects of this element are difficult to predict. CMM 2023–01 includes four options for the one-month high seas FAD closure: April, May, November, or December. In 2018, NMFS analyzed the impacts of the two previous options included in earlier CMMs, which were the 2-month high seas FAD closure in April and May and the 2-month high seas FAD closure in November and December, using data from 2014–2017, and did not find any statistically significant differences between the average number of sets in high seas areas, or the number of FAD associated sets in the high seas across months. The earlier CMMs only included those two options for two-month high seas FAD closures and did not include the four options for one-month high seas FAD closures included in CMM 2023–01. However, NMFS did observe trends in the number of high seas and the number of FAD sets in the high seas areas that supported selection of the November–December FAD prohibition period. In

particular, the number of FAD sets in the high seas areas were low during November and December due to fishing effort limits met prior to the end of the season. If the effort limit was reached prior to November, then the later prohibition period would have a lesser adverse direct economic impact on the U.S. purse seine fleet. The analysis also noted that unpredictable future conditions such as ex-vessel price and environmental conditions—could result in either closure period having a greater adverse direct economic impact on the fleet. In 2018–2023, NMFS chose to implement the 2-month high seas FAD closure in November–December, and in 2018, the high seas was closed from September 19–December 31, and in 2019, the U.S. EEZ and the high seas were closed from October 9–November 28 and from December 9–31. Thus, in 2018 and for most of 2019, the 2-month high seas FAD closure had little to no additional impacts due to the closures from the fishing effort limits already being reached. Similarly, for 2024–2026, if the high seas are closed to all purse seine fishing towards the end of the year as a result of the fishing effort limit being reached, the high seas FAD closure during either November or December would have no additional effect whatsoever. In that situation, given that any closure would likely occur later in the year, implementing the one-month closure in December would be likely to have less effect than implementing the one-month closure in November. However, if the high seas are not closed to fishing during the closure period, given the performance of the fleet in recent years, the prohibition on FAD setting would make the high seas less favorable for fishing than they otherwise would be, since only unassociated sets would be allowed there, but it is not possible to characterize how influential that factor would be. Thus, it is not possible to predict the effects in terms of the spatial distribution of fishing effort or the proportion of fishing effort that is made on FADs.

With respect to both the one and a half month FAD closure and one-month additional high seas FAD closure compared to the no-action alternative of no FAD closures in place at all, as for the limits on fishing effort, vessel operators might choose to schedule their routine maintenance periods so as to take best advantage of the available opportunities for making FAD sets (*e.g.*, during the FAD closures). However, the limited number of vessel maintenance facilities in the region might constrain vessel operators' ability to do this.

Vessels in the U.S. WCPO purse seine fleet make both unassociated sets and FAD sets when not constrained by regulation, so one type of set is not always more valuable or efficient than the other. Which set type is optimal at any given time is a function of immediate conditions in and on the water. Other factors, such as fuel prices (unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (*e.g.*, FAD fishing, which tends to result in greater catches of lower-value skipjack tuna and smaller yellowfin tuna and bigeye tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish) also contribute to whichever set type is optimal at a given time. Clearly, the ability to do either type of set is valuable, and constraints on the use of either type can be expected to bring adverse economic impacts to fishing operations. Thus, the greater the constraints on the ability to make FAD sets, the greater the expected economic impacts of the action. Because the factors affecting the relative value of FAD sets and unassociated sets are many, and because the relationships among them are not well known, it is not possible to quantify the expected economic impacts of the FAD restrictions. However, it appears reasonable to conclude two points. First, the FAD restrictions would adversely impact producer surplus relative to the no-action alternative of no FAD prohibition periods in place. The fact that the fleet has made such a substantial portion of its sets on FADs in the past indicates that prohibiting the use of FADs in the specified areas and periods could bring substantial costs and/or revenue losses. Second, vessel operators might be able to mitigate the impacts of the FAD restrictions by scheduling their routine vessel and equipment maintenance during the FAD closures, but this opportunity might be constrained by the limited vessel maintenance facilities in the region.

Compared to the second no-action alternative or status quo alternative of FAD prohibition periods that would be twice as long as the FAD prohibition periods that would be implemented under the proposed rule, any adverse effects would be proportionally reduced. Thus the adverse effects in terms of costs and revenue losses would be less under the proposed rule than under the status quo no-action alternative.

Disproportionate Impacts

In the purse seine fishing sector, approximately 80 percent of the affected entities are small entities, so disproportionate impacts would not be expected. The direct effect of the proposed rule would be to constrain fishing effort, as compared to the no-action alternative of no closure periods in place at all, by purse seine fishing vessels, with consequent constraining effects on both revenues (because catches would be less) and operating costs (because less fishing would be undertaken). Although some purse seine fishing entities are larger than others, NMFS is not aware of any differences between the small entities and the large entities (as defined by the RFA) in terms of their capital costs, operating costs, or other aspects of their businesses. Accordingly, there is no information to suggest that the direct adverse economic impacts on small purse seine entities would be disproportionately greater than those on large purse seine entities. However, the direct effect of the proposed rule would be to reduce constraints on fishing effort, as compared to the status quo no-action alternative, by purse seine fishing vessels.

Duplicating, Overlapping, and Conflicting Federal Regulations

NMFS has not identified any Federal regulations that duplicate, overlap with, or conflict with the proposed regulations.

Alternatives to the Proposed Rule

NMFS has sought to identify alternatives that would minimize the proposed rule's economic impacts on small entities (*i.e.*, significant alternatives). Taking the no-action alternative of no FAD prohibition periods could result in lesser adverse economic impacts than the proposed action for affected entities, but NMFS does not prefer this no-action alternative, because it would be inconsistent with the United States' obligations under the Convention. Taking the no-action alternative of retaining the status quo FAD prohibition periods that are twice as long in duration could result in greater adverse economic impacts than the proposed action for affected entities. This alternative would also be inconsistent with the United States' obligations under the Convention. Alternatives identified for the proposed rule are discussed below.

NMFS considered in detail the timing of the additional one-month FAD closure for the high seas. CMM 2023–01 allows members to choose either April,

May, November, or December, as the additional month for the high seas FAD closure. NMFS has compared the expected direct economic impacts of these four options (implementing a high seas FAD closure in April, May, November, or December) on purse seine fishing businesses in the RIR for the proposed rule, by analyzing two discrete alternatives. Due to the similarities between implementing the high seas FAD closure in April or May (a spring closure) or in November or December (a winter closure), the RIR analyzed the impacts of implementing the closure in April or May as compared to November or December. The analysis finds a closure later in the year—a December closure—is more likely to have a lesser direct economic impact on those businesses for the following reasons: because the later closure period is more likely to run concurrently with a closure of the high seas in the Convention Area to purse seine fishing (if the fishing effort limits are reached), in which case the FAD closure would bring no additional economic impacts.

Paperwork Reduction Act

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: May 23, 2024.

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 300 as follows:

**PART 300—INTERNATIONAL
FISHERIES REGULATIONS**

**Subpart O—Western and Central
Pacific Fisheries for Highly Migratory
Species**

- 1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

- 2. In § 300.223, revise paragraphs (b)(2) and (b)(3)(i) to read as follows:

§ 300.223 Purse seine fishing restrictions.

* * * * *

(b) * * *

(1) * * *

(2) The requirements of paragraph (b)(1) of this section shall apply:

(i) From July 1 through August 15, in each calendar year;

(ii) In any area of high seas, from December 1 through December 31, in each calendar year.

(3) *Activating FADs for purse seine vessels.* (i) A vessel owner, operator, or crew of a fishing vessel of the United States equipped with purse seine gear shall turn on the tracking equipment of an active FAD while the FAD is onboard the vessel and before it is deployed in the water in the Convention Area.

* * * * *

[FR Doc. 2024–11732 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 89, No. 104

Wednesday, May 29, 2024

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

DEPARTMENT OF AGRICULTURE

Forest Service

Bridger-Teton National Forest; Wyoming; Revision of the Land Management Plan for the Bridger-Teton National Forest

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of intent to initiate the assessment phase of the Land Management Plan revision for the Bridger-Teton National Forest.

SUMMARY: The Forest Service, U.S. Department of Agriculture, is initiating the assessment phase of the Land Management Plan revision process for the Bridger-Teton National Forest, located in Wyoming. The assessment supports the subsequent planning phase, which will result in a revised land management plan to guide all resource management activities on the Bridger-Teton National Forest. The assessment will identify and consider relevant and readily accessible material about ecological, social, and economic conditions and trends in the planning area and will identify best available scientific information including and Native or Indigenous knowledge. Findings will then help describe the need to change the plan and inform revision of the plan.

DATES: In late 2022, the Bridger-Teton National Forest Supervisor and staff initiated engagement with Tribes, and letters inviting consultation were mailed to Tribes in November 2023. Additional engagements with Tribal, county, State, and Federal entities, as well as public engagement opportunities occurred in 2023 and early 2024. Additional engagement with Tribes, cooperating agencies, and the public are planned for 2024 through the assessment phase. Future engagements will be planned for the subsequent plan revision phases. Interested parties may learn more about

this and future planning phases, as well as information on opportunities to engage by visiting the Bridger-Teton land management planning website, located at <https://www.fs.usda.gov/detail/btnf/landmanagement/planning/?cid=FSEPRD1093592>.

A draft assessment for public review and comment is expected in summer 2024. After review and incorporation of public comments and additional information from Tribal consultation on the draft assessment, a final assessment and need to change the plan will be produced and used in subsequent phases of the plan revision.

ADDRESSES: For questions about Land Management Plan revision or comments on initiating the assessment phase of plan revision, please address mail to: Bridger-Teton National Forest, Attn: Forest Plan Revision, P.O. Box 1888, Jackson, WY 83001 or hand-deliver to the Supervisor's Office, 340 N Cache Street, Jackson, WY. Questions may also be sent electronically to comments-intermtn-bridger-teton@usda.gov. All correspondence, including names and addresses, will be part of the public record.

FOR FURTHER INFORMATION CONTACT: Dominique Brough, Forest Plan Revision Team Leader, by phone at (307) 739-5508 or by email at dominique.brough@usda.gov; or Mary Cernicek, Strategic Communications and Planning Public Affairs Officer, by phone at (307) 739-5564 or by email at mary.cernicek@usda.gov. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The 2012 Planning Rule (36 CFR part 219), which implements the National Forest Management Act (NFMA) of 1976, provides that the Forest Service develop, maintain, and revise Land Management Plans for all National Forests and Grasslands. Land Management Plans provide the programmatic framework for management of forest resources and are amendable as conditions change over time. The current Bridger-Teton Land Management Plan was adopted in 1990.

The 2012 Planning Rule requires the assessment to include information regarding the status and trends of ecological, social, and economic

conditions within the planning area and across the broader landscape. In particular, the agency must identify and evaluate information relevant to the plan area for the following: (1) Terrestrial ecosystems, aquatic ecosystems, and watersheds; (2) Air, soil, and water resources and quality; (3) System drivers, including dominant ecological processes, disturbance regimes, and stressors, such as natural succession, wildland fire, invasive species, and climate change, and the ability of terrestrial and aquatic ecosystems in the plan area to adapt to change; (4) Baseline assessment of carbon stocks; (5) Threatened, endangered, proposed, and candidate species, and potential species of conservation concern present in the plan area; (6) Social, cultural, and economic conditions; (7) Benefits people obtain from the national forest system planning area (ecosystem services); (8) Multiple uses and their contributions to local, regional, and national economies; (9) Recreation settings, opportunities and access, and scenic character; (10) Renewable and nonrenewable energy and mineral resources; (11) Infrastructure, such as recreational facilities and transportation and utility corridors; (12) Areas of tribal importance; (13) Cultural and historic resources and uses; (14) Land status and ownership and access patterns; and (15) Existing designated areas located in the plan area including wilderness and wild and scenic rivers and potential need and opportunity for additional designated areas. (36 CFR 219.6)

During this assessment phase, the Forest Service invites other government agencies, Tribes, non-governmental parties, and the public to share information about social, economic, and environmental conditions of the Bridger-Teton National Forest and the broader landscape. Existing information about conditions on the Bridger-Teton, including information gathered through public engagement, from cooperating agencies, and Tribal consultation, will be integrated into the assessment. The Forest Service will host public outreach forums to share progress and gather additional information.

Topics of interest will be discussed in the assessment and subsequent plan development phases include: areas of tribal importance; at-risk species; livestock grazing; management within

inventoried roadless areas; watersheds and intact ecosystems; habitat connectivity; sustainable recreation; human population pressures; mature and old growth forest conditions; fire management within the wildland urban interface; and timber management and production trends. Wilderness evaluation and the identification of eligible wild and scenic rivers will be separate from the assessment but included in plan development.

Responsible Official: The responsible official for the revision of the Land Management Plan is Chad Hudson, Forest Supervisor, Bridger-Teton National Forest.

Dated: May 17, 2024.

Troy Heithecker,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–11664 Filed 5–28–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Business Enterprise Research and Development Survey

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed extension of the Business Enterprise Research and Development Survey, prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 29, 2024.

ADDRESSES: Interested persons are invited to submit written comments by email to Thomas.J.Smith@census.gov. Please reference Business Enterprise Research and Development Survey in the subject line of your comments. You may also submit comments, identified

by Docket Number USBC–2024–0014, to the Federal e-Rulemaking Portal: <http://www.regulations.gov>. All comments received are part of the public record. No comments will be posted to <http://www.regulations.gov> for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or specific questions related to collection activities should be directed to Michael Flaherty, U.S. Census Bureau, Chief, Research, Development & Innovation Surveys Branch, 301–763–7699, michael.j.flaherty@census.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau, with support from the National Center for Science and Engineering Statistics (NCSES) within the National Science Foundation, plans to conduct the Business Enterprise Research and Development Survey (BERD) for the 2024–2026 survey years. BERD covers all domestic, non-farm, for-profit businesses with at least 10 paid employees. BERD provides the only comprehensive national data on Research and Development (R&D) costs and detailed expenses by type and industry.

The Census Bureau has conducted a business R&D survey since 1957, collecting primarily financial information on the systematic work companies undertake to discover new knowledge or use existing knowledge to develop new or improved goods and services.

The 2024–2026 BERD will continue to collect the following types of information:

- R&D expense based on accepted accounting standards.
- Worldwide R&D of U.S. companies.
- Business segment detail.
- R&D-related capital expenditures.
- Detailed data about the R&D workforce.
- R&D strategy and data on the potential impact of R&D on the market.
- R&D directed to application areas of particular national interest.

- Data measuring intellectual property protection activities and technology transfer.

Domestic and foreign researchers in academia, business, and government analyze and cite data from the BERD. Among the federal government users are the Bureau of Economic Analysis (BEA) and the White House's Office of Science and Technology Policy (OSTP). BEA includes R&D in the system of national accounts that measures the economic well-being of the country. BERD data are key inputs into these accounts, which feed into the calculation of the U.S. Gross Domestic Product (GDP). The White House, in 2006, issued the American Competitiveness Initiative to "increase investments in research and development, strengthen education, and encourage entrepreneurship." In support of this initiative and in response to legislative mandates, data on R&D are delivered to OSTP, primarily in the biennial National Science Board report Science and Engineering Indicators. Also, the National Science Foundation (NSF) produces a series of publications containing R&D data including the National Patterns of R&D Resources series, the S&E State Profile series, and the annual Business Enterprise Research and Development Survey series. Special reports and other publications are also prepared.

II. Method of Collection

BERD utilizes an online survey instrument. Respondents are mailed and emailed letters directing them to create a Census account and access the survey through their account. The online survey automatically skips questions that do not apply [based on previous responses] and checks for common errors. Links to detailed question-by-question instructions will be embedded in the electronic instrument. Excel spreadsheets are available to facilitate the electronic collection of information from various areas of the companies. A consolidator spreadsheet is also available to assist companies that need to gather information from business units and then compile the information into one company report.

Limited data can be taken over the phone should companies choose to call and wish to report that way.

III. Data

OMB Control Number: 0607–0912.

Form Number(s): BRD–1.

Type of Review: Regular submission, Request for an Extension, without Change, of a Currently Approved Collection.

Affected Public: For-profit businesses with at least 10 paid employees.

Estimated Number of Respondents: 47,500.

Estimated Time per Response: 2 Hours and 37 Minutes.

Estimated Total Annual Burden Hours: 124,450.

Estimated Total Annual Cost to Public: \$0. (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., sections 8(b), 131 and 182; title 42, U.S.C. 1861–76 (National Science Foundation Act of 1950, as amended).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–11680 Filed 5–28–24; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance for Emergency Economic Information Collections

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed extension of the Generic Clearance for Emergency Economic Information Collections, prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 29, 2024.

ADDRESSES: Interested persons are invited to submit written comments by email to Thomas.J.Smith@census.gov. Please reference Generic Clearance for Emergency Economic Information Collections in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2024–0013, to the Federal e-Rulemaking Portal: <http://www.regulations.gov>. All comments received are part of the public record. No comments will be posted to <http://www.regulations.gov> for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Lisa

Donaldson, Chief, Economy-Wide Statistics Division, 301–763–7296, and lisa.e.donaldson@census.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to request a 3-year extension of the Office of Management and Budget (OMB) approval for the Generic Clearance for Emergency Economic Information Collections (EEIC). The EEIC provides the quick turn-around necessary for conducting emergency economic information collections in response to unanticipated international, national, or regional declared emergencies or events of national interest arising as a direct result of declared emergencies having a significant economic impact on U.S. businesses and/or state or local governments. The purpose of the collections is to gauge and monitor the economic impact of such events on U.S. businesses or organizations and state or local governments.

Emergencies, once declared by the authorized state or federal official or entity, that could trigger the need for an EEIC may have global, national, or regional impact on U.S. businesses and governments, and include the following examples:

- Pandemic or other health emergency
- Natural or manmade disaster
- Acts of war or terrorism
- Civil unrest or insurrection

Other events of national interest arising as a direct result of declared emergencies may also have a significant impact on U.S. businesses or governments. General categories of national interest events arising as a direct result of declared emergencies which could trigger the need for an EEIC are:

- Economic crises
- Financial crises
- International geo-political instabilities
- Resource shortages
- Cyberterrorism
- New legislation passed as a direct result of a declared emergency

EEIC questions may be included as supplemental questions on existing Census Bureau surveys or conducted as new special-purpose surveys. The data will be collected by paper or electronic instruments, depending on the survey or program.

EEIC questions will be chosen from a pretested Question Bank. For some subjects, the Question Bank includes specific questionnaire content. In other cases, the Question Bank includes topics which will then be addressed with questions designed to meet data needs that arise during a future

unknown event. Some questions have been cognitively tested and should be considered final; some may require testing for final wording. Questions that may require testing and refinement are annotated in the Question Bank. As the Question Bank matures with new or revised content, the Census Bureau will resubmit the bank for review.

Prior to adding EEIC questions to any survey, the Census Bureau will consult with OMB and submit a request for approval, allowing between 3 and 10 business days for OMB action. Over the existing period of clearance, the EEIC Generic Clearance was used to clear supplemental questions which were added to existing surveys, responsive to both recession conditions resulting from the COVID-19 Pandemic and various severe weather events which occurred in 2022.

As data collections will be tailored to the emergency, users of the data may vary, but may include: federal, state, or local officials charged with decision-making during the emergency; business leaders and policymakers wishing to develop plans to ameliorate the effects of the emergency; academics and members of the press wishing to study and disseminate information about the emergency; and the public. The data collected will help us understand how and why data we collect in our ongoing surveys may be affected by the emergency, as well as allow us to disseminate data as part of existing releases, new releases, or experimental releases.

II. Method of Collection

The vast majority of business and government surveys to which EEIC questions may be added utilize the Census Bureau's online reporting system called Centurion as their primary collection system. New information collections conducted under this generic clearance will also likely collect responses electronically using Centurion.

III. Data

OMB Control Number: 0607-1019.
Form Number(s): None.

Type of Review: Regular submission, Request for an Extension, without Change, of a Currently Approved Collection.

Affected Public: Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government.

Estimated Number of Respondents: 300,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 50,000.

Estimated Total Annual Cost to Public: \$0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., sections 131, 161 and 182.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024-11678 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-26-2024]

Foreign-Trade Zone (FTZ) 64; Notification of Proposed Production Activity; USA Big Mountain Paper Inc.; (Disposable Diapers/Underwear/Pads and Wet Wipes); Jacksonville, Florida

USA Big Mountain Paper Inc. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Jacksonville, Florida within FTZ 64. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on May 20, 2024.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via www.trade.gov/ftz.

The proposed finished products include disposable diapers/absorbent underwear/absorbent pads and personal cleansing wet wipes (duty free).

The proposed foreign-status materials/components include: non-woven fabric of polypropylene; non-woven fabric of polypropylene and Spandex; polyethylene film; biaxially-oriented polypropylene film; low-density polyethylene bags; adhesive polypropylene tape with Velcro; adhesive polypropylene tape; tissue paper; Spandex fiber (of polyurethane); hot melt glue; super absorbent polymer: absorbent polyacrylate granules mixed with paper pulp; super absorbent polymer paper: a sheet of paper pulp with integrated polyacrylate polymer in granule form; corrugated paper cartons; adhesive polyethylene strips and tapes used in packaging; and, paper labels (duty rate ranges from duty-free to 8%). The request indicates that certain materials/components are subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: ftz@trade.gov. The

closing period for their receipt is July 8, 2024.

A copy of the notification will be available for public inspection in the “Online FTZ Information System” section of the Board’s website.

For further information, contact Diane Finver at Diane.Finver@trade.gov.

Dated: May 23, 2024.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2024–11735 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–40–2024]

Approval of Subzone Status; Stoltzfus Logistics International, LLC; Atglen, Pennsylvania

On March 8, 2024, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the FTZ Corp. of Southern Pennsylvania, grantee of FTZ 147, requesting subzone status subject to the existing activation limit of FTZ 147, on behalf of Stoltzfus Logistics International, LLC, in Atglen, Pennsylvania.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (89 FR 19294, March 18, 2024). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 147H was approved on May 23, 2024, subject to the FTZ Act and the Board’s regulations, including section 400.13, and further subject to FTZ 147’s 2,000-acre activation limit.

Dated: May 23, 2024.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2024–11736 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration [A–570–908]

Sodium Hexametaphosphate From the People’s Republic of China: Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order

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

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on Sodium Hexametaphosphate (SHMP) from the People’s Republic of China (China) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the “Final Results of Sunset Review” section of this notice.

DATES: Applicable May 29, 2024.

FOR FURTHER INFORMATION CONTACT:

Kabir Archuleta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2593.

SUPPLEMENTARY INFORMATION:

Background

On March 19, 2008, Commerce published its AD order on SHMP from China.¹ On February 1, 2024, Commerce published the notice of initiation of the third five-year sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).² On February 15, 2024, Commerce received a notice of intent to participate in this review from ICL Specialty Products, Inc. and Innophos, Inc. (collectively, the petitioners) within the deadline specified in 19 CFR 351.218(d)(1)(i).³ The petitioners claimed interested party status under section 771(9)(C) of the Act as manufacturers of a domestic like product in the United States.

On March 1, 2024, the petitioners provided a complete substantive response for this review within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).⁴ We received no substantive responses from any other interested parties, nor was a hearing

requested. On March 22, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties.⁵ As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of this *Order*.

Scope of the Order

The merchandise subject to this *Order* is SHMP. It is imported under subheading 2835.39.5000 of the Harmonized Tariff Schedule of the United States (HTSUS). It may also be imported as a blend or mixture under subheading 3824.90.3900, HTSUS. The American Chemical Society, Chemical Abstract Service (CAS) has assigned the name “Polyphosphoric Acid, Sodium Salt” to SHMP. The CAS registry number is 68915–31–1. However, SHMP is commonly identified by CAS No. 10124–56–8 in the market. For purposes of the *Order*, the narrative description is dispositive, not the tariff heading, CAS registry number, or CAS name. For a complete description of the scope of the *Order*, see the Issues and Decision Memorandum.⁶

Analysis of Comments Received

All issues raised in this review, including the likelihood of continuation or recurrence of dumping in the event of revocation and the magnitude of the margins likely to prevail if the *Order* were revoked, are addressed in the accompanying Issues and Decision Memorandum. 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 <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce

¹ See *Notice of Antidumping Duty Order: Sodium Hexametaphosphate from the People’s Republic of China*, 73 FR 14772 (March 19, 2008) (*Order*).

² See *Initiation of Five-Year (Sunset) Reviews*, 89 FR 6499 (February 1, 2024).

³ See Petitioners’ Letter, “Notice of Intent to Participate,” dated February 15, 2024.

⁴ See Petitioners’ Letter, “Substantive Response to Notice of Initiation of Five-Year (Sunset) Review of the Antidumping Order,” dated March 1, 2024.

⁵ See Commerce’s Letter, “Sunset Reviews for February 1, 2024,” dated March 22, 2024.

⁶ See Memorandum “Issues and Decision Memorandum for the Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order on Sodium Hexametaphosphate from the People’s Republic of China,” dated concurrently with this notice (Issues and Decision Memorandum).

determines that revocation of the *Order* would be likely to lead to the continuation or recurrence of dumping and that the magnitude of the dumping margins likely to prevail would be up to 188.05 percent.

Administrative Protective Order

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

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: May 22, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. History of the *Order*
- V. Legal Framework
- VI. Discussion of the Issues
 1. Likelihood of Continuation or Recurrence of Dumping
 2. Magnitude of the Margins of Dumping Likely to Prevail
- VII. Final Results of Sunset Review
- VIII. Recommendation

[FR Doc. 2024–11780 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–555–002]

Certain Paper Shopping Bags From Cambodia: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain paper shopping bags (paper bags) from Cambodia are being, or are likely to be, sold in the United States at less-than-fair value (LTFV). The period of investigation (POI) is April 1, 2022, through March 31, 2023.

DATES: Applicable May 29, 2024.

FOR FURTHER INFORMATION CONTACT: Charles Doss or Kyle Clahane, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4474 or (202) 482–1168, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2024, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of paper bags from Cambodia, in which we also postponed the final determination until May 17, 2024.¹ We invited interested parties to comment on the *Preliminary Determination*.

A summary of the events that occurred since Commerce published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.² 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 <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Investigation

The products covered by this investigation are paper bags from Cambodia. For a complete description of the scope of this investigation, see Appendix I.

¹ See *Certain Paper Shopping Bags from Cambodia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 89 FR 325 (January 3, 2024) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

² See Memorandum, “Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Paper Shopping Bags from Cambodia,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Scope Comments

During the course of this investigation, Commerce received scope comments from parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.³ We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.⁴ We made no changes to the scope of the investigation from the scope published in the *Preliminary Determination*, as noted in Appendix I to this notice.

Final Affirmative Determination of Critical Circumstances, in Part

We continue find that that critical circumstances do not exist with respect to imports of paper bags from Cambodia for Nice Packaging (Cambodia) Co., Ltd. (Nice), UUPak, and all other producers and exporters, but do exist with respect to imports of paper bags from Pan Pacific. For a full description of the methodology and results of Commerce's critical circumstances analysis, see the Issues and Decision Memorandum.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), we conducted verifications of the sales and cost information submitted by Nice Packaging (Cambodia) Co., Ltd. (Nice) for use in our final determination.⁵ In addition, Commerce was unable to conduct an on-site verification of the information relied upon in making its final determination with respect to UUPak Company Limited (UUPak). However, from February 21 through 22, 2024, we took additional steps, in lieu of an on-site verification to verify the information relied upon in making this final determination, in accordance with section 782(i) of the Act, by conducting virtual verification of UUPak.⁶

³ See Memorandum, “Preliminary Scope Decision Memorandum,” dated December 27, 2023 (Preliminary Scope Decision Memorandum).

⁴ See Memorandum, “Final Scope Decision Memorandum,” dated March 11, 2024 (Final Scope Decision Memorandum).

⁵ See Memoranda, “Verification of Nice Packaging (Cambodia) Co., Ltd. Sales Responses,” dated March 26, 2024; and “Verification of the Cost Response of Nice Packaging (Cambodia) Co., Ltd. in the Antidumping Duty Investigation of Paper Shopping Bags from Cambodia,” dated March 28, 2024.

⁶ See Memorandum, “Verification of the Questionnaire Responses of UUPak Company Limited,” dated March 15, 2024.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached as Appendix II to this notice.

Changes Since the Preliminary Determination

We have made certain changes to the margin calculations for Nice since the *Preliminary Determination*. For a discussion of these changes, see the Issues and Decision Memorandum.⁷

Use of Adverse Facts Available (AFA)

As discussed in the *Preliminary Determination*, Commerce assigned to Pan Pacific Plastics Manufacturing, Inc. (Pan Pacific) an estimated weighted-average dumping margin on the basis of adverse facts available (AFA), pursuant to sections 776(a) and (b) of the Act.⁸ For the reasons explained in the Issues and Decision Memorandum, and consistent with Commerce's practice, as AFA, we assigned Pan Pacific the highest corroborated dumping margin alleged in the petition.⁹

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually investigated exporters and producers, excluding rates that are zero, *de minimis*, or determined entirely under section 776 of the Act.

Commerce calculated an individual estimated weighted-average dumping margin for Nice. As explained in the *Preliminary Determination* PDM, Commerce continues to determine that, under section 772(a) of the Act, UUPak did not have any reviewable sales during the POI and, as such, has not calculated a final margin for UUPak.¹⁰ As a result, because we have only calculated one margin and that margin is not zero, *de minimis*, or based entirely on facts otherwise available, the

estimated weighted-average dumping margin calculated for Nice is the margin assigned to UUPak and all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Producer/exporter	Weighted-average dumping margin (percent)
Nice Packaging (Cambodia) Co., Ltd	7.07
UUPak Company Limited	7.07
Pan Pacific Plastics Manufacturing, Inc	*248.81
All Others	7.07

* Rate based on AFA.

Disclosure

We intend to disclose the calculations performed in this final determination within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, for Nice, UUPak, and all-other producers/exporters, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after January 3, 2024, the date of publication in the **Federal Register** of the *Preliminary Determination*.

In accordance with section 735(c)(4) of the Act, because Commerce continues to find that critical circumstances exist for Pan Pacific, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise, as described in Appendix I to this notice, which were entered, or withdrawn from warehouse for consumption on or after October 5, 2023, which is 90 days before the publication of the *Preliminary Determination* in the **Federal Register**, at the cash deposit rate indicated above.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, we will instruct CBP to require a cash deposit for estimated antidumping duties for such entries as follows: (1) the cash deposit rate for each respondent listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this

final determination; (2) if the exporter is not the respondent identified above but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin listed for the producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters is the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of paper bags from Cambodia no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, all cash deposits posted will be refunded, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the "Continuation of Suspension of Liquidation" section above.

Administrative Protective Order

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

Notification to Interested Parties

This determination and this notice are issued and published pursuant to

⁷ See Memorandum, "Nice Packaging (Cambodia) Co. Ltd. Final Analysis Memorandum," dated concurrently with this notice (Nice's Final Sales Analysis Memorandum).

⁸ See *Preliminary Determination*, 89 FR at 325.

⁹ See *Preliminary Determination* PDM at 6–8.

¹⁰ See *Preliminary Determination* PDM at, "Treatment of UUPak's Sales." Our treatment of UUPak remains unchanged for purposes of this final determination.

sections 735(d) and 777(i)(1) of the Act, and 19 CFR 351.210(c).

Dated: May 17, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products within the scope of this investigation are paper shopping bags with handles of any type, regardless of whether there is any printing, regardless of how the top edges are finished (*e.g.*, folded, serrated, or otherwise finished), regardless of color, and regardless of whether the top edges contain adhesive or other material for sealing closed. Subject paper shopping bags have a width of at least 4.5 inches and depth of at least 2.5 inches.

Paper shopping bags typically are made of kraft paper but can be made from any type of cellulose fiber, paperboard, or pressboard with a basis weight less than 300 grams per square meter (GSM).

A non-exhaustive illustrative list of the types of handles on shopping bags covered by the scope include handles made from any materials such as twisted paper, flat paper, yarn, ribbon, rope, string, or plastic, as well as die-cut handles (whether the punchout is fully removed or partially attached as a flap).

Excluded from the scope are:

- Paper sacks or bags that are of a 1/6 or 1/7 barrel size (*i.e.*, 11.5–12.5 inches in width, 6.5–7.5 inches in depth, and 13.5–17.5 inches in height) with flat paper handles or die-cut handles;
- Paper sacks or bags with die-cut handles, a grams per square meter paper weight of less than 86 GSM, and a height of less than 11.5 inches; and
- Paper sacks or bags (i) with non-paper handles made wholly of woven ribbon or other similar woven fabric¹¹ and (ii) that are finished with folded tops or for which tied knots or t-bar aglets (made of wood, metal, or plastic) are used to secure the handles to the bags.

The above-referenced dimensions are provided for paper bags in the opened position. The height of the bag is the distance from the bottom fold edge to the top edge (*i.e.*, excluding the height of handles that extend above the top edge). The depth of the bag is the distance from the front of the bag

edge to the back of the bag edge (typically measured at the bottom of the bag). The width of the bag is measured from the left to the right edges of the front and back panels (upon which the handles typically are located).

This merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 4819.30.0040 and 4819.40.0040. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

- Summary
- Background
- Final Affirmative Determination of Critical Circumstances, In Part
- Changes Since the *Preliminary Determination*
- Discussion of the Issues
 - Whether Commerce's Application of the Adverse Facts Available Rate to Pan Pacific is Unreasonable
 - Whether Commerce Should Clarify the Scope
 - Whether Commerce Should Alter Its Application of Constructed Value
 - Whether Commerce Should Continue to Adjust Nice's Cost of Production
 - Whether Commerce Should Make Changes to Nice's Final Margin Calculations
- Recommendation

[FR Doc. 2024–11779 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2022–2023

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that the two exporters subject to this review, Saha Thai Steel Pipe Public Co., Ltd. (Saha Thai) and Thai Premium Pipe Co. Ltd. (TPP), did not make sales of subject merchandise at less than normal value during the period of review (POR) March 1, 2022, through February 28, 2023.

DATES: Applicable May 29, 2024.

FOR FURTHER INFORMATION CONTACT:

Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0410.

SUPPLEMENTARY INFORMATION:

Background

On March 6, 2024, Commerce published the preliminary results of the 2022–2023 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes (CWP) from Thailand in the **Federal Register** and invited interested parties to comment.¹ We received no comments from interested parties on the *Preliminary Results*, and we have made no changes to the *Preliminary Results*. Accordingly, no decision memorandum accompanies this **Federal Register** notice. The *Preliminary Results* are hereby adopted in these final results. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by this order are circular welded carbon steel pipes and tubes from Thailand. For a complete description of the scope of the order, *see* the *Preliminary Results*.²

Final Results of Review

We determine that the following weighted-average dumping margin exists for the period March 1, 2022, through February 28, 2023:

Producer/exporter	Weighted-average dumping margin (percent)
Saha Thai Steel Pipe Public Co., Ltd. (also known as Saha Thai Steel Pipe (Public) Company, Ltd.)	0.00
Thai Premium Pipe Co. Ltd	0.00

¹¹ Paper sacks or bags with handles made of braided or twisted materials, such as rope or cord, do not qualify for this exclusion.

¹ *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review; 2022–2023*, 89 FR 15971

(March 6, 2024) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

² *Id.*

Disclosure

Normally, Commerce discloses to interested parties the calculations of the final results of an administrative review within five days of a public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because we have made no changes to the *Preliminary Results*, there are no calculations to disclose.

Assessment Rates

Consistent with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), upon completion of the administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise covered this review. Because both of the respondents' weighted-average dumping margins or an importer-specific assessment rates are zero or *de minimis* in the final results of review, we intend to instruct CBP to liquidate entries without regard to antidumping duties.³ The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.⁴

For entries of subject merchandise during the POR produced by Saha Thai and TPP, for which they did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of

the notice of final results of administrative review for all shipments of CWP from Thailand entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Saha Thai and TPP will be equal to the weighted-average dumping margin established in the final results of this administrative review (*i.e.*, 0.00 percent); (2) for merchandise exported by a company not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review or another completed segment of this proceeding, but the producer is, then the cash deposit rate will be the company-specific rate established for the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 15.67 percent, the all-others rate established in the less-than-fair-value investigation.⁵ These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

Administrative Protective Order

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

Notification to Interested Parties

Commerce is issuing and publishing the final results of this review in

accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: May 22, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–11734 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Announcement of Approved International Trade Administration Trade Mission

AGENCY: International Trade Administration, Department of Commerce.

SUMMARY: The United States Department of Commerce, International Trade Administration (ITA), is announcing one upcoming trade mission that will be recruited, organized, and implemented by ITA. This mission is:

Financial Technologies Business Development Trade Mission to Hong Kong and Thailand, October 28–November 1, 2024

A summary of the mission is found below. Application information and more detailed mission information, including the commercial setting and sector information, can be found at the trade mission website: <https://www.trade.gov/trade-missions>.

For this mission, recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (<https://www.trade.gov/trade-missions-schedule>) and other internet websites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

FOR FURTHER INFORMATION CONTACT: Jeffrey Odum, Trade Events Task Force, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–6397 or email Jeffrey.Odum@trade.gov.

SUPPLEMENTARY INFORMATION:

The Following Conditions for Participation Will Be Used for the Mission

Applicants must submit a completed and signed mission application and

³ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101, 8102–03 (February 14, 2012); see also 19 CFR 351.106(c)(2).

⁴ See section 751(a)(2)(C) of the Act.

⁵ See *Order*.

supplemental application materials, including adequate information on their products and/or services, primary market objectives, and goals for participation that is adequate to allow the Department of Commerce to evaluate their application. If the Department of Commerce receives an incomplete application, the Department may either: reject the application, request additional information/clarification, or take the lack of information into account when evaluating the application. If the requisite minimum number of participants is not selected for a particular mission by the recruitment deadline, the mission may be canceled.

Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, are marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content by value. In the case of a trade association or organization, the applicant must certify that, for each firm or service provider to be represented by the association/organization, the products and/or services the represented firm or service provider seeks to export are either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content by value.

A trade association/organization applicant must certify to the above for all of the companies it seeks to represent on the mission.

In addition, each applicant must:

- Certify that the products and services that it wishes to market through the mission would be in compliance with U.S. export controls and regulations;
- Certify that it has identified any matter pending before any bureau or office in the Department of Commerce;
- Certify that it has identified any pending litigation (including any administrative proceedings) to which it is a party that involves the Department of Commerce; and
- Sign and submit an agreement that it and its affiliates (1) have not and will not engage in the bribery of foreign officials in connection with a company's/participant's involvement in this mission, and (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

In the case of a trade association/organization, the applicant must certify that each firm or service provider to be represented by the association/organization can make the above certifications.

The Following Selection Criteria Will Be Used for the Mission

Targeted mission participants are U.S. firms, services providers, and trade associations/organizations providing or promoting U.S. products and services that have an interest in entering or expanding their business in the mission's destination country. The following criteria will be evaluated in selecting participants:

- Suitability of the applicant's (or in the case of a trade association/organization, represented firm's or service provider's) products or services to these markets;
- The applicant's (or in the case of a trade association/organization, represented firm's or service provider's) potential for business in the markets, including the likelihood of exports resulting from the mission; and
- Consistency of the applicant's (or in the case of a trade association/organization, represented firm's or service provider's) goals and objectives with the stated scope of the mission.

Balance of company size and location may also be considered during the review process. Referrals from a political party or partisan political group or any information, including on the application, containing references to political contributions or other partisan political activities will be excluded from the application and will not be considered during the selection process. The sender will be notified of these exclusions.

Definition of Small- and Medium-Sized Enterprise

For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies as a "small business" under the Small Business Administration's (SBA) size standards (<https://www.sba.gov/document/support-table-size-standards>), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool (<https://www.sba.gov/size-standards>) can help you determine the qualifications that apply to your company.

Mission List: (additional information about trade missions can be found at <https://www.trade.gov/trade-missions>).

Financial Technologies Business Development Trade Mission to Hong Kong and Thailand, October 28–November 1, 2024

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing a

Financial Technologies (Fintech) Business Development Mission to Hong Kong and Thailand from October 28–November 1, 2024.

The purpose of the fintech mission is to expand opportunities for U.S. companies to explore the immense potential that Hong Kong and Thailand offer in terms of access to capital, market size and talent pool. Delegates will gain invaluable insights into the local market landscape and establish relationships with local banks, financial institutions, and investors.

This business development mission is aimed at promoting and expanding the international presence of U.S. financial technology companies and to foster bilateral partnerships between U.S. fintech companies and financial institutions in Hong Kong and Thailand. These collaborations can stimulate innovation in the global fintech landscape and strengthen the global presence of U.S. companies. This mission will also be part of delivering and advancing U.S. technology, standards, and commercial interests in this vital region of the world.

ITA will organize a tailored program for U.S. companies exploring opportunities in Hong Kong and Thai markets and will leverage strong connections with U.S. interagency partners to lead discussions on trade, financing, and technical aspects of doing business in these two markets. Mission participants will have the opportunity to meet with potential buyers and partners, financial institutions, government officials, investors and associations. Mission participants will participate in Hong Kong Fintech Week on the first stop, followed by a visit to Bangkok. Both stops will include ITA-hosted networking events, pre-screened business-to-business matchmaking meetings, roundtable discussions with U.S. and foreign government and industry leaders, and optional company site visits.

Mission participants will receive assistance to secure meetings, gain greater exposure to Hong Kong and Thai markets, and benefit from the guidance and insights of ITA's commercial team and the support and expertise of interagency partners including the U.S. Department of State and the U.S. Department of the Treasury.

Hong Kong

Hong Kong is a Special Administrative Region (SAR) of the People's Republic of China (PRC) with a population of 7.4 million. There are numerous business opportunities given Hong Kong's finance and marketing

talent base, sophisticated infrastructure, and access to mainland China’s manufacturing centers. According to Invest Hong Kong (Hong Kong’s official inbound investment agency), 78 of the world’s top 100 banks call Hong Kong home. With over 163 licensed banks and 8 virtual banks, Hong Kong has large financial infrastructure. There are no controls over capital movement, no capital gains, and no tax on dividends. Hong Kong hosts the largest pool of RMB liquidity outside Mainland China. Hong Kong also serves as a springboard for foreign firms seeking access to Mainland China and for Chinese companies going global.

The Hong Kong government aims to push Hong Kong’s status as a financial center, with fintech as a key subsector. As Hong Kong is home to over 3,900 startups, roughly 800 fintech companies, and ten unicorn companies, it claims a spot among the leading global cities for fostering swift startup growth. In June 2021, the Hong Kong Monetary Authority (HKMA) rolled out a “Fintech 2025” strategy for driving fintech development in Hong Kong. Blockchain technology advancements and the increasing use of big data analytics are among the top fintech trends in Hong Kong in 2024.

As a show of support for the sector, each year Invest Hong Kong organizes Hong Kong FinTech Week, one of the largest and most influential fintech events in Asia. It gathers regulators, fintech leaders and innovators around the world to in a dynamic conference and large exhibition setting, enabling attendees to connect with the Hong Kong and regional fintech industry. Hong Kong FinTech Week in 2023

attracted a record high of 35,000 attendees, over 5.5 million views online from over 100 economies, featured over 800 speakers and over 700 exhibitors.

To encourage inbound fintech activity into Hong Kong, Invest Hong Kong also organizes two attractive programs at no cost: the Global Fast Track Program, which is a hybrid program for startups to connect with investors and corporates, and a Global Scaleup Competition for eligible tech companies that are selected to pitch in front of judges at Hong Kong Fintech Week. In fact, a U.S. fintech company nearly won last year’s competition. Moreover, the Fintech Association of Hong Kong has a vibrant board and very active membership that is enthusiastic about welcoming inbound U.S. fintech and related companies.

Because the U.S. Commercial Service in Hong Kong has a long history of attending Hong Kong Fintech Week, we are in a strong position to help many U.S. companies connect with the deep and sophisticated ecosystem of this growing industry. There will be no additional cost to the participants of this Trade Mission to attend Hong Kong Fintech Week.

Thailand

Thailand, located in the heart of ASEAN, is an upper middle-income country and the second-largest economy in ASEAN after Indonesia. Its gross domestic product (GDP) in 2022 was US\$ 526 billion, growing 2.6 percent from the previous year.

In Thailand, the public sector plays a significant role in developing fintech initiatives. Engagement with the Thai government is critical, as it seeks to make Bangkok a regional financial hub.

In recent years, the fintech sector has been developing and evolving rapidly, driven by new government initiatives, advancements in technology, and changing consumer behavior. The adoption of new technologies is transforming traditional financial institutions and creating new opportunities for development in the sector.

Since the pandemic in 2020, Thailand has swiftly embraced digital transformation in both its public and private sectors. This shift has been encouraged by government support aiming to establish Thailand as a regional fintech hub. As a result, Thailand’s fintech sector has experienced incredible growth driven by technology adoption across industries. For example, Thailand has seen a surge in digital transactions. E-wallets and mobile payment platforms have gained widespread acceptance among Thai society. There are nearly 300 fintech companies in Thailand, which has an active Thailand Fintech Association comprised of members in a wide variety of categories in fintech.

The Thai fintech ecosystem also has a growing list of organizations, agencies, and companies that support the growth in the sector. As another initiative from the government, in 2023, the BOT released the consultation document on a virtual bank licensing framework, which is the groundwork for introducing virtual banks as new financial service providers. The central bank plans to finalize the licensing regulation and announce the list of approved applications in 2024. During the initial phase, the three licenses will be awarded.

PROPOSED TIMETABLE

[* **Note:** The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.]

Sunday	• Trade Mission Participants Arrive in Hong Kong by Sunday • Optional: no-host evening gathering in Central, Hong Kong
October 27	Full Day in Hong Kong
Monday	• Hong Kong Interagency Briefing by U.S. Consulate in HK • B2B matchmaking meetings at Hong Kong FinTech Week facilitated by the U.S. Commercial Service • Networking receptions organized by private sector partners
October 28	Full Day in Hong Kong
Tuesday	• Visit Hong Kong FinTech Week • B2B matchmaking meetings facilitated by the U.S. Commercial Service • Networking reception organized by U.S. Consulate
October 29	Half Day in Hong Kong/Travel to Thailand
Wednesday	• Site visits to government and influential private sector offices involved in fintech in Hong Kong * • Roundtable with Fintech Association of Hong Kong or AmCham Hong Kong members * • Travel from Hong Kong to Thailand (Bangkok)
October 30	* Optional site visits; some companies may have their own meetings arranged
Thursday	Full Day in Bangkok, Thailand
October 31	• Limited Country Team Briefing • Meeting with the executive at the Ministry of Finance • Meeting with the National Cyber Security Agency • Meeting with the Bank of Thailand
Friday	Full Day in Bangkok, Thailand

PROPOSED TIMETABLE—Continued

[* **Note:** The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.]

November 1	• B2B Meetings • Fintech Association of Thailand • Thai Banks Association • Association of Thai Securities Companies • AMCHAM/US ABC
	Mission Concludes

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 10 and maximum of 15 firms participate in the mission from the applicant pool, subject to space availability.

Fees and Expenses

After a firm or trade association has been selected to participate in the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Business Development Mission will be \$2,900 for small or medium-sized enterprises (SME); and \$4,500 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is \$750. The participation fee includes the cost for participants of this Trade Mission to attend mission related activities at Hong Kong Fintech Week in Hong Kong. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

If and when an applicant is selected to participate in a particular mission, a payment to the Department of Commerce in the amount of the designated participation fee below is required. Upon notification of acceptance to participate, those selected have 5 business days to submit payment or the acceptance may be revoked.

Participants selected for a trade mission will be expected to pay for the cost of personal expenses, including, but not limited to, international travel, lodging, meals, transportation, communication, and incidentals, unless otherwise noted. Participants will, however, be able to take advantage of U.S. Government rates for hotel rooms. In the event that a mission is canceled, no personal expenses paid in

anticipation of a mission will be reimbursed. However, participation fees for a canceled mission will be reimbursed to the extent they have not already been expended in anticipation of the mission.

If a visa is required to travel on a particular mission, applying for and obtaining such a visa will be the responsibility of the mission participant. Government fees and processing expenses to obtain such a visa are not included in the participation fee. However, the Department of Commerce will provide instructions to each participant on the procedures required to obtain business visas.

Trade Mission members participate in trade missions and undertake mission-related travel at their own risk. The nature of the security situation in a given foreign market at a given time cannot be guaranteed. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. The U.S. Department of State issues U.S. Government international travel alerts and warnings for U.S. citizens available at <https://travel.state.gov/content/passports/en/alertswarnings.html>. Any question regarding insurance coverage must be resolved by the participant and its insurer of choice.

Travel and in-person activities are contingent upon the safety and health conditions in the United States and the mission countries. Should safety or health conditions not be appropriate for travel and/or in-person activities, the Department will consider postponing the event or offering a virtual program in lieu of an in-person agenda. In the event of a postponement, the Department will notify the public, and applicants previously selected to participate in this mission will need to confirm their availability but need not reapply. Should the decision be made to organize a virtual program, the Department will adjust fees, accordingly, prepare an agenda for virtual activities, and notify the previously selected applicants with the option to opt-in to the new virtual program.

Travel and in-person activities are contingent upon the safety and health conditions in the United States and the mission countries. Should safety or health conditions not be appropriate for travel and/or in-person activities, the Department will consider postponing the event or offering a virtual program in lieu of an in-person agenda. In the event of a postponement, the Department will notify the public, and applicants previously selected to participate in this mission will need to confirm their availability but need not reapply. Should the decision be made to organize a virtual program, the Department will adjust fees, accordingly, prepare an agenda for virtual activities, and notify the previously selected applicants with the option to opt-in to the new virtual program.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (<http://export.gov/trademissions>) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than July 31, 2024. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after July 31, 2024, will be considered only if space and scheduling constraints permit.

Contacts

Peter Sexton—Recruitment Lead, U.S. Commercial Service, U.S. Export Assistance Center—New York, NY, 212-809-2647, Peter.Sexton@trade.gov

Gemal Brangman—Project Lead, Global Trade Programs, Washington, DC,

202–482–3773, *Gemal.Brangman@trade.gov*
Geoffrey Parish, U.S. Commercial Service, U.S. Consulate-General—Hong Kong & Macau, *Geoffrey.Parish@trade.gov*
Paul Frost, U.S. Commercial Service, U.S. Consulate-General—Hong Kong & Macau, *Paul.Frost@trade.gov*
Nicole Yan, U.S. Commercial Service, U.S. Consulate-General—Hong Kong & Macau, *Nicole.Yan@trade.gov*
Catherine Spillman, U.S. Commercial Service, U.S. Embassy—Bangkok, Thailand, *Catherine.Spillman@trade.gov*
Charles Phillips, U.S. Commercial Service, U.S. Embassy—Bangkok, Thailand, *Charles.Phillips@trade.gov*
Oraphan Boonyalug, U.S. Commercial Service, U.S. Embassy—Bangkok, Thailand, *Oraphan.Boonyalug@trade.gov*

Gemal Brangman,

Director, Global Trade Programs.

[FR Doc. 2024–11691 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Advisory Committee on Supply Chain Competitiveness: Notice of Public Meeting

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed topics of discussion for the upcoming public meeting of the Advisory Committee on Supply Chain Competitiveness (Committee).

DATES: The meeting will be held on June 12, 2024, from 9:40 a.m. to 2:00 p.m., Eastern Daylight Time (EDT).

ADDRESSES: The meeting will be held via Zoom.

FOR FURTHER INFORMATION CONTACT: Richard Boll, Designated Federal Officer, Office of Supply Chain Services, International Trade Administration at Email: *richard.boll@trade.gov*, phone 571–331–0098.

SUPPLEMENTARY INFORMATION:

Background: The Committee was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. app.). It provides advice to the Secretary of Commerce on the necessary elements of a comprehensive policy approach to

supply chain competitiveness and on regulatory policies and programs and investment priorities that affect the competitiveness of U.S. supply chains. For more information about the Committee visit: <https://www.trade.gov/acsc>.

Matters to Be Considered: Committee members are expected to continue discussing the major competitiveness-related topics raised at the previous Committee meetings, including supply chain resilience and congestion; trade and competitiveness; freight movement and policy; trade innovation; regulatory issues; finance and infrastructure; and workforce development. The Committee's subcommittees will report on the status of their work regarding these topics. The agenda may change to accommodate other Committee business. The Office of Supply Chain Services will post the final detailed agenda on its website, <https://www.trade.gov/acsc>. The video with closed captioning of the meeting will also be posted on the Committee website.

The meeting is open to the public and press on a first-come, first-served basis. Space is limited. Please contact Richard Boll, Designated Federal Officer, at *richard.boll@trade.gov*, for participation information.

Heather Sykes,

Director, Office of Supply Chain Services.

[FR Doc. 2024–11688 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD938]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice; issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, notification is hereby given that a Letter

of Authorization (LOA) has been issued to Echo Offshore LLC (Echo) for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico (GOM).

DATES: The LOA is effective from May 22, 2024 through December 31, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

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

SUPPLEMENTARY INFORMATION:

Background

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

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

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

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively “industry operators”), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

Echo plans to conduct a 2D high-resolution seismic survey in Lease Blocks 61 and 66 (South Marsh Island Area). Echo plans to use a single, 20-cubic inch airgun, in addition to three

other high-resolution geophysical (HRG) acoustic sources. Please see Echo’s application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by Echo in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, 5398, January 19, 2021). In order to generate the appropriate take numbers for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone¹); (3) number of days; and (4) season.² The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

Exposure modeling results were generated using the single airgun proxy. Because those results assume use of a 90-in³ airgun, the take numbers authorized through this LOA are considered conservative (*i.e.*, they likely overestimate take) due to differences in the sound source planned for use by Echo, as compared to those modeled for the rule. The survey is planned to occur for up to 2 days in Zone 2. The season is not known in advance. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.*, winter or summer).

Based on the results of our analysis, NMFS has determined that the level of taking expected for this survey and authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations. See table 1 in this notice and table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine

mammals in an LOA if it will exceed “small numbers.” In short, when an acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS’ discussion of the MMPA’s small numbers requirement provided in the final rule (86 FR 5322, 5438, January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations, through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 5391, January 19, 2021). For this comparison, NMFS’ approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and model-predicted abundance information (<https://seamap.env.duke.edu/models/Duke/GOM/>). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.*, 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take ¹	Abundance ²	Percent abundance
Rice’s whale ³	0	51	n/a
Sperm whale	0	2,207	n/a
<i>Kogia</i> spp	0	4,373	n/a
Beaked whales	0	3,768	n/a
Rough-toothed dolphin	4 ⁰	4,853	n/a
Bottlenose dolphin	62	176,108	0.0
Clymene dolphin	0	11,895	n/a
Atlantic spotted dolphin	5 ²⁶	74,785	0.0
Pantropical spotted dolphin	0	102,361	n/a
Spinner dolphin	0	25,114	n/a
Striped dolphin	0	5,229	n/a
Fraser’s dolphin	0	1,665	n/a

¹ For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

² For purposes of acoustic exposure modeling, seasons include Winter (December–March) and Summer (April–November).

TABLE 1—TAKE ANALYSIS—Continued

Species	Authorized take ¹	Abundance ²	Percent abundance
Risso's dolphin	0	3,764	n/a
Melon-headed whale	0	7,003	n/a
Pygmy killer whale	0	2,126	n/a
False killer whale	0	3,204	n/a
Killer whale	0	267	n/a
Short-finned pilot whale	0	1,981	n/a

¹ Scalar ratios were not applied in this case due to brief survey duration.

² Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.*, 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and the killer whale, the larger estimated SAR abundance estimate is used.

³ The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.*, 2021).

⁴ Modeled take of one decreased to zero. For rough-toothed dolphin, use of the exposure modeling produces results that are smaller than the average GOM group size (*i.e.*, estimated exposure value of 1, relative to assumed average group size of 14) (Maze-Foley and Mullin, 2006). NMFS' typical practice is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, given the very short survey duration and small estimated exposure value NMFS has determined that it is unlikely the species would be encountered at all. As a result, in this case NMFS has not authorized take for this species.

⁵ Modeled take of 13 increased to account for potential encounter with a group of average size (Maze-Foley and Mullin, 2006).

Based on the analysis contained herein of Echo's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.*, less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to Echo authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: May 23, 2024.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2024–11784 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD983]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

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

DATES: This hybrid meeting will be held on Friday, June 14, 2024, at 9:30 a.m.

ADDRESSES: This meeting will be held at the Hilton Garden Inn, 100 High Street, Portsmouth, NH 03801; telephone: (603) 431–1499.

Webinar registration URL information: https://nefmc-org.zoom.us/join/register/WN_Fwh9UPgZSk-JKW65KOn12Q.

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

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Committee will meet to discuss a summary of Amendment 10 public comments received during the scoping period. They will receive an update including the timeline for Atlantic Herring Specifications for 2025–2027. The Committee will discuss an example of in-season estimates regarding River Herring and Shad Catch Caps and will make recommendations, as appropriate. Other business will be discussed as necessary.

Although non-emergency issues not contained on the agenda may come

before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024–11750 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0684–XD981]

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

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

ACTION: Notice of SEDAR 95 Atlantic Migratory Cobia Removals Webinar I.

SUMMARY: The SEDAR 95 assessment of the Atlantic stock of cobia will consist of a series of data and assessment webinars. See **SUPPLEMENTARY INFORMATION**

DATES: The SEDAR 95 Atlantic Migratory Cobia Removals Webinar I has been scheduled for Monday, June 17, 2024, from 1 p.m. to 4 p.m., eastern. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

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

SEDAR address: 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; www.sedarweb.org.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: Julie.neer@safmc.net.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment

analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the webinar meeting are as follows:

Discuss and review available removals data streams and provide recommendations for their use in the assessment.

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

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 10 business days prior to the meeting.

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

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024–11748 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XD982]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

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

DATES: This hybrid meeting will be held on Thursday, June 13, 2024, at 9:30 a.m.

ADDRESSES: This meeting will be held at the Hilton Garden Inn, 100 High Street, Portsmouth, NH 03801; telephone: (603) 431–1499.

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

FOR FURTHER INFORMATION CONTACT: Cate O’Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:**Agenda**

The Herring Advisory Panel will meet to discuss a summary of Amendment 10 public comments received during the scoping period. They will receive an update including the timeline for Atlantic Herring Specifications for 2025–2027. The Panel will discuss an example of in-season estimates regarding River Herring and Shad Catch Caps and will make recommendations, as appropriate. Other business will be discussed as necessary. Atlantic Herring Stakeholder Engagement Session—3 p.m.–5 p.m.

Following the Advisory Panel meeting, the Atlantic Herring Research Track Working Group will hold a stakeholder engagement session. The session will begin with a progress report followed by an opportunity for stakeholders to ask questions and provide feedback to the working group. This session is being hosted jointly by the New England Fishery Management Council and the Northeast Fisheries Science Center.

Although non-emergency issues not contained on the agenda may come

before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024-11749 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD993]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

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

DATES: This meeting will be held on Monday, June 17, 2024 at 1 p.m.

ADDRESSES:

Meeting address: This meeting will be held at Four Points by Sheraton, One Audubon Road, Wakefield, MA 01880; telephone: (781) 245-9300.

Webinar registration URL information: <https://nefmc-org.zoom.us/j/8ba0Bie4uzQ>

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

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Committee will meet to review Scallop Research Set-Aside (RSA): Develop research recommendations for the notice of funding opportunity announcement (NOFO). Discuss recommending two-year research priorities and consider longer-term enhancement project awards. Scallop specifications and management measures: Receive an update on the timeline and possible measures, including data on flatfish accountability measures and seasonal closures. This action will be initiated at the June 2024 Council meeting. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024-11753 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD991]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

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

DATES: This meeting will be held on Friday, June 14, 2024, at 9 a.m.

ADDRESSES:

Webinar URL information: https://nefmc-org.zoom.us/j/tjcvceigrjMoHdT6FMrSt_LLX8eylkn3DHq7

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

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Advisory Panel will meet to discuss Northern Edge: Review and discuss draft alternatives for the Northern Edge Habitat-Scallop Framework. Recommend modifications to the draft alternatives and rationale. Provide general direction on preparation of this management action, as needed. Recommendations will be discussed during the June Council meeting. The panel will also discuss Scallop Research Set-Aside (RSA): Develop research recommendations for the notice of funding opportunity announcement (NOFO). Discuss recommending two-year research priorities and consider longer-term enhancement project awards. They will also review Scallop specifications and management measures: Receive an update on the timeline and possible measures, including data on flatfish accountability measures and seasonal closures. This action will be initiated at the June 2024 Council meeting. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come

before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024-11751 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD992]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a joint hybrid meeting of its Scallop Committee and Habitat Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Monday, June 17, 2024 at 9 a.m.

ADDRESSES:

Meeting address: This meeting will be held at Four Points by Sheraton, One Audubon Road, Wakefield, MA 01880; telephone: (781) 245-9300.

Webinar registration URL information: <https://nefmc-org.zoom.us/>

webinar/register/WN_ldH4ubaJT_q8ba0Bie4uzQ.

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

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Habitat and Scallop Committees will meet jointly to discuss Northern Edge: Review and discuss draft alternatives for the Northern Edge Habitat-Scallop Framework. Recommend modifications to the draft alternatives and rationale. Provide general direction on preparation of this management action, as needed. Recommendations will be discussed during the June Council meeting. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

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

Dated: May 23, 2024.

Diane M. DeJames-Daly,

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

[FR Doc. 2024-11752 Filed 5-28-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of Old Woman Creek National Estuarine Research Reserve; Notice of Public Meeting; Request for Comments

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of public meeting and opportunity to comment.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management, will hold an in-person public meeting to solicit input on the performance evaluation of the Old Woman Creek National Estuarine Research Reserve. NOAA also invites the public to submit written comments.

DATES: NOAA will hold an in-person public meeting on Tuesday, August 6, 2024, at 5 p.m. Eastern Daylight Time (EDT). NOAA may close the meeting 15 minutes after the conclusion of public testimony and after responding to any clarifying questions from hearing participants. NOAA will consider all relevant written comments received by Friday, August 16, 2024.

ADDRESSES: Comments may be submitted by one of the following methods:

- *In-Person Public Meeting:* Provide oral comments during the public meeting on Tuesday, August 6, 2024, at 5 p.m. EDT. The public meeting will be held at the Old Woman Creek Visitor Center (Mike DeWine Center for Coastal Wetland Studies) at 2514 Cleveland Road East, Huron, Ohio 44839.

- *Email:* Send written comments to Michael Migliori, Lead Evaluator, NOAA Office for Coastal Management, at czma.evaluations@noaa.gov. Include "Comments on Performance Evaluation of the Old Woman Creek National Estuarine Research Reserve" in the subject line.

NOAA will accept anonymous comments; however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive, personally identifiable information, such as account numbers and social security numbers, should not be included with the comment. Comments that are not

related to the performance evaluation of the Old Woman Creek National Estuarine Research Reserve, or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

FOR FURTHER INFORMATION CONTACT: Michael Migliori, Evaluator, NOAA Office for Coastal Management, by email at Michael.Migliori@noaa.gov or by phone at (443) 322–8936. Copies of the previous evaluation findings, management plan, and site profile may be viewed and downloaded at coast.noaa.gov/czm/evaluations. A copy of the evaluation notification letter and most recent progress report may be obtained upon request by contacting Michael Migliori.

SUPPLEMENTARY INFORMATION: Section 315(f) of the Coastal Zone Management Act (CZMA) requires NOAA to conduct periodic evaluations of Federally approved national estuarine research reserves. The evaluation process includes holding one or more public meetings, considering public comments, and consulting with interested Federal, State, and local agencies and members of the public. During the evaluation, NOAA will consider the extent to which the State of Ohio has met the national objectives and has adhered to the management plan approved by the Secretary of Commerce, the requirements of section 315(b)(2) of the CZMA and the terms of financial assistance under the CZMA. When the evaluation is complete, NOAA's Office for Coastal Management will place a notice in the **Federal Register** announcing the availability of the final evaluation findings.

Authority: 16 U.S.C. 1461

Keelin Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–11745 Filed 5–28–24; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0076]

Agency Information Collection Activities; Comment Request; William D. Ford Federal Direct Loan Program (Direct Loan Program) Promissory Notes and Related Forms

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of

1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before July 29, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2024–SCC–0076. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, (202) 377–4018.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the

information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: William D. Ford Federal Direct Loan Program (Direct Loan Program) Promissory Notes and related forms.

OMB Control Number: 1845–0007.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: Individuals or Households; Private Sector

Total Estimated Number of Annual Responses: 9,862,685.

Total Estimated Number of Annual Burden Hours: 4,021,663.

Abstract: The Direct Subsidized Loan and Direct Unsubsidized Loan Master Promissory Note (Subsidized/Unsubsidized MPN) serves as the means by which an individual agrees to repay a Direct Subsidized Loan and/or Direct Unsubsidized Loan.

The Direct PLUS Loan Master Promissory Note (PLUS Loan MPN) serves as the means by which an individual applies for and agrees to repay a Direct PLUS Loan. If a Direct PLUS Loan applicant is determined to have an adverse credit history, the applicant may qualify for a Direct PLUS Loan by obtaining an endorser who does not have an adverse credit history. The Endorser Addendum serves as the means by which an endorser agrees to repay the Direct PLUS Loan if the borrower does not repay it.

An MPN is a promissory note under which a borrower may receive loans for a single or multiple academic years. The MPN explains the terms and conditions of the loans that are made under the MPN.

The Direct Consolidation Loan Application and Promissory Note (Consolidation Note) serves as the means by which a borrower applies for a Direct Consolidation Loan and promises to repay the loan. It also explains the terms and conditions of the Direct Consolidation Loan. The Consolidation Note Instructions explain to the borrower how to complete the Consolidation Note. The Consolidation Additional Loan Listing Sheet provides additional space for a borrower to list loans that he or she wishes to consolidate. The Consolidation Request to Add Loans serves as the means by which a borrower may add other loans to an existing Direct Consolidation Loan within a specified time period. The Consolidation Loan Verification

Certificate serves as the means by which the U.S. Department of Education obtains the information needed to pay off the holders of the loans that the borrower wants to consolidate.

The proposed changes to the forms currently approved under OMB No. 1845–0007 include the following:

- Revised language in the promissory notes where necessary to reflect changes to the terms and conditions of Direct Loans made by final regulations published on November 1, 2022 (87 FR 65904) and July 10, 2023 (88 FR 43820).
- To eliminate duplication of content, we have consolidated the information presented in the current Terms and Conditions and Borrowers Rights and Responsibilities Statement (BRR) into a single Terms and Conditions/BRR section.
- To make it easier for borrowers to complete the promissory notes, we have incorporated the instructions within the body of the promissory notes at the beginning of each section to which the instructions apply.
- To reduce the number of forms in this collection, we have eliminated the Additional Loan Listing Sheet and added extra spaces to list loans in the Consolidation Application/Promissory Note itself.
- To accommodate changes made to the Departments systems used in processing promissory notes, the current data field in all of the promissory notes that asks for the borrowers middle initial has been changed to request the borrowers full middle name, and a new data field asking for any suffix to the borrowers name (e.g., Jr. or Sr.) has been added.
- We have revised the Privacy Act Statement in each of the promissory notes based on the most recent updates to the applicable Systems of Records Notices.

Dated: May 22, 2024.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–11713 Filed 5–28–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: Docket Search Results ED–2024–SCC–0075]

Agency Information Collection Activities; Comment Request; Providing Reading Interventions for Students in Middle School Toolkit Evaluation

AGENCY: Institution of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before July 29, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number Docket Search Results ED–2024–SCC–0075. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Anousheh Shayestehpour, (202) 987–1148.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its

information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Providing Reading Interventions for Students in Middle School Toolkit Evaluation.

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 2,647.

Total Estimated Number of Annual Burden Hours: 851.

Abstract: The current authorization for the Regional Educational Laboratories (REL) program is under the Education Sciences Reform Act of 2002, part D, section 174, (20 U.S.C. 9564), administered by the Department of Education, Institute of Education Sciences (IES), National Center for Education Evaluation and Regional Assistance (NCEE). The central mission and primary function of the RELs is to support applied research and provide technical assistance to state and local education agencies within their region (ESRA, part D, section 174(f)). The REL program's goal is to partner with educators and policymakers to conduct work that is change-oriented and supports meaningful local, regional, or state decisions about education policies, programs, and practices to improve outcomes for students.

Grades 6–8 mark an extended and crucial period in which students are expected to master increasingly complex literacy skills (Biancarosa & Snow, 2006; Hagaman et al., 2016). By the middle school grades, reading instruction typically shifts from a focus on fundamental literacy skills, such as decoding and phonemic awareness, to genre-specific textual conventions,

comprehension strategies, and learning curricular content from texts (Chall, 1983; Goldman & Snow, 2015). For students without the fundamental skills to read fluently, decode accurately, and comprehend text, the more advanced literacy practices needed for secondary content acquisition and text reading can be out of reach. Students who struggle with reading at the middle school level often have limited ability to access curricular content aligned to grade-level standards in English language arts and other subject areas (Torgesen et al., 2007) and may experience adverse educational outcomes with respect to attendance (Fisher & Frey, 2014), graduation rates (Daniel et al., 2006), and mental health (Daniel et al., 2006; Mugnaini et al., 2009).

The purpose of this evaluation is to test the efficacy of the Providing Reading Interventions for Students in Middle School Toolkit, or the PRISMS Toolkit. This toolkit supports the application of evidence-based recommendations from the What Works Clearinghouse (WWC) Providing Reading Interventions for Students in Grades 4–9 Educator's Practice Guide (hereafter, practice guide; Vaughn et al., 2022) through a suite of professional development activities. We anticipate that the toolkit will impact teacher knowledge, self-efficacy, and instructional practice. These changes in teacher knowledge, beliefs, and practice, in turn, will positively impact student outcomes, including student engagement, as measured by student engagement in reading and school attendance, and reading proficiency.

The evaluation team plans to conduct an independent evaluation using a school-level, cluster randomized control trial design to assess the program's impact on teachers' practices and beliefs and students' engagement and literacy outcomes. The evaluation will also assess the implementation of the toolkit and how it may be effectively scaled. The evaluation will take place in 52 schools across an estimated 10 districts in Texas and will focus on teachers and students in grade 6–8. The evaluation will produce a report and presentations to study participants, practitioners, policymakers, and researchers, and infographics and blog posts for a wider audience of educators and policymakers. These will be designed to inform district and school leaders and teachers about reading interventions that could be beneficial for all students in grade 6–8, but particularly those who are reading below grade level expectations.

Dated: May 22, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–11677 Filed 5–28–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, June 20, 2024; 5:30 p.m.–7 p.m. CDT

ADDRESSES: West Kentucky Community and Technical College, Emerging Technology Center, Room 215, 5100 Alben Barkley Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Robert “Buz” Smith, Federal Coordinator, by Phone: (270) 441–6821 or Email: Robert.Smith@pppo.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Administrative Activities
- Public Comment Period

Public Participation: The meeting is open to the public. The EM SSAB, Paducah will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert “Buz” Smith in advance of the meeting. The EM SSAB, Paducah will hear oral public comments during the meeting. Written statements may be filed either before or after the meeting. Written comments received by no later than 5 p.m. CDT on

Monday, June 17, 2024, will be read aloud during the meeting. Written comments submitted by 5 p.m. CDT on Friday, June 28, 2024, will be included in the minutes. Please submit written comments to Robert “Buz” Smith with “Public Comment” in the subject line. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: Minutes will be available by writing or calling Eric Roberts, Board Support Manager, Emerging Technology Center, Room 221, 4810 Alben Barkley Drive, Paducah, KY 42001; Phone: (270) 554–3004. Minutes will also be available at the following website: <https://www.energy.gov/pppo/pgdp-cab/listings/meeting-materials>.

Signing Authority: This document of the Department of Energy was signed on May 22, 2024, by Alyssa Petit, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC on May 23, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–11720 Filed 5–28–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

RIN 1901–AB55

Request for Information Regarding the Advanced Technology Vehicles Manufacturing Loan Program

AGENCY: Loan Programs Office, Department of Energy.

ACTION: Request for information (“RFI”).

SUMMARY: The Loan Programs Office (“LPO”) of the U.S. Department of Energy (“DOE”) is seeking public input on this RFI to inform LPO’s implementation of the Inflation Reduction Act of 2022 provisions relating to the Advanced Technology Vehicles Manufacturing Loan Program (the “ATVM Program”).

DATES: Written comments are requested by June 28, 2024. If you anticipate difficulty in submitting comments within that period, contact the person listed in **FOR FURTHER INFORMATION CONTACT** as soon as possible.

ADDRESSES: Interested persons are encouraged to submit comments, identified by “ATVM Program RFI,” by any of the following methods:

Email: lpofederalregistercomments@hq.doe.gov. Include “ATVM Program RFI” in the subject line of the message. Email attachments can be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, prepared in accordance with the detailed instructions in section III of this document.

Postal Mail: Loan Programs Office, Attn: LPO Legal Department, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0121. Please submit one signed original paper copy. Due to potential delays in DOE’s receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Steven Westhoff, Attorney-Adviser, Loan Programs Office, email: steven.westhoff@hq.doe.gov, or phone: (240) 220–4994.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
 - A. Background: Decarbonization of the Transportation Sector and Strengthening Domestic Supply Chains
 - B. ATVM Program
 - C. Infrastructure Investment and Jobs Act & Inflation Reduction Act
- II. Request for Information
 - A. Trains or Locomotives
 - B. Maritime Vessels
 - C. Aircrafts
 - D. Hyperloop Technology
 - E. Community Jobs & Justice
- III. Submission of Comments

I. Introduction

A. Background: Decarbonization of the Transportation Sector and Strengthening Domestic Supply Chains

On August 16, 2022, President Joseph R. Biden signed the landmark Inflation Reduction Act of 2022 (“IRA”)¹ into law, which in part supports the broad goals of deploying clean energy, strengthening domestic manufacturing, and investing in workers and communities. The IRA reflects advanced technology vehicle manufacturing’s role in advancing transportation

decarbonization and the supply chain goals of the Nation and U.S. manufacturers. Specifically, section 50142 of the IRA appropriates \$3 billion, available through September 30, 2028, for the costs of providing direct loans under section 136(d) of the Energy Independence and Security Act of 2007,² the underlying authority for DOE’s ATVM Program.³

The ATVM Program can provide financing to help deploy eligible advanced technology vehicles or the manufacturing of qualifying components for eligible vehicles in the United States. These projects can be along the advanced technology vehicle value chain, including processing of critical materials for advanced technology vehicles; manufacturing of battery cell components, battery cells, battery modules, and battery packs for electric vehicles (“EVs”); recycling of battery components or critical materials; manufacturing of various nonroad advanced technology vehicles or their components; or manufacturing of EV charging infrastructure components, among other areas. The ATVM Program supports applicants’ efforts to reequip, modernize, or expand existing facilities for these purposes, and/or support engineering integration performed related to the manufacturing of eligible vehicles or components in the United States.

Onshoring and reshoring parts of advanced technology vehicle supply chain is an important part of helping the United States increase its energy independence and bolster its competitiveness in a global supply chain. Advanced technology vehicles are often dependent on a consistent and predictable supply chain. Today, the United States relies heavily on importing advanced technology vehicle supply chain components from abroad, exposing the nation to supply chain vulnerabilities that threaten to disrupt the availability and cost of these technologies, as well as the workforce that manufactures them.

LPO projects are often first movers in these sectors in the United States, helping American manufacturers scale up domestic manufacturing capacity, develop technical know-how, and create good-paying American jobs in new

sectors. By providing flexible access to capital for borrowers in clean energy sectors where traditional commercial debt is unavailable, LPO can help support American entrepreneurs’ efforts in these areas. This is critical as DOE seeks to deploy advanced technology vehicle production at scale while protecting the research, technology, and economic security interests of the American people. Investment in American manufacturing also helps the United States lead the world in clean energy industries and positions U.S. firms to export these clean technologies to our global partners. In addition, supporting the advanced technology vehicle supply chain and deploying these vehicles helps meet our climate and emissions reduction objectives as a Nation.

President Biden set an ambitious goal that at least 50 percent of all new passenger cars and light trucks and at least 30 percent of all medium and heavy-duty vehicles sold in 2030 be zero-emission vehicles, including battery electric, plug-in hybrid electric, or fuel cell EVs.⁴ The transportation sector is the largest source of greenhouse gas (“GHG”) emissions in the United States, accounting for 27 percent of all emissions in 2020. Transportation also is a major source of smog-forming nitrogen oxides and particulate matter, which can trigger asthma attacks and other health problems for the most vulnerable among us.⁵ Advanced technology vehicles and qualifying components stand to help reduce GHG emissions and other mobile source air pollutants that may have a disproportionate impact on the air quality in overburdened and underserved communities.

Onshoring and reshoring parts of advanced technology vehicle supply chain in the United States is critical to growing America’s manufacturing base, reaching the Biden-Harris Administration’s climate and multi-pollutant emissions reduction objectives, and protecting taxpayer resources and our national security.

⁴ E.O. 14037, “Strengthening American Leadership in Clean Cars and Trucks,” 86 FR 43583 (August 10, 2021); “FACT SHEET: Biden-Harris Administration Proposes New Standards to Protect Public Health that Will Save Consumers Money, and Increase Energy Security,” April 12, 2023. Available at www.whitehouse.gov/briefing-room/statements-releases/2023/04/12/fact-sheet-biden-harris-administration-proposes-new-standards-to-protect-public-health-that-will-save-consumers-money-and-increase-energy-security/.

⁵ *Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act’s Investments in Clean Energy and Climate Action*, Version 2, January 2023. Available at www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf.

¹ Public Law 117–169 (2022).

² 42 U.S.C. 17013(d).

³ The Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009 provided loan authority of \$25 billion and appropriated \$7.51 billion for credit subsidy cost. Public Law 110–329, sec. 129(a) (2008). The IRA removed the \$25 billion cap on the total amount of ATVM Program loans established under section 136(d)(1) of the Energy Independence and Security Act of 2007. Public Law 117–169, sec. 50142(c) (2022).

B. ATVM Program

Section 136 of the Energy Independence and Security Act of 2007, as amended (42 U.S.C. 17013) (the “ATVM statute”) authorizes the Secretary of Energy (the “Secretary”) to issue grants and direct loans to applicants for the costs of reequipping, expanding, or establishing manufacturing facilities in the United States to produce qualified advanced technology vehicles, or qualifying components. The ATVM statute also authorizes the Secretary to issue grants and direct loans for the costs of engineering integration performed in the United States of qualifying advanced technology vehicles and qualifying components. The ATVM Program represents the Secretary’s implementation of the direct loan authority under the ATVM statute and is administered by LPO. The purpose of the ATVM Program is to originate, underwrite, and service loans to eligible vehicle manufacturers and component manufacturers to finance the cost of: (i) reequipping, expanding or establishing manufacturing facilities in the United States to produce advanced technology vehicles and qualifying components; and (ii) engineering integration performed in the United States of advanced technology vehicles and qualifying components. These manufacturing facilities support vehicles that demonstrate improved performance and/or emissions standards compared to the existing vehicle fleet, in furtherance of the Administration’s transportation decarbonization and EV goals.

C. Infrastructure Investment and Jobs Act & Inflation Reduction Act

Section 40401(b) of the Infrastructure Investment and Jobs Act⁶ (the “IIJA”) amended the definitions provision of the ATVM statute to add the following categories of vehicles within the ATVM statute’s definition of “advanced technology vehicle”: a medium duty vehicle or a heavy duty vehicle that exceeds 125 percent of the greenhouse gas emissions and fuel efficiency standards established by the final rule of the Environmental Protection Agency entitled “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2” (81 FR 73478 (October 25, 2016)); a train or locomotive; a maritime vessel; an aircraft; and hyperloop technology.⁷

Section 50142 of the IRA appropriates \$3 billion for the ATVM Program,

including to support direct loans for projects in the categories of advanced technology vehicles added to the program by the IIJA. However, section 50142 also provides that, with respect to trains or locomotives, maritime vessels; aircraft; and hyperloop technology, such funds may be used for that purpose “only if such advanced technology vehicles emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases” (*emphasis added*).^{8,9} This standard was made part of the ATVM Program regulations at 10 CFR part 611.¹⁰

LPO is currently establishing additional criteria pursuant to which it will evaluate loan applications under the expanded categories of advanced technology vehicles, including satisfaction of the GHG emission requirements of the IRA. LPO expects that these requirements will evolve over time as each applicable advanced technology vehicle sector matures.

II. Request for Information

The purpose of this RFI is to solicit feedback from manufacturers, project and technology developers, investors, minority-owned businesses, academia, research laboratories, government agencies, State and local officials, labor unions, Tribes, community-based organizations, and other interested parties on issues related to the implementation of the changes to the ATVM Program stemming from the IRA and IIJA. This is solely a request for information.

You may answer as few or as many of the questions below as you would like but please focus on the areas that are most pertinent to your expertise. When responding, please use the bolded category letters and sub-numbers as headings in your response to the greatest extent possible and refer to the questions (*e.g.*, A.1., A.2., A.3., . . .) in the body of your responses. This helps save time both for the responder and the reviewers. Especially where noted, respondents should think in terms of

potential categories of advanced technology vehicles that would fall within the purpose and scope of the expanded ATVM Program: trains or locomotives, maritime vessels; aircraft; and hyperloop technology.

Please be as specific as possible in all responses, including what subset of an industry your answer is in reference to (*e.g.*, Offshore Support Vessels or Commercial Harbor Craft in the maritime industry), if applicable.

A. Trains or Locomotives

1. “Advanced technology vehicles” in the context of the ATVM Program are defined as having increased performance requirements, for example, better fuel economy for on-road advanced technology vehicles. The IRA requires trains or locomotives to “emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases” to be eligible for IRA funding.¹¹ Recognizing that different trains, locomotives, or qualifying components within the rail industry have different potential performance requirements and metrics, please indicate what sub-category of the industry your answer reflects.

a. How could DOE consider the performance requirements for “business as usual” trains or locomotives? How could DOE consider the performance requirements for low or zero GHG emission “advanced technology” trains or locomotives?

b. What metrics/testing protocols/standards do customers typically use to measure the performance requirements and performance targets of trains or locomotives? How do they validate or qualify performance?

c. Do existing bodies, such as regulators or industry monitors, measure these performance and emissions metrics? Please describe what bodies do so and how they measure.

2. Please comment on the near and long term expected capital investment in the train and locomotive industry, including components.

a. What investments are planned for new and existing manufacturing facilities? What factors influence these investment decisions?

b. What is the expected volume and distribution of new or modified vehicles in the train and locomotive industry? What factors influence procurement decisions in this sector?

3. Please comment on key barriers to implementing advanced technology vehicle manufacturing projects in the rail industry.

⁸ Public Law 117–169, sec. 50142(a) (2022).

⁹ Section 40401 of the IIJA also prohibited the Secretary from using amounts appropriated prior to the date of the enactment of the IIJA to provide direct loans under the ATVM statute for the costs of activities that were not eligible for those loans prior to that date. *Public Law 117–58, sec. 40401(b)(3)(E)* (2021), adding 42 U.S.C. 17013(l). However, this prohibition was later eliminated by the Consolidated Appropriations Act of 2023. *Public Law 117–328, div. D, tit. III, sec. 308* (2022), repealing 42 U.S.C. 17013(l).

¹⁰ Statutory Updates to the Advanced Technology Vehicles Manufacturing Program, 89 FR 33196 (April 29, 2024); anticipated to become effective July 15, 2024, unless adverse comment is received by May 29, 2024.

¹¹ Footnote 8, *supra*.

⁶ Public Law 117–58 (2021).

⁷ 42 U.S.C. 17013(a)(1)(B)–(F).

4. What supply chain issues do the advanced technology rail industry face? Are these expected to change over time and if so, how?

5. Please comment on any current or upcoming regulatory requirements or factors impacting the rail industry and LPO's ability to support train or locomotive manufacturing projects.

a. Are there standard certification or readiness indicators applicable to the rail sector which indicate a rail product's commercial readiness?

B. Maritime Vessels

1. "Advanced technology vehicles" in the context of the ATVM Program are defined as having increased performance requirements, for example, better fuel economy for on-road advanced technology vehicles. The IRA requires maritime vessels to "emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases" to be eligible for IRA funding.¹² Recognizing that different maritime vessels or qualifying components within the maritime industry have different potential performance requirements and metrics, please indicate what sub-category of the industry your answer reflects.

a. How could DOE consider the performance requirements for "business as usual" maritime vessels? How could DOE consider the performance requirements for low or zero GHG emission "advanced technology" maritime vessels?

b. What metrics do customers typically use to measure the performance requirements and performance targets of maritime vessels? How do they validate or qualify performance?

c. Do existing bodies, such as regulators or industry monitors, measure these performance and emissions metrics? Please describe what bodies do so and how they measure.

2. Please comment on the near and long term expected capital investment in the maritime industry, including components.

a. What investments are planned for new and existing manufacturing facilities? What factors influence these investment decisions?

b. What is the expected volume and distribution of new or modified vehicles in the maritime industry. What factors influence procurement decisions in this sector?

3. Please comment on key barriers to implementing advanced technology

vehicle manufacturing projects in the maritime industry.

4. What supply chain issues do the advanced technology maritime industry face? Are these expected to change over time and if so, how?

5. Please comment on any regulatory requirements or factors impacting the maritime industry and LPO's ability to support maritime vessel manufacturing projects.

a. Are there standard certification or readiness indicators applicable to the maritime sector which indicate a maritime product's commercial readiness?

C. Aircrafts

1. "Advanced technology vehicles" in the context of the ATVM Program are defined as having increased performance requirements, for example, better fuel economy for on-road advanced technology vehicles. The IRA requires aircraft to "emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases" to be eligible for IRA funding.¹³ Recognizing that different aircraft or qualifying components within the aircraft industry have different potential performance requirements and metrics, please indicate what sub-category of the industry your answer reflects.

a. How could DOE consider the performance requirements for "business as usual" aircraft? How could DOE consider the performance requirements for low or zero GHG emission "advanced technology" aircraft?

b. What metrics do customers typically use to measure the performance requirements and performance targets of aircraft? How do they validate or qualify performance?

c. Do existing bodies, such as regulators or industry monitors, measure these performance and emissions metrics? Please describe what bodies do so and how they measure.

2. Please comment on the near and long term expected capital investment in the aircraft industry, including components.

a. What investments are planned for new and existing manufacturing facilities? What factors influence these investment decisions?

b. What is the expected volume and distribution of new or modified vehicles in the aircraft industry. What factors influence procurement decisions in this sector?

3. Please comment on key barriers to implementing advanced technology

vehicle manufacturing projects in the aircraft industry.

4. What supply chain issues do the advanced technology aircraft industry face? Are these expected to change over time and if so, how?

5. Please comment on any regulatory requirements or factors impacting the aircraft industry and LPO's ability to support aircraft manufacturing projects.

a. Are there standard certification or readiness indicators applicable to the aircraft sector which indicate an aircraft product's commercial readiness?

D. Hyperloop Technology

1. Please comment on definitions DOE could consider for hyperloop technology.

2. "Advanced technology vehicles" in the context of the ATVM Program are defined as having increased performance requirements, for example, better fuel economy for on-road advanced technology vehicles. The IRA requires hyperloop vehicles to "emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases" to be eligible for IRA funding.¹⁴

a. How could DOE consider a "business as usual" case for hyperloop vehicles? How could DOE consider the performance requirements for low or zero GHG emission "advanced technology" hyperloop vehicles?

b. What design factors or technology components contribute to the GHG emissions of hyperloop vehicles? What innovations could contribute to future reductions in GHG emissions from hyperloop vehicles?

3. Please comment on use cases that would represent significant emissions reductions or efficiency improvements through the use of advanced technology hyperloop vehicles.

4. Please comment on existing hyperloop technology and potential near- to mid-term commercial deployments of hyperloop technology.

E. Community Jobs & Justice

1. Please comment on how DOE can consider the broad goals of deploying clean energy, strengthening domestic manufacturing, investing in workers and communities, supporting the Justice40 Initiative¹⁵ including mitigating environmental justice concerns, and engaging in meaningful tribal consultations when reviewing and evaluating applications for projects in the ATVM Program.

¹²Footnote 8, *supra*.

¹³Footnote 8, *supra*.

¹⁴Footnote 8, *supra*.

¹⁵See www.energy.gov/justice/justice40-initiative.

III. Submission of Comments

DOE invites all interested parties to submit in writing by June 28, 2024, comments and information on matters addressed in this RFI.

Submitting comments via email or postal mail. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author. Attachments should be limited to no more than 10 megabytes (MB) in size.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Signing Authority

This document of the Department of Energy was signed on May 22, 2024, by Jigar Shah, Executive Director, Loan Programs Office, pursuant to delegated authority from the Secretary of Energy.

That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 23, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024-11723 Filed 5-28-24; 8:45 am]

BILLING CODE 6450-01-P

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: EG24-186-000.

Applicants: Spanish Peaks Solar LLC.

Description: Spanish Peaks Solar LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 5/22/24.

Accession Number: 20240522-5082.

Comment Date: 5 p.m. ET 6/12/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER24-1587-000.

Applicants: AlbertaEx, L.P.

Description: Report Filing:

Supplement to Application for Market-Based Rate Authority to be effective N/A.

Filed Date: 5/20/24.

Accession Number: 20240520-5111.

Comment Date: 5 p.m. ET 5/30/24.

Docket Numbers: ER24-1808-001.

Applicants: ISO New England Inc., New England Power Company.

Description: Tariff Amendment: ISO New England Inc. submits tariff filing per 35.17(b): Amended Filing of Revisions to Schedule 21-NEP to be effective 5/1/2024.

Filed Date: 5/22/24.

Accession Number: 20240522-5118.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-1906-000.

Applicants: Cheyenne Light, Fuel and Power Company.

Description: Supplement to May 1, 2024 Order 2023 Open Access

Transmission Tariff Revisions of Cheyenne Light, Fuel and Power.

Filed Date: 5/17/24.

Accession Number: 20240517-5076.

Comment Date: 5 p.m. ET 6/7/24.

Docket Numbers: ER24-2071-000.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: Tariff Amendment: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.15: Notice of Cancellation of ECSA, SA No. 6494 to be effective 7/22/2024.

Filed Date: 5/22/24.

Accession Number: 20240522-5059.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-2072-000.

Applicants: The Empire District Electric Company, Southwest Power Pool, Inc.

Description: Compliance filing: The Empire District Electric Company submits tariff filing per 35: The Empire District Electric Company's Order No. 864 Compliance Filing to be effective 1/27/2020.

Filed Date: 5/22/24.

Accession Number: 20240522-5060.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-2073-000.

Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.

Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2024-05-22 SA 3785 Termination of ATC-WPL West Sharon PCA to be effective 5/23/2024.

Filed Date: 5/22/24.

Accession Number: 20240522-5080.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-2074-000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Amendment to WMPA, SA No. 7025; Queue No. AG1-193 (amend) to be effective 7/22/2024.

Filed Date: 5/22/24.

Accession Number: 20240522-5104.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-2075-000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: 205(d) Rate Filing: Amendment to Service Agreement FERC No. 816 to be effective 4/30/2024.

Filed Date: 5/22/24.

Accession Number: 20240522-5113.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24-2076-000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: 205(d) Rate Filing: Initial Filing of Rate Schedule FERC No. 370 to be effective 4/30/2024.

Filed Date: 5/22/24.

Accession Number: 20240522–5176.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24–2077–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Amendment to ISA, SA No. 4827; Queue No. AC1–010 (amend) to be effective 7/22/2024.

Filed Date: 5/22/24.

Accession Number: 20240522–5177.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24–2078–000.

Applicants: Nestlewood Solar I LLC.

Description: Tariff Amendment: Notice of Cancellation of Rate Schedule and Request for Waivers to be effective 5/23/2024.

Filed Date: 5/22/24.

Accession Number: 20240522–5189.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24–2079–000.

Applicants: Basin Electric Power Cooperative.

Description: Initial rate filing: Submission of Service Agreement No. 119 to be effective 9/10/2023.

Filed Date: 5/22/24.

Accession Number: 20240522–5197.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24–2080–000.

Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Original GIA, Service Agreement No. 7258; NQ213 to be effective 4/22/2024.

Filed Date: 5/22/24.

Accession Number: 20240522–5200.

Comment Date: 5 p.m. ET 6/12/24.

Docket Numbers: ER24–2081–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: 05(d) Rate Filing: Amendment to Rate Schedule FERC No. 30 to be effective 7/22/2024.

Filed Date: 5/22/24.

Accession Number: 20240522–5217.

Comment Date: 5 p.m. ET 6/12/24.

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: May 22, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024–11756 Filed 5–28–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–124–000]

Colorado Interstate Gas Company, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Totem Enhanced Deliverability 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 Totem Enhanced Deliverability Project (Project) involving construction and operation of facilities by Colorado Interstate Gas Company, L.L.C. (CIG) in Adams County, Colorado. 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. 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 p.m. eastern time on June 21, 2024. 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 April 8, 2024, you will need to file those comments in Docket No. CP24–124–000 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.

CIG 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 located 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 located 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 (CP24-124-000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting 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

CIG proposes to modify and enhance the existing Totem natural gas storage field (Totem) to increase the maximum withdrawal rate in Adams County, Colorado and construct related aboveground facilities. The Project would provide about 50 million standard cubic feet (MMcf) of natural gas per day. CIG anticipates its project would improve the overall performance of Totem and increase both the maximum total inventory and base gas capacity of the field by one billion cubic feet (Bcf).

The Project would consist of the following facilities and activities:

- Installation of six new injection/withdrawal (I/W) wells, each with a wellhead and meter yard and 0.42 mile of 6-inch-diameter lateral pipeline to connect the new wells to gathering lines;
- Conversion of one existing I/W well to an observation well;
- Along Line 254F-1:
 - Replacement of 0.62 mile of 8-inch-diameter gathering pipeline with approximately 0.72 miles of 12-inch-diameter gathering pipeline to connect the Totem Compressor Station to existing and new I/W wells;
 - Replacement of approximately 0.12 mile of existing 6-inch-diameter pipeline with approximately 0.08 mile of new 4-inch and 6-inch-diameter pipeline to interconnect with the new segment;
 - Installation of 7 new tap valves/lateral tie-ins;
 - Replacement of the launcher/receiver facilities;
 - Along Line 254-2:

- Replacement of approximately 0.28 mile of existing 6-inch and 10-inch-diameter pipeline with approximately 0.26 mile of new 3-inch, 4-inch and 6-inch-diameter pipeline to interconnect;

○ Installation of 7 new tap valves/lateral tie-ins;

- Abandonment in place of approximately 0.4 mile of 3-inch diameter on Line 254F-7;
- Installation of approximately 0.68 miles of new permanent access road that will encircle each of the new I/W wells;
- Modifications at the existing Totem Compressor Station; and
- Injection of approximately 1 Bcf of additional base gas into Totem;

The general location of the Project facilities is shown in appendix 1.C.¹

Land Requirements for Construction

Construction of the proposed facilities would disturb about 84.01 acres of land for the aboveground facilities, storage wells, and access roads. Following construction, CIG would maintain about 6.78 acres for permanent operation of the project’s facilities; the remaining acreage would be restored and revert to former uses. For the Project, CIG would convert 2.65 acres of agricultural land to developed land.

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;
- socioeconomic;
- 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

¹ 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. For assistance, contact FERC at FercOnlineSupport@ferc.gov or call toll free, (866) 208-3676 or TTY (202) 502-8659.

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 eLibrary² 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.³ 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(s), 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.⁴ 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; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. 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 CP24-124-000 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: May 22, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-11755 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24-469-000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Application and Establishing Intervention Deadline

Take notice that on May 15, 2024, Transcontinental Gas Pipe Line Company, LLC (Transco), P.O. Box 1396, Houston, Texas 77251-1396, filed an application under section 7(b) of the Natural Gas Act (NGA), and part 157 of the Commission's regulations requesting authorization for its Abandonment of Offshore Lateral from Mustang Island to Brazos Areas Project (Project). The Project consists of the abandonment in place of Transco's offshore lateral extending from the Mustang Island Areas Block A-85 Platform to the Brazos Area Block A-133 Platform, which consists of approximately 12.9 miles of a 24-inch-diameter offshore gathering lateral and appurtenant facilities located in federal waters, offshore Texas, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is

² For instructions on connecting to eLibrary, refer to the last page of this notice.

³ The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at title 40, Code of Federal Regulations, section 1501.8.

⁴ 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.

available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

Any questions regarding the proposed project should be directed to Travis Beach, Sr. Regulatory Analyst, Transcontinental Gas Pipe Line Company, LLC, P.O. Box 1396, Houston, Texas 77251, by phone at (346) 439-0447, or by email at Travis.Beach@Williams.com.

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,¹ within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on June 11, 2024. How to file protests, motions to intervene, and comments is explained below.

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.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)² and 385.211³ of the Commission's regulations under the NGA, any person⁴ may file a protest to the application. Protests must comply with the requirements specified in section 385.2001⁵ of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before June 11, 2024.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP24-469-000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. 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; first select "General" and then select "Comment on a Filing"; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number CP24-469-000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426
To file via any other courier: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov.

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,⁶ has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁷ and the regulations under the NGA⁸ by the intervention deadline for the project, which is June 11, 2024. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual,

² 18 CFR 157.10(a)(4).

³ 18 CFR 385.211.

⁴ Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

⁵ 18 CFR 385.2001.

⁶ 18 CFR 385.102(d).

⁷ 18 CFR 385.214.

⁸ 18 CFR 157.10.

¹ 18 CFR (Code of Federal Regulations) 157.9.

this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://www.ferc.gov/resources/guides/how-to/intervene.asp>.

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP24-469-000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. 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; first select "General" and then select "Intervention." The eFiling feature includes a document-less intervention option; for more information, visit <https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf>; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP24-469-000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To file via any other courier: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail or email at: Travis Beach, Sr. Regulatory Analyst, Transcontinental Gas Pipe Line Company, LLC, P.O. Box 1396, Houston, Texas 77251, or at Travis.Beach@Williams.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed⁹ motions to intervene are automatically granted by operation of Rule 214(c)(1).¹⁰ Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.¹¹ A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be 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 as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Intervention Deadline: 5:00 p.m. Eastern Time on June 11, 2024.

Dated: May 21, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-11672 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24-79-000.

⁹ The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

¹⁰ 18 CFR 385.214(c)(1).

¹¹ 18 CFR 385.214(b)(3) and (d).

Applicants: Dickerson Power, LLC, Lanyard Power Marketing, LLC, Chalk Point Power, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Chalk Point Power, LLC, et. al.

Filed Date: 5/20/24.

Accession Number: 20240520-5228.

Comment Date: 5 p.m. ET 6/10/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24-184-000.

Applicants: Imperial Power Plant, LLC.

Description: Imperial Power Plant, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 5/21/24.

Accession Number: 20240521-5146.

Comment Date: 5 p.m. ET 6/11/24.

Docket Numbers: EG24-185-000.

Applicants: Pecos Power Plant, LLC.

Description: Pecos Power Plant, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 5/21/24.

Accession Number: 20240521-5147.

Comment Date: 5 p.m. ET 6/11/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20-2452-006; ER20-2453-007; ER20-844-004.

Applicants: Hamilton Projects Acquiror, LLC, Hamilton Patriot LLC, Hamilton Liberty LLC.

Description: Amendment to 10/23/2023, Notice of Change in Status of Hamilton Liberty LLC, et al.

Filed Date: 5/20/24.

Accession Number: 20240520-5204.

Comment Date: 5 p.m. ET 6/10/24.

Docket Numbers: ER21-2368-002.

Applicants: Chalk Point Power, LLC.

Description: Compliance filing: Chalk Point PJM Schedule 2 Filing to be effective N/A.

Filed Date: 5/21/24.

Accession Number: 20240521-5160.

Comment Date: 5 p.m. ET 6/11/24.

Docket Numbers: ER22-2569-002.

Applicants: Dickerson Power, LLC.

Description: Compliance filing: Dickerson PJM Schedule 2 Filing to be effective N/A.

Filed Date: 5/21/24.

Accession Number: 20240521-5163.

Comment Date: 5 p.m. ET 6/11/24.

Docket Numbers: ER24-1125-001.

Applicants: Wildflower Solar, LLC.

Description: Compliance filing: Wildflower Solar LLC submits tariff filing per 35: Supplement to Revised Market-Based Rate Tariff to be effective 2/1/2024.

Filed Date: 5/21/24.
Accession Number: 20240521–5155.
Comment Date: 5 p.m. ET 6/11/24.
Docket Numbers: ER24–1679–000.
Applicants: Eden Solar LLC.
Description: Supplement to April 1, 2024 Eden Solar, LLC tariff filing.
Filed Date: 5/17/24.
Accession Number: 20240517–5156.
Comment Date: 5 p.m. ET 5/30/24.
Docket Numbers: ER24–2066–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Notice of Cancellation of WMPA SA No. 5730, Queue No. AF2–428 to be effective 7/20/2024.
Filed Date: 5/20/24.
Accession Number: 20240520–5207.
Comment Date: 5 p.m. ET 6/10/24.
Docket Numbers: ER24–2067–000.
Applicants: Middletown Coke Company, LLC.
Description: Compliance filing: Middletown Coke Reactive Power Tariff Filing (5.21.24) to be effective 6/1/2024.
Filed Date: 5/21/24.
Accession Number: 20240521–5096.
Comment Date: 5 p.m. ET 6/11/24.
Docket Numbers: ER24–2068–000.
Applicants: Basin Electric Power Cooperative.
Description: § 205(d) Rate Filing: Submission of Amended Service Agreement No. 100 to be effective 4/19/2023.
Filed Date: 5/21/24.
Accession Number: 20240521–5129.
Comment Date: 5 p.m. ET 6/11/24.
Docket Numbers: ER24–2069–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to WMPA, SA No. 6310; Queue No. AG1–086 to be effective 7/21/2024.
Filed Date: 5/21/24.
Accession Number: 20240521–5143.
Comment Date: 5 p.m. ET 6/11/24.
Docket Numbers: ER24–2070–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to OA, Sch 12 re: Termination of Mega Energy & Western Reserve to be effective 7/21/2024.
Filed Date: 5/21/24.
Accession Number: 20240521–5159.
Comment Date: 5 p.m. ET 6/11/24.
 Take notice that the Commission received the following electric securities filings:
Docket Numbers: ES24–39–000.
Applicants: Indianapolis Power & Light Co.
Description: Application Under Section 204 of the Federal Power Act for

Authorization to Issue Securities of Indianapolis Power & Light Company.

Filed Date: 5/20/24.
Accession Number: 20240520–5227.
Comment Date: 5 p.m. ET 6/10/24.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD24–7–000.
Applicants: North American Electric Reliability Corporation, Western Electricity Coordinating Council.
Description: North American Electric Reliability Corporation submits Joint Petition for Approval of Proposed Regional Reliability Standard FAC–501–WECC–4.
Filed Date: 5/17/24.
Accession Number: 20240517–5195.
Comment Date: 5 p.m. ET 6/20/24.

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: May 21, 2024.
Debbie-Anne A. Reese,
Acting Secretary.
 [FR Doc. 2024–11675 Filed 5–28–24; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. Each 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. For assistance, please contact FERC Online Support at

FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Docket Nos.	File date	Presenter or requester
Prohibited: None.		
Exempt:		
1. P-1494-000	5-8-2024	U.S. Senate ¹
2. CP24-8-000	5-9-2024	FERC Staff ²
3. ER24-99-000	5-9-2024	U.S. Congress ³

Dated: May 21, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-11670 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24-774-000.

Applicants: Tallgrass Interstate Gas Transmission, LLC.

Description: Compliance filing: TIGT 2024-05-21 Annual Penalty Charge Reconciliation to be effective N/A.

Filed Date: 5/21/24.

Accession Number: 20240521-5164.

Comment Date: 5 p.m. ET 6/3/24.

Docket Numbers: RP24-775-000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: 4(d) Rate Filing: Non-Conforming Agreements Filing (AEP/CO SWG) to be effective 7/1/2024.

Filed Date: 5/21/24.

Accession Number: 20240521-5219.

Comment Date: 5 p.m. ET 6/3/24.

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 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

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Dated: May 22, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-11747 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24-773-000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreements Filing Nextera Energy Eff. June 1, 2024 to be effective 6/1/2024.

Filed Date: 5/20/24.

Accession Number: 20240520-5143.

Comment Date: 5 p.m. ET. 6/3/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

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: May 21, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-11674 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

¹ Senator Markwayne Mullin.

² Correspondence from Alabama-Coushatta Tribe of Texas dated 05/9/2024.

³ Congressman Sean Casten.

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. RM96–1–043]****Standards for Business Practices of Interstate Natural Gas Pipelines; Notice of Minor Correction**

On March 21, 2024, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to amend its regulations to incorporate by reference, with certain enumerated exceptions, the latest version (Version 4.0) of Standards for Business Practices of Interstate Natural Gas Pipelines adopted by the Wholesale Gas Quadrant of the North American Energy Standards Board (NAESB) with comments due on June 4, 2024.¹ On May 21, 2024, NAESB filed a report regarding a minor correction to its Invoicing Related Standards (Version 4.0) to modify standard 3.4.1 related to the technical implementation of the Transportation/Sales Invoice.

Comments on the minor correction may be filed on or before June 4, 2024, along with comments on the NOPR.

Dated: May 21, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–11671 Filed 5–28–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. CP24–468–000]****Texas Gas Transmission, LLC, Gulf Pipeline Company, LLC; Notice of Application and Establishing Intervention Deadline**

Take notice that on May 8, 2024, Texas Gas Transmission, LLC (Texas Gas) and Gulf Pipeline Company, LLC (Gulf South), 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, jointly filed an application under sections 7(b) and 7(c) of the Natural Gas Act (NGA) and part 157 of the Commission's regulations requesting authorization for their Eunice Reliability and Lake Charles Supply Projects (Project). Specifically, Texas Gas proposes to: (1) replace four 1,100 horsepower (HP) and one 2,250 HP reciprocating units with one 8,968 HP Solar T70 gas-fired, turbine-driven unit and one 6,391 HP Solar T60 gas-fired, turbine-driven unit,

and appurtenances at its Eunice Compressor Station in Acadia Parish, Louisiana; (2) install overpressure protection at its existing Woodlawn Junction in Jefferson Davis Parish, Louisiana; and (3) abandon by lease the Project capacity of 120,000 dekatherms per day (Dth/d). Additionally, Gulf South seeks authorization to acquire the Project capacity by lease from Texas Gas. The Project will allow Texas Gas to provide 120,000 Dth/d of new transportation service leased to Gulf South to meet the needs of an electric utility and two natural gas marketers serving end-use customers in the Lake Charles area. Texas Gas estimates the total cost of the Project to be \$72,856,800, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at public.reference@ferc.gov.

Any questions regarding the proposed project should be directed to J. Kyle Stephens, Vice President, Regulatory Affairs at Texas Gas Transmission, LLC and Gulf South Pipeline Company, LLC, 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, by phone at (713) 479–8033, or by email at Kyle.Stephens@bwpipelines.com.

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,¹ within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for

Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on June 11, 2024. How to file protests, motions to intervene, and comments is explained below.

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.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)² and 385.211³ of the Commission's regulations under the NGA, any person⁴ may file a protest to the application. Protests must comply with the requirements specified in section

² 18 CFR 157.10(a)(4).

³ 18 CFR 385.211.

⁴ Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

¹ Standards for Business Practices of Interstate Natural Gas Pipelines, Notice of Proposed Rulemaking, 186 FERC ¶ 61,196 (2024).

¹ 18 CFR (Code of Federal Regulations) 157.9.

385.2001⁵ of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before June 11, 2024.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP24-468-000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. 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; first select "General" and then select "Comment on a Filing"; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number CP24-468-000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To file via any other courier: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 2225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov.

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in

determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,⁶ has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁷ and the regulations under the NGA⁸ by the intervention deadline for the project, which is June 11, 2024. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://www.ferc.gov/resources/guides/how-to/intervene.asp>.

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP24-468-000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. 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; first select "General" and then select "Intervention." The eFiling feature includes a document-less intervention option; for more information, visit <https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf>; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to

intervene must reference the Project docket number CP24-468-000.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

To file via any other courier: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail or email at: Kyle Stephens, Vice President, Regulatory Affairs, Texas Gas Transmission, LLC and Gulf South Pipeline Company, LLC, 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, or by email at Kyle.Stephens@bwpipelines.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed⁹ motions to intervene are automatically granted by operation of Rule 214(c)(1).¹⁰ Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.¹¹ A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be 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 as described above. The eLibrary link also provides access to the texts of all formal documents issued by the

⁹ The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

¹⁰ 18 CFR 385.214(c)(1).

¹¹ 18 CFR 385.214(b)(3) and (d).

⁶ 18 CFR 385.102(d).

⁷ 18 CFR 385.214.

⁸ 18 CFR 157.10.

⁵ 18 CFR 385.2001.

Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Intervention Deadline: 5:00 p.m. Eastern Time on June 11, 2024.

Dated: May 21, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

[FR Doc. 2024-11673 Filed 5-28-24; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OARM-2016-0762; FRL-12004-01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; General Administrative Requirements for Assistance Programs (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), General Administrative Requirements for Assistance Programs (EPA ICR Number 0938.23, OMB Control Number 2030-0020) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through June 30, 2024. Public comments were previously requested via the **Federal Register** on September 28, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before June 28, 2024.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OARM-2016-0762 to EPA online using www.regulations.gov (our preferred method), by email to docket_oms@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200

Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:

Amanda Kemp, Office of Grants and Debarment, National Policy, Training and Compliance Division, 3903R, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202-564-0209; fax number: 202-565-2470; email address: kemp.amanda@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through June 30, 2024. 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.

Public comments were previously requested via the **Federal Register** on September 28, 2023 during a 60-day comment period (88 FR 66840). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The information is collected from applicants and recipients of EPA assistance to monitor adherence to the programmatic and administrative requirements of the Agency's financial assistance program. The information collected is used to make awards, pay recipients, and collect information on how Federal funds are being spent. EPA needs this information to meet its Federal stewardship responsibilities. This ICR renewal requests authorization for the collection of information under

EPA's General Regulation for Assistance Programs, which establishes minimum management requirements for all recipients of EPA grants or cooperative agreements (assistance agreements). These regulations include only those provisions mandated by statute or added by EPA to ensure sound and effective financial assistance management with respect to Disadvantaged Business Enterprise (DBE) utilization. The information required by these regulations will be used by EPA award officials to make assistance awards and assistance payments and to verify that the recipient is using Federal funds appropriately.

Form numbers: listed in supporting statement.

Respondents/affected entities: The primary recipients of EPA assistance agreements are state and local governments, Indian Tribes, educational institutions, and not-for-profit institutions.

Respondent's obligation to respond: Required to obtain an assistance agreement (40 CFR part 30, 40 CFR part 31, and 40 CFR part 33 for awards made prior to December 26, 2014, and 2 CFR 200, 2 CFR 1500, and 40 CFR part 33 for awards made after December 26, 2014).

Estimated number of respondents: 9,821 (total).

Frequency of response: On occasion, quarterly, and annually.

Total estimated burden: 302,030 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$19,719,538 (per year), which includes \$0 annualized capital or operation & maintenance costs.

Changes in the estimates: There is an increase of 207,424 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase occurred for several reasons. First, EPA received unprecedented levels of funding to award grants under the American Rescue Plan (ARP), the Bipartisan Infrastructure Bill (BIL), and the Inflation Reduction Act (IRA). This led to a significant increase in number of grant applications received and awards made under various EPA grant programs. EPA also revised its approach to more accurately estimate the number of ongoing grant recipients who are subject to the requirements for record keeping and submittal of quarterly progress reports. In addition, EPA reviewed the burden assumptions in the ICR to ensure that they reflect the Agency's current experiences under its grant programs. EPA made adjustments to increase the burden hour estimates

for three of the requirements based on consultations with grant recipients.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2024-11764 Filed 5-28-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OLEM-2023-0416; FRL-12003-01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Materials Management (New)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Materials Management (EPA ICR Number 2789.01, OMB Control Number 2050-NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a request for approval of a new collection. Public comments were previously requested on the overall collection via the **Federal Register** on September 29, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments on this specific information request.

DATES: Comments may be submitted on or before June 28, 2024.

ADDRESSES: Submit written comments and recommendations to OMB for the proposed information collection 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:

Hannah Blaufuss, Resource Conservation and Sustainability Division, Office of Resource Conservation and Recovery, 5306P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202-564-5614; email address: Blaufuss.hannah@epa.gov.

SUPPLEMENTARY INFORMATION: This is a request for approval of a new information collection under EPA’s Materials Management Generic ICR. 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.

Public comments were previously requested on the overall collection via the **Federal Register** on September 29, 2023 during a 60-day comment period (88 FR 67277). This notice allows for an additional 30 days for public comments. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA’s public docket, visit <http://www.epa.gov/dockets>.

Abstract: Several statutes including the Save our Seas 2.0 Act (SOS 2.0) (Pub. L. 116-224), the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), and the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580) direct EPA to implement grants and programs promoting efficient and equitable non-hazardous waste management in the United States. EPA’s Office of Land and Emergency Management, Office of Resource Conservation and Recovery (ORCR) is charged with, among other responsibilities, assuring that associated programs, policies, and grant monies are properly targeted to meet those goals. This proposed information collection is designed to provide ORCR with the timely and consistent information on waste/materials generation, disposition, and recovery it needs to fulfill that mission. Specifically, it will allow EPA to develop and use new forms and methods to support additional grant reporting requirements and volume resulting from recent funding legislation. Furthermore, the collection will allow EPA to use interviews, focus groups, and surveys to inform the Agency’s understanding of methods, amounts, and economics of solid waste collection, management, recovery, reduction, and reuse.

EPA is recommending that OMB provides clearance for the Agency to conduct this set of associated information collection activities as a hybrid generic ICR. As described in OMB Memo “Paperwork Reduction Act—Generic Clearances” from May 28, 2010:

A generic ICR is a request for OMB approval of a plan for conducting more than one information collection using very similar methods when (1) the need for and the overall practical utility of the data collection can be evaluated in advance, as part of the review of the proposed plan, but (2) the agency cannot determine the details of the

specific individual collections until a later time.

To use a generic ICR, agencies follow the traditional ICR process to initially request OMB clearance for a general set of related information collection activities. Agencies then file subsequent requests (ICs) to gain clearance for specific actions on an as-needed basis. However, because clearance for many of the common elements (such as the agency’s authority to collect information, the scope and practical utility of information to be collected, the mechanisms and methodologies that will be employed, and the overall estimates of respondent burden) are established in the initial request, the content of, and approval process for, individual ICs can be, to varying extents, abridged. Within the range of generic ICR types, hybrid generic ICRs require the highest level of public and OMB review—with each IC submission having its own public notice and 30 day comment period announced in the **Federal Register**. EPA believes that a hybrid generic ICR is the most appropriate model to be used in this case because it: (1) allows the Agency to react quickly to evolving national strategies and infrastructure improvement plans; (2) allows the Agency to apply insight gathered in initial ICs to inform the need, scope, and methodologies used in subsequent information collections; and, (3) maintains the public’s and OMB’s ability to apply robust scrutiny to all proposed collections. Given the demonstrated need for fundamental waste generation and management information, the evolving nature of these data, and the expectations for pace/progress placed on ORCR, pursuing individual conventional ICRs to gather the required information would be impractical.

Form numbers: To be included in individual IC requests.

Respondents/affected entities: The grant reports would be administered to grantees which include U.S. States and Territories, communities of U.S. states, federally recognized Native American Tribes, and intertribal consortia. Additional information collections used to assess waste generation and management systems across the country may expand that respondent universe to include, non-profit organizations, public-private partnerships, U.S. cities and municipalities, waste management and recycling facilities, and individuals.

Respondent’s obligation to respond: Grant recipients will be required to submit progress and final reports according to the Infrastructure

Investment and Jobs Act (IIJA) (Pub. L. 117–58). Other information collection activities will be voluntary.

Estimated number of respondents: 146,345 (total).

Frequency of response: Grant recipients are required to report on a quarterly basis. Other information collections will be determined on an activity-by-activity basis, but no more than annually.

Total estimated burden: 15,397 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$1,001,153 (per year) which assumes a 100% response rate, annualized capital or operation & maintenance costs are not expected.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2024–11765 Filed 5–28–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OMS–2024–0127; FRL–11966–01–OMS]

Agency Information Collection Activities; Proposed Information Collection Request; Comment Request; Background Checks for Contractor Employees (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), Background Checks for Contractor Employees (Renewal) (EPA ICR Number 2159.09, OMB Control Number 2030–0043) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through November 30, 2024. This notice allows for 60 days for public comments.

DATES: Comments must be submitted on or before July 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OMS–2024–0127, to EPA online using www.regulations.gov (our preferred method), by email oei.docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all

comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Brandon R. Hawkins, Policy and Oversight Branch, Office of Acquisition Solutions (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–250–8897; email address: Hawkins.Brandon.R@epa.gov.

SUPPLEMENTARY INFORMATION: This is a request for approval of a proposed extension of the ICR, which is currently approved through November 30, 2024. 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.

This notice allows 60 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate forms of information technology. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the

opportunity to submit additional comments to OMB.

Abstract: The EPA uses contractors to perform services throughout the nation with regard to environmental emergencies involving the release, or threatened release, of oil, radioactive materials, or hazardous chemicals that may potentially affect communities and the surrounding environment. The Agency may request contractors responding to any of these types of incidents to conduct background checks and apply Government-established suitability criteria in title 5 CFR Administrative Personnel 731.104 *Appointments Subject to Investigation*, 732.201 *Sensitivity Level Designations and Investigative Requirements*, and 736.102 *Notice to Investigative Sources* when determining whether employees are acceptable to perform on given sites or on specific projects. In addition to emergency response contractors, EPA may require background checks for contractor personnel working in sensitive sites or sensitive projects. The background checks and application of the Government's suitability criteria must be completed prior to contract employee performance. The contractor shall maintain records associated with all background checks. Background checks cover citizenship or valid visa status, criminal convictions, weapons offenses, felony convictions, and parties prohibited from receiving federal contracts.

Form Numbers: None.

Respondents/affected entities: Private Contractors.

Respondent's obligation to respond: Required to obtain a benefit per Title 5 CFR Administrative Personnel 731.104 *Appointments Subject to Investigation*, 732.201 *Sensitivity Level Designations and Investigative Requirements*, and 736.102 *Notice to Investigative Sources*.

Estimated number of respondents: 1,000 (total).

Frequency of response: Triennial.

Total estimated burden: 1,000 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$208,720 (per year), which includes \$0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is no change in the hours in the total estimated respondent burden compared with the ICR currently approved by OMB.

Pamela D. Legare,

Director, Office of Acquisition Solutions.

[FR Doc. 2024–11775 Filed 5–28–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY**[EPA-HQ-OMS-2024-0126; FRL-11962-01-OMS]****Proposed Information Collection Request; Comment Request; Drug Testing for Contractor Employees (Renewal)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), “Drug Testing for Contractor Employees (Renewal)” (EPA ICR No. 2183.09, OMB Control No. 2030-0044) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through July 31, 2024. 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.

DATES: Comments must be submitted on or before July 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OMS-2024-0126 online using www.regulations.gov (our preferred method), by email to oei.docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Pamela Leftrict, Policy Oversight Branch, Office of Acquisition Solutions (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564-9463; email address: leftrict.pamela@epa.gov.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be

viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA’s public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This ICR applies to a contractor who performs response services at sensitive sites with serious security concerns where the Agency and public interest would best be protected through drug testing of contractor employees. It requires the contractor to test employees for the use of marijuana, cocaine, opiates, amphetamines, phencyclidine (PCP), and any other controlled substances. Only contractor employees who have been tested within the previous 90 calendar days and have passing drug test results may be directly engaged in on-site response work and/or on-site related activities at designated sites with significant security concerns. The Agency may request contractors responding to any of these types of incidents to conduct drug testing and apply Government-established suitability criteria in Title 5 CFR Administrative Personnel 731.104 *Appointments Subject to Investigation*, 732.201 *Sensitivity Level Designations and Investigative Requirements*, and 736.102 *Notice to Investigative Sources* when determining whether employees

are acceptable to perform on given sites or on specific projects.

Form Numbers: None.

Respondents/affected entities: Private Contractors.

Respondent’s obligation to respond:

Required to obtain a benefit per Title 5 CFR Administrative Personnel 731.104 *Appointments Subject to Investigation*, 732.201 *Sensitivity Level Designations and Investigative Requirements*, and 736.102 *Notice to Investigative Sources*.

Estimated number of respondents: 500 (total).

Frequency of response: annual.

Total estimated burden: 1,125 hours (per year). Burden is defined at 5 CFR 1320.03(b) *Total estimated cost:* \$133,010 (per year), includes \$0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the hours in the total estimated respondent burden compared with the ICR currently approved by OMB.

Pamela D. Legare,

Director, Office of Acquisition Solutions.

[FR Doc. 2024-11773 Filed 5-28-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY**[EPA-HQ-OEJECR-2023-0530; FRL-12002-01-OMS]****Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Environmental Justice Thriving Communities Technical Assistance Centers (TCTAC) Program: Post-Award Reporting and Public Outreach Information Collections (New)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Environmental Justice Thriving Communities Technical Assistance Centers (TCTAC) Program: Post-Award Reporting and Public Outreach Information Collections (EPA ICR Number 2794.01, OMB Control Number 2035-NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** on November 15, 2023 during a 60-day

comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before June 28, 2024.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OEJECR–2023–0530, to EPA online using www.regulations.gov (our preferred method), by email to Docket_OMS@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:

Aarti Iyer, Office of the Chief Financial Officer, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; email address: iyer.aarti@epa.gov; phone: 202–564–0214.

SUPPLEMENTARY INFORMATION: This is a request for approval of a new collection. 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.

Public comments were previously requested via the **Federal Register** on November 15, 2023 during a 60-day comment period (88 FR 78353). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: To help expand historically underserved and overburdened

communities' access to critical resources, the U.S. Environmental Protection Agency (EPA) has collaborated with the U.S. Department of Energy to develop the Environmental Justice Thriving Communities Technical Assistance Centers (TCTAC) Program. The 18 Centers will operate in cooperative agreements with EPA to remove barriers and improve access for communities who wish to apply for financial assistance awards to tackle their environmental justice concerns. The Centers will provide assistance and training to build capacity in: identifying sources of funding; navigating grant application systems; compiling strong grant proposals; managing grants; and developing partnerships and coalitions. With this Information Collection Request (ICR), EPA seeks authorization to collect post-award information from each Center to track their progress. Collection of this information enables EPA to assess and manage the TCTAC Program, which ensures responsible stewardship of public funds; rigorous evidence-based learning and improvement; and transparent accountability to the American public. This ICR also requests authorization for the Centers to collect input and insights from communities who seek to obtain technical assistance services, as well as stakeholders who have valuable experience and expertise in community engagement and empowerment. These information collections will enable the Centers to document local priorities, needs, and norms to ensure that they develop useful and relevant technical assistance and training services. Furthermore, feedback about these services will enable the Centers to conduct self-assessments to identify best practices and areas for improvement. Lastly, this ICR requests authorization for the National Centers in the TCTAC Program to conduct quarterly needs assessments for the Regional Centers, in order to identify the best ways in which the National Centers can support, expand, and bolster the technical assistance that local communities may need.

Form Numbers: None.

Respondents/affected entities:

Recipients of financial assistance awards from the Environmental Justice Thriving Communities Technical Assistance Centers (TCTAC) Program, community members, stakeholders.

Respondent's obligation to respond:

Required for financial assistance award recipients to obtain or retain a benefit (CAA 103(b), CWA 104(b), FIFRA 20(a), MPRSA 203, SDWA 1442(b), SWDA 8001(a), and TSCA 10(a)). Voluntary for

public outreach information collections via surveys and focus groups.

Estimated number of respondents: 20,498.

Frequency of response: Varies.

Total estimated burden: 6,359 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$201,712 (per year), there are no annualized capital or operation & maintenance costs.

Changes in the Estimates: This is a new collection, and so does not involve any program changes or burden adjustments.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2024–11769 Filed 5–28–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0335; FRL–12007–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; School Integrated Pest Management Awards Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), School Integrated Pest Management Awards Program, (EPA ICR Number 2531.03 and OMB Control Number 2070–0200) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through May 31, 2024. Public comments were previously requested via the **Federal Register** on August 14, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments must be submitted on or before June 28, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2023–0335, to EPA online using www.regulations.gov (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change

including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:

Carolyn Siu, Office of Program Support (7602M), Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564-0335; email address: siu.carolyn@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through March 31, 2024. 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.

Public comments were previously requested via the **Federal Register** on August 14, 2023 during a 60-day comment period (88 FR 55039). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA’s public docket, visit <http://www.epa.gov/dockets>.

Abstract: This ICR covers the paperwork activities associated with the U.S. Environmental Protection Agency’s new program to encourage the use of Integrated Pest Management (IPM) as the preferred approach to pest control in the nation’s schools. IPM is a smart, sensible, and sustainable approach to pest control that emphasizes the remediation of pest conducive conditions. IPM combines a variety of pest management practices to provide effective, economical pest control with the least possible hazard to people, property, and the environment. These practices involve exclusion of pests, maintenance of sanitation, and the judicious use of pesticides.

EPA’s vision is that all students in the U.S. will experience the benefits provided by an IPM program in their school district. The Agency’s IPM implementation efforts are based on a wholesale approach aimed at kindergarten through 12th grade public and Tribal schools. The Agency intends to use the information collected through this ICR to encourage school districts to implement IPM programs and to recognize those that have attained a notable level of success. Since IPM implementation occurs along a continuum, the School IPM (SIPM) incentive program will recognize each milestone step a school district must take to begin, grow, and sustain an IPM program.

This program has five award categories—Great Start, Leadership, Excellence, Sustained Excellence, and Connector. The first four categories are stepwise levels that are reflective of the effort, experience, and, ultimately, success that results from implementing EPA-recommended IPM tactics that protect human health and the environment. Schools with pest infestations are not only exposed to potential harm to health and property, but also to stigmatization. The SIPM recognition program will give districts across the nation the opportunity to receive positive reinforcement through public recognition of their efforts in implementing pest prevention and management strategies.

Form numbers: 9600-054.

Respondents/affected entities: School districts or entities that represent them, which include the following North American Industry Classification System (NAICS) Codes: 6111—Elementary and Secondary Schools, 6244—Child Day Care Services, 56172—Janitorial Services, 56173—Landscaping Services, 56171—Exterminating and Pest Control Services, and 5617—Services to Buildings and Dwellings.

Respondent’s obligation to respond: Voluntary but required to retain a benefit.

Estimated number of respondents: 53 (total).

Frequency of response: Occasionally.

Total estimated burden: 914 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$98,358 (per year), includes \$0 annualized capital or operation & maintenance costs.

Changes in the estimates: There are minor corrections to the burden from the last renewal for the Great Start, Model of Sustained Excellence and the Connector Award which were miscalculated but still reflect no change in the actual burden. There were no

changes in the number of respondents and the Agency burden hours over the previous renewal cycle. The only change is that the cost estimates were updated using the May 2022 wage rates. This change is an adjustment.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-11778 Filed 5-28-24; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0931; FR ID 222601]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before June 28, 2024.

ADDRESSES: Comments should be sent to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Your comment must be submitted into www.reginfo.gov per the above instructions for it to be considered. In addition to submitting in www.reginfo.gov also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to PRA@fcc.gov and to Cathy.Williams@fcc.gov. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418-2918. To view a

copy of this information collection request (ICR) submitted to OMB: (1) go to the web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called “Currently Under Review,” (3) click on the downward-pointing arrow in the “Select Agency” box below the “Currently Under Review” heading, (4) select “Federal Communications Commission” from the list of agencies presented in the “Select Agency” box, (5) click the “Submit” button to the right of the “Select Agency” box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to

minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

OMB Control Number: 3060–0931.
Title: Section 80.103, Digital Selective Calling (DSC) Operating Procedures—Maritime Mobile Identity (MMSI).
Form Number: N/A.
Type of Review: Extension of a currently approved collection.
Respondents: Individuals or households; business or other for-profit entities and Federal Government.
Number of Respondents and Responses: 40,000 respondents; 40,000 responses.

Estimated Time per Response: .25 hours.
Frequency of Response: On occasion reporting requirement and third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is in 47 U.S.C. 154, 303, 307(e), 309 and 332 of the Communications Act of 1934, as amended. The reporting requirement is contained in international agreements and ITU–R M.541.9.

Total Annual Burden: 10,000 hours.
Total Annual Cost: No cost.
Needs and Uses: The information collected is necessary to require owners of marine VHF radios with Digital Selective Calling (DSC) capability to register information such as the name, address, type of vessel with a private entity issuing marine mobile service

identities (MMSI). The information would be used by search and rescue personnel to identify vessels in distress and to select the proper rescue units and search methods.

The requirement to collect this information is contained in international agreements with the U.S. Coast Guard and private sector entities that issue MMSI’s.

The information is used by private entities to maintain a database used to provide information about the vessel owner in distress using marine VHF radios with DSC capability. If the data were not collected, the U.S. Coast Guard would not have access to this information which would increase the time and effort needed to complete a search and rescue operation.

Federal Communications Commission.
Marlene Dortch,
Secretary, Office of the Secretary.
[FR Doc. 2024–11777 Filed 5–28–24; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID 222500]

Deletion of Items From May 23, 2024 Open Meeting

May 22, 2024.
The following items have been deleted from the list of items scheduled for consideration at the Thursday, May 23, 2024, Open Meeting. Item Nos. 5 and 6 were adopted by the Commission on May 20, 2024. Item No. 2 was adopted and released on May 21, 2024. The items were previously listed in the Commission’s Sunshine Notice on Thursday, May 16, 2024.

Item No.	Bureau	Subject
2	MEDIA	<i>Title:</i> Restricted Adjudicatory Matter. <i>Summary:</i> The Commission will consider a restricted adjudicatory matter from the Media Bureau.
5	ENFORCEMENT	<i>Title:</i> Enforcement Bureau Action. <i>Summary:</i> The Commission will consider an enforcement action.
6	ENFORCEMENT	<i>Title:</i> Enforcement Bureau Action. <i>Summary:</i> The Commission will consider an enforcement action.

Federal Communications Commission.
Marlene Dortch,
Secretary.
[FR Doc. 2024–11781 Filed 5–28–24; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

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, invites the general public and other Federal agencies to take this opportunity to comment on the request to renew the existing information collections described below (OMB Control No. 3064–0097, –0115, and –0208). The notice of the proposed renewal for these

information collections were previously published in the **Federal Register** on March 5, 2024 and March 11, 2024, allowing for a 60-day comment period.

DATES: Comments must be submitted on or before June 28, 2024.

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 7:00 a.m. and 5:00 p.m.

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:

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:** Interagency Notice of Change in Director or Executive Officer.

OMB Number: 3064–0097.

Forms: 6822/02.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0097]

Information collection (IC) (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. Interagency Notice of Change in Director or Executive Officer, 12 USC 1831i (Mandatory).	Reporting (On Occa- sion).	23	2.7	02:00	124
Total Annual Burden (Hours) .....	.....	.....	.....	.....	124

Source: FDIC.

General Description of Collection: Section 32 of the FDIA (12 U.S.C. 1831i) requires an insured depository institution or depository institution holding company under certain circumstances to notify the appropriate federal banking agency of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of such institution at least 30 days before such addition or employment becomes effective. Section 32 of the FDIA also provides that the FDIC may disapprove an individual's service as a

director or senior executive officer of certain state nonmember banks or state savings associations if, upon assessing the individual's competence, experience, character, and integrity, it is determined that the individual's service would not be in the best interest of the depositors of the institution or the public. The Interagency Notice of Change in Director or Senior Executive Officer, with the information contained in the Interagency Biographical and Financial Report (described above) as an attachment, is used by the FDIC to collect information relevant to assess

the individual's competence, experience, character, and integrity. There is no change in the methodology or substance of this information collection. The reduction in estimated annual burden (from 214 hours in 2021 to 124 hours currently) is due to the decrease in the estimated number of annual responses.

2. **Title:** Prompt Corrective Action
OMB Number: 3064–0115

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0115]

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)
Prompt Corrective Action, 12 USC 1831o (Vol- untary).	Reporting (Annual)	4	4	04:00	64
Total Annual Burden (Hours) .....	.....	.....	.....	.....	64

Source: FDIC.

General Description of Collection: The Prompt Corrective Action (PCA) provisions of section 38 of the Federal Deposit Insurance Act requires or permits the FDIC and other federal banking agencies to take certain supervisory actions when FDIC-insured

institutions fall within certain capital categories. They also restrict or prohibit certain activities and require the submission of a capital restoration plan when an insured institution becomes undercapitalized. Various provisions of the statute and the FDIC's implementing

regulations require the prior approval of the FDIC before an FDIC-supervised institution, or certain insured depository institutions, can engage in certain activities, or allow the FDIC to make exceptions to restrictions that would otherwise be imposed. This

collection of information consists of the applications that are required to obtain the FDIC's prior approval to engage in these activities. There is no change in the methodology or substance of this information collection. The estimated burden remains unchanged from 2021.

3. *Title:* Restrictions on Qualified Financial Contracts of Subsidiaries of certain FDIC Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions

OMB Number: 3064–0208
Forms: None
Affected Public: Private Sector
Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN
[OMB No. 3064–0208]

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)
Restrictions on Qualified Financial Contracts of Subsidiaries of Certain FDIC-Supervised Institutions and Applicable Subsidiaries; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, 12 CFR 382 (Voluntary).	Reporting (On Occasion).	1	1	10:00	10
Total Annual Burden (Hours) .....	.....	.....	.....	.....	10

General Description of Collection: Part 382 of the FDIC regulations (part 382) is necessary to give effect to such cross-default restrictions in the International Swaps and Derivatives Association, Inc. (ISDA) 2015 Universal Resolution Stay Protocol (ISDA Protocol). Part 382 requires that FDIC-supervised institutions that are subsidiaries of global systemically important banks (GSIBs) and their counterparties either adhere to the ISDA Protocol or take the prescribed steps to amend the contractual provisions of their Qualified Financial Contracts (QFCs), consistent with the requirements in the rule, within a specified period of time. If such institutions elect to amend their QFCs in lieu of adhering to the ISDA Protocol, they must seek the FDIC's approval of the proposed amendments, giving rise to this information collection. The information collection is necessary to ensure QFCs are amended in compliance with part 382. The rule applies to FDIC-supervised institutions that are subsidiaries of GSIBs and sets forth requirements parallel to those contained in similar rules recently published by the Federal Reserve Board and the Office of the Comptroller of the Currency with regard to entities they supervise to ensure consistent regulatory treatment of QFCs among the various entities within a GSIB group.

There is no change in the methodology or substance of this information collection. The total estimated annual burden for this information collection is 10 hours, which is a decrease of 10 hours from the 2021 information collection submission (20 hours). This decrease is a result of a reduction in the estimated annual number of respondents because of the

automation and standardization of business processes.

Request for Comment

Comments are invited on: (a) Whether the collection of information is 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 collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.
Dated at Washington, DC, on May 23, 2024.
James P. Sheesley,
Assistant Executive Secretary.
[FR Doc. 2024–11718 Filed 5–28–24; 8:45 am]
BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS24–12]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of special closed meeting.

Description: In accordance with section 1104(b) of title XI of the

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a Special Closed Meeting on this date.
Location: Virtual meeting via Webex.
Date: May 22, 2024.
Time: 11:10 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter pursuant to section 1104(b) of title XI (12 U.S.C. 3333(b)). No action was taken by the ASC.

James R. Park,
Executive Director.
[FR Doc. 2024–11762 Filed 5–28–24; 8:45 am]
BILLING CODE 6700–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single Source Cooperative Agreement To Fund Universidad del Valle de Guatemala

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the award of approximately \$5,000,000 with an expected total funding of approximately \$25,000,000 over a 5-year period, to the Universidad del Valle de

Guatemala. This award will build upon previously funded Global Health Security projects, and specifically surveillance activities by CDC to collaboratively work with host countries to create sustainable systems that can inform local public health policy.

DATES: The period for this award will be September 30, 2024, through September 29, 2029.

FOR FURTHER INFORMATION CONTACT: Shana Eatman, Centers for Disease Control and Prevention, 1600 Clifton Rd., Atlanta, GA, Telephone: 770-488-3933, Email: DGHPNOFOs@cdc.gov.

SUPPLEMENTARY INFORMATION: The single source award will build on existing public health infrastructure and CDC-supported surveillance and workforce development platform in the region. This award will enable CDC to work collaboratively with recipients to sustain its Global Health Security Agenda (GHSa) efforts to strengthen health protection, detection, and response capacity in Guatemala/Central America. Universidad del Valle de Guatemala is in a unique position to conduct this work, as it will focus on multi-pathogen key public health impact disease surveillance of respiratory pathogen surveillance, support for entomological activities and public health workforce development.

Summary of the Award

Recipient: Universidad del Valle de Guatemala.

Purpose of the Award: The purpose of this award is to enhance global health security in Guatemala/CA through epidemiologic, clinical, and laboratory-based surveillance. This award should contribute to strengthening national notifiable disease surveillance and translating data into public health action.

Amount of Award: \$5,000,000 in Federal Fiscal Year (FFY) 2024 funds, with a total estimated \$25,000,000 for the 5-year period of performance, subject to availability of funds. Please note, Year 1 funding is as follows: \$5,000,000 for Core Component 1, \$10,000,000 for Approved but Unfunded (ABU) Component 2, \$15,000,000 Component 3 (ABU), and \$15,000,000 for (ABU) Component 4.

Period of Performance: September 30, 2024, through September 29, 2029.

Authority: This program is authorized under section 307 of the Public Health Service Act [42 U.S.C. 242j] and section 317(k)(2) of the Public Health Service Act [42 U.S.C. 247(b)(k2)].

Dated: May 21, 2024.

Jamie Legier,

*Acting Director, Office of Grants Services,
Centers for Disease Control and Prevention.*

[FR Doc. 2024-11725 Filed 5-28-24; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS-2540-24]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by June 28, 2024.

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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in

this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT:

William Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Skilled Nursing Facility and Skilled Nursing Facility Complex Cost Report; *Use:* The primary function of the cost report is to implement the principles of cost reimbursement that require that SNFs maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Specifically, CMS-2540-24 collects discrete data, previously reported in summary form, used in determining the cost weights for the SNF market basket and for payment adequacy analyses. SNFs and SNF health care complexes participating in the Medicare program submit these cost reports annually to report cost and statistical data used by CMS to determine reasonable costs. Essentially the methods of determining costs payable under Medicare involve making use of data available from the provider's accounting records, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries.

We originally published the 30-day notice on April 17, 2024 (89 FR 27413); however, there was a significant delay

between the publication of the notice and the associated files being publicly available. For this reason, we are publishing the 30-day notice again. *Form Number:* CMS-2540-24 (OMB control number: 0938-0463); *Frequency:* Annually; *Affected Public:* Private Sector—Business or other for-profits, Not-for-profit institutions; *Number of Respondents:* 14,189; *Total Annual Responses:* 14,189; *Total Annual Hours:* 2,866,178. (For policy questions regarding this collection contact Luann Piccione at 410-786-5423.)

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024-11741 Filed 5-28-24; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Tribal Consultation Meetings

AGENCY: Office of Early Childhood Development (ECD), Office of Head Start (OHS), and Office of Child Care (OCC), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Head Start Act, notice is hereby given of one joint Tribal consultation session to be held between HHS/ACF ECD, OHS, and OCC leadership and the leadership of Tribal governments operating Tribal Maternal, Infant, and Early Childhood Home Visiting; Tribal Child Care and Development Fund; and Head Start and Early Head Start programs. The purpose of this consultation session is to discuss ways to better meet the needs of Tribal children and their families and issues affecting the delivery of early childhood services in their geographic locations. The consultation will also provide an opportunity for discussion on the review and promulgation of Head Start Program Performance Standards, as required under the Head Start Act. To meet this legislative requirement, one Tribal consultation will be held as part of HHS/ACF or ACF Tribal consultation sessions.

DATES: The meetings will take place July 9 and 10, 2024, at the following times:

- July 9 from 9 a.m.–5 p.m. Mountain Standard Time; and
- July 10 from 9 a.m.–3 p.m. Mountain Standard Time

ADDRESSES: The meetings are in-person in Fort McDowell, Arizona, at: We-Ko-Pa Casino Resort, 10438 WeKoPa Way, Fort McDowell, AZ 85264

FOR FURTHER INFORMATION CONTACT:

Todd Lertjuntharangool, Regional Program Manager, Region 11, Office of Head Start, email Todd.Lertjuntharangool@acf.hhs.gov, or phone (866) 763-6481. Additional information and online meeting registration will be forthcoming.

SUPPLEMENTARY INFORMATION: In accordance with section 640(l)(4) of the Head Start Act, 42 U.S.C. 9835(1)(4), ACF announces a joint Tribal consultation session to be held between HHS/ACF ECD, OHS, and OCC leadership and the leadership of Tribal governments operating Tribal Maternal, Infant, and Early Childhood Home Visiting; Tribal Child Care and Development Fund; and Head Start and Early Head Start programs.

The agenda for the scheduled joint consultation reflects the statutory purposes of Head Start Tribal consultations related to meeting the needs of American Indian and Alaska Native (AIAN) children and families and will include the opportunity to discuss topics such as the Tribal Request for Information and recent changes to AIAN Head Start eligibility requirements. The consultation will also provide an opportunity for discussion on the review and promulgation of Head Start Program Performance Standards under section 641A(a)(2)(D) of the Head Start Act. OHS will also highlight the progress made in addressing issues and concerns raised in the previous OHS Tribal consultations.

The consultation session includes elected or appointed leaders of Tribal governments and their designated representatives. Designees must have a letter from the Tribal government authorizing them to represent the Tribe. Tribal governments must submit the designee letter at least 3 days before the consultation session to AIANheadstart@acf.hhs.gov. Other representatives of Tribal organizations and Native non-profit organizations are welcome to attend as observers.

Within 45 days of the consultation session, a detailed report of each consultation session will be available for all Tribal governments receiving funds for Head Start and Early Head Start programs. Tribes can submit written testimony for the report to AIANheadstart@acf.hhs.gov prior to each consultation session or within 30 days of each meeting. OHS will summarize oral testimony and comments from the consultation

sessions in each report without attribution, along with topics of concern and recommendations.

Khari M. Garvin,

Director, Office of Head Start.

Megan E. Steel,

ACF Certifying Officer.

[FR Doc. 2024-11783 Filed 5-24-24; 11:15 am]

BILLING CODE 4184-40-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2024-N-2149]

Agency Information Collection Activities; Proposed Collection; Comment Request; De Novo Classification Process (Evaluation of Automatic Class III Designation)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions related to the De Novo Classification Process.

DATES: Either electronic or written comments on the collection of information must be submitted by July 29, 2024.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 29, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically,

including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2024-N-2149 for "Agency Information Collection Activities; Proposed Collection; Comment Request; De Novo Classification Process (Evaluation of Automatic Class III Designation)." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in

its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-8867, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether

the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

De Novo Classification Process (Evaluation of Automatic Class III Designation)—21 CFR Part 860, Subpart D

OMB Control Number 0910-0844—Extension

This information collection supports FDA regulations and information collection discussed in associated guidance. Sections 201(h), 513(a) and (f), 701(a), and 704 of the Federal Food, Drug, and Cosmetic (FD&C Act) (21 U.S.C. 321(h), 360c(a) and (f), 371(a), and 374) establish a comprehensive system for the regulation of medical devices intended for human use. Section 513(f)(2) of the FD&C Act provides for a "De Novo" classification process, most recently amended by section 3101 of the 21st Century Cures Act (Pub. L. 114-255). The final rule "Medical Device De Novo Classification Process" (86 FR 54826), established 21 CFR part 860, subpart D (sections 860.200 through 860.260) to implement provisions in section 513(f)(2) of the FD&C Act. These regulations govern format and content elements for De Novo device classification requests, as well as withdrawal of the requests, and explain FDA procedures for acceptance, review, and granting or denying a request.

In addition to regulatory requirements set forth in 21 CFR part 860, subpart D, the guidance document entitled "Acceptance Review for De Novo Classification Requests" communicates our thinking on criteria set out in 21 CFR part 860.230, in assessing whether a De Novo request should be accepted for substantive review. The guidance document includes an "Acceptance Checklist" to assist respondents in this regard.

The collections of information described by this notice are necessary to satisfy the previously mentioned statutory requirements for administration of this voluntary

submission program. FDA uses the information to evaluate whether a medical device may be reclassified from Class III into Class I or II, and if applicable, to determine the general and/or special controls necessary to sufficiently regulate the medical device. Respondents to this information collection are private sector or other for-profit businesses.
FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

21 CFR part 860, subpart D; information collection activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
§§ 860.210, 860.220, 860.230; De Novo requests—format, content, and acceptance elements.	79	1	79	182 hours	14,378
§ 860.230; FDA acceptance of request (<i>GFI Acceptance Checklist</i> ; Appendix A) ¹ .	79	1	79		
§ 860.250; withdrawal of request	5	1	5	0.17 (10 mins.)	1
Total			84		14,379

¹ FDA assumes activities associated with review of the Acceptance Checklist are included in burden for submission of requests captured in row 1.

Our estimated burden for the information collection reflects an overall increase of 2,002 hours and a corresponding increase of 11 responses. We attribute this adjustment to an increase in the number of submissions we received over the last few years.

Dated: May 23, 2024.

Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2024–11743 Filed 5–28–24; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration
[Docket No. FDA–2023–N–4805]

Maria Anzures-Camarena: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.
ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Maria Anzures-Camarena from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Ms. Anzures-Camarena was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. Ms. Anzures-Camarena was given notice of the proposed debarment and an opportunity to request a hearing to show why she should not be debarred. As of March 6, 2024, (30 days after receipt of the notice), Ms. Anzures-Camarena has

not responded. Ms. Anzures-Camarena’s failure to respond and request a hearing constitutes a waiver of her right to a hearing concerning this matter.

DATES: This order is applicable May 29, 2024.

ADDRESSES: Any application by Ms. Anzures-Camarena for special termination of debarment under section 306(d)(4) of the FD&C Act (21 U.S.C. 335a(d)(4)) may be submitted at any time as follows:

Electronic Submissions

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. An application submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application 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 application, that information will be posted on <https://www.regulations.gov>.
 - If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).
- Written/Paper Submissions*
- *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 a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All applications must include the Docket No. FDA–2023–N–4805. Received applications 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 an application with confidential information that you do not wish to be made publicly available, submit your application 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 your application. 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. 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, 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 between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT:

Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240-402-8743, debarments@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On March 17, 2023, Ms. Anzures-Camarena was convicted as defined in section 306(l)(1) of the FD&C Act in the U.S. District Court for the Eastern District of Texas-Beaumont Division when the court accepted her plea of guilty and entered judgment against her for the felony offense of Conspiracy to Traffick in Drugs with Counterfeit Mark in violation of 18 U.S.C. 371, and 18 U.S.C. 2320(a)(4). The underlying facts supporting the conviction are as follows: As contained in the Second Superseding Indictment, and the Factual Basis, between approximately April 2014 and February 2021 Ms. Anzures-Camarena was involved in a conspiracy with drug traffickers to distribute misbranded and counterfeit cough syrup. Specifically, Ms. Anzures-Camarena worked for Woodfield Pharmaceutical LLC as a packaging specialist. Woodfield Pharmaceutical LLC was a part of a group of pharmaceutical companies that included Woodfield Pharmaceutical LLC, a contract manufacturing company, and Woodfield Distribution LLC, a third-party logistics company (collectively, "Woodfield").

On April 25, 2014, Woodfield acquired Pernix Manufacturing LLC (Pernix). Pernix had, in January 2014, entered into an agreement with Byron A. Marshall and his Drug Trafficking

Organization (DTO) to copy and manufacture cough syrup according to the directions of Marshall and his associates. Marshall was not licensed or authorized to distribute cough syrup and any background check of the personal information provided by Marshall to Pernix or later Woodfield would have revealed that he was not a licensed physician as he claimed. Initially, Marshall sought to copy Actavis Prometh VC with Codeine (Actavis). Actavis is a purple, peach-mint flavored prescription cough syrup that was in demand as a street drug. Marshall and his associates wanted to mass produce and traffic a counterfeit version of Actavis that contained promethazine, but not codeine.

On April 24, 2014, Actavis Holdco US discontinued production of Actavis due to its widespread abuse by recreational drug users. A Pernix product-development scientist worked with Marshall and his associates to re-create the Actavis product without codeine and promethazine in order to re-create the syrup base, which is a necessary component of cough syrup. Marshall and his associates would add Promethazine to the counterfeit syrup base prior to bottling and distribution in order to create the street drug. Marshall and his DTO also obtained counterfeited commercial-grade pharmaceutical labels designed to look exactly like the genuine labels for the prescription cough syrup from another supplier. Later in the conspiracy, Marshall and his DTO asked Woodfield employees to reformulate other cough syrup to use in their drug trafficking scheme to include Hi-Tech Promethazine Hydrochloride and Codeine Phosphate Oral Solution (Hi-Tech) and Wockhardt Promethazine Syrup Plain (Wockhardt).

In her position within Woodfield, Ms. Anzures-Camarena assisted in the packaging and delivery of the counterfeit syrup. In addition, when the Marshall DTO exhausted its available supply of promethazine, Ms. Anzures-Camarena was videoed, along with her supervisor, removing controlled substances from Woodfield's vault to deliver to the Marshall DTO. Later, Ms. Anzures-Camarena agreed with other Woodfield employees to create additional syrup base supply not authorized by Woodfield in order to sell that additional supply to Marshall and DTO at a reduced price in order to split the fee with other Woodfield employees, a practice Ms. Anzures-Camarena and other employees called, "double batching." No records of the "double batching" were created.

From 2014 through February 2021, the conspiracy between the Marshall

DTO produced and distributed, or attempted to produce and distribute, approximately 65,920 gallons of counterfeit cough syrup.

FDA sent Ms. Anzures-Camarena, by certified mail, on January 25, 2024, a notice proposing to permanently debar her from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act that Ms. Anzures-Camarena was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal informed Ms. Anzures-Camarena of the proposed debarment and offered her an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Ms. Anzures-Camarena received the proposal and notice of opportunity for a hearing on February 5, 2024. Ms. Anzures-Camarena failed to request a hearing within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and waived any contentions concerning her debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Maria Anzures-Camarena has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Ms. Anzures-Camarena is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses in any capacity the services of Ms. Anzures-Camarena during her debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Ms. Anzures-Camarena provides services in any capacity to a person with an approved or pending drug product application during her period of debarment she will be subject to civil money penalties (section 307(a)(7) of the

FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Ms. Anzures-Camarena during her period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of sections 306 and 307 of the FD&C Act, a “drug product” is defined as a “drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262)” (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Dated: May 23, 2024.
Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2024–11727 Filed 5–28–24; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–2377]

Bayer HealthCare Pharmaceuticals, Inc., et al.; Withdrawal of Approval of Three New Drug Applications

AGENCY: Food and Drug Administration, HHS.
ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of three new drug applications (NDAs) 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 June 28, 2024.
FOR FURTHER INFORMATION CONTACT: Kimberly Lehrfeld, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6226, Silver Spring, MD 20993–0002, 301–796–3137, Kimberly.Lehrfeld@fda.hhs.gov.
SUPPLEMENTARY INFORMATION: The applicants listed in table 1 have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

TABLE 1—NDAs FOR WHICH APPROVAL IS WITHDRAWN

Application No.	Drug	Applicant
NDA 019857	Cipro in Dextrose 5% in Plastic Container (ciprofloxacin) Injectable, 200 milligrams (mg)/100 milliliters (mL) and 400 mg/200 mL.	Bayer HealthCare Pharmaceuticals, Inc., 100 Bayer Blvd., Whippany, NJ 07981.
NDA 021158	Factive (gemifloxacin mesylate) Tablet, Equivalent to (EQ) 320 mg base.	LG Chem Ltd., C/O Parexel International, 2520 Meridian Parkway, Suite 200, Durham, NC 27713.
NDA 021473	Cipro XR (ciprofloxacin hydrochloride) Extended-Release Tablet, EQ 287.5 mg base.	Bayer HealthCare Pharmaceuticals, Inc.

Therefore, approval of the applications listed in table 1, and all amendments and supplements thereto, is hereby withdrawn as of June 28, 2024. Approval of each entire application is withdrawn, including any strengths and dosage forms included in the application but inadvertently missing from table 1. Introduction or delivery for introduction into interstate commerce of products listed in table 1 without an approved NDA 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 table 1 that are in inventory on June 28, 2024 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: May 23, 2024.
Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2024–11721 Filed 5–28–24; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1829]

Platform Technology Designation Program; Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.
ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing the availability of a draft guidance for industry entitled “Platform Technology Designation Program for Drug Development.” The purpose of this draft guidance is to provide details about the implementation of the Platform Technology Designation Program established by the PREVENT Pandemics Act. This draft guidance outlines eligibility factors for receiving a platform technology designation, potential benefits of receiving a designation, how to leverage data from designated platform technologies, how

to discuss the planned designation request as part of a milestone meeting, the recommended content of a designation request submission, and the review timelines for a designation request. This draft guidance, when finalized, will represent the current thinking of FDA.
DATES: Submit either electronic or written comments on the draft guidance by July 29, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance. Submit electronic or written comments on the proposed collection of information in the draft guidance by July 29, 2024.
ADDRESSES: You may submit comments on any guidance at any time as follows:
Electronic Submissions
Submit electronic comments in the following way:
• *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your

comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2024-D-1829 for "Platform Technology Designation Program for Drug Development." 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)).

Submit written requests for single copies of this draft guidance to the Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4162, Silver Spring, MD 20993. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the draft guidance may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Melissa Furness, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4162, Silver Spring, MD 20993, 240-402-8912; or James Myers, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

With regard to the proposed collection of information: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled

"Platform Technology Designation Program for Drug Development." This draft guidance provides details about the implementation of the Platform Technology Designation Program under section 506K of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 356k), which was established by section 2503 of the PREVENT Pandemics Act (2022) and enacted as part of Public Law 117-328. This draft guidance, when finalized, will outline criteria for receiving a platform technology designation, benefits of receiving a designation, how to leverage data from designated platform technologies, how to discuss the planned designation request as part of a milestone meeting, the recommended content of a designation request submission, and the review timelines for a designation request.

To determine eligibility for designation as a designated platform technology, FDA will first determine whether the technology qualifies as a platform technology. Under section 506K(h)(1) of the FD&C Act, a platform technology is a well understood and reproducible technology, which can may include a nucleic acid sequence, molecular structure, mechanism of action, delivery method, vector, or a combination of any such technologies that FDA determines to be appropriate, where it: (1) is incorporated in or utilized by a drug and is essential to the structure or function of such drug; (2) can be adapted for, incorporated into, or utilized by, more than one drug sharing common structural elements; and (3) facilitates the manufacture or development of more than one drug through a standardized production or manufacturing process or processes. A platform technology designation does not affect product eligibility for any expedited approval pathways if it is otherwise eligible. Sponsors of applications or emergency use authorization requests will also be allowed under certain circumstances to leverage data related to designated platform technologies previously submitted to FDA.

Under section 506K(b) of the FD&C Act, a platform technology is eligible for designation by FDA if: (1) it is incorporated in, or utilized by, an approved drug; (2) preliminary evidence demonstrates that the platform technology has the potential to be incorporated in, or utilized by, more than one drug without an adverse effect on quality, manufacturing, or safety; and (3) data or information submitted by the same party indicates that incorporation or utilization of the platform technology has a reasonable likelihood to bring

significant efficiencies to the drug development or manufacturing process and to the review process.

This draft guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on the “Platform Technology Designation Program.” 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. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Investigational New Drug Regulations

OMB Control Number 0910–0014—
Revision

This information collection supports implementation of the Platform Technology Designation Program under section 506K of the FD&C Act. FDA recommends requesting designation of a platform technology during the investigational new drug phase of drug development for a planned new drug application (NDA) or biologics license application (BLA). Any request for platform technology designation will be reviewed by a team of FDA experts to evaluate the data and information submitted and to examine if the platform technology meets the definitional and eligibility criteria

outlined in sections 506K(h)(1) and (b), respectively, of the FD&C Act. If the sponsor receives a platform technology designation, then information about the platform designation can be leveraged in subsequent applications from the same sponsor. A different sponsor may be able to leverage platform technology data if they receive a full right of reference to the leveraged data under a business arrangement with the originator of the platform technology. If a platform technology receives a platform technology designation, then FDA may take actions to expedite the development and review of any subsequent application submitted under section 505(b) of the FD&C Act or section 351(a) of the Public Health Service Act for a drug that uses or incorporates the designated platform technology pursuant to section 506K(e) of the FD&C Act.

We are issuing a draft guidance for industry entitled “Platform Technology Designation Program for Drug Development,” which outlines: (1) criteria for receiving a platform technology designation, (2) potential benefits of receiving a designation, (3) how to leverage data from designated platform technologies, (4) how to discuss a planned designation request as part of a milestone meeting, (5) the recommended content of a designation request submission, and (6) the review timelines for a designation request.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹—PLATFORM TECHNOLOGY DESIGNATION PROGRAM

Section 506K of the FD&C act	Number of respondents	Number of records per respondents	Total annual records	Average burden per record	Total hours
Platform technology designation request; Guidance for industry section II.C	10	1	10	60	600

¹ There are no capital or operating and maintenance costs associated with the information collection.

Our updated figures are based on our experience with the information collection along with Agency data and reflect burden we attribute to the applicable reporting requirements and to those respondents we believe may incur such burden. These activities include submitting a request for platform technology designation to FDA. These estimates are based on historical metrics obtained during the first year of the Platform Technology Designation Program. We estimate that the number of platform technology designation requests received will increase after the publication of this guidance.

This draft guidance also refers to previously approved FDA collections of information. The collections of information in 21 CFR part 314 relating to the submissions of NDAs have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 relating to the submissions of BLAs have been approved under OMB control number 0910–0338. The collections of information in 21 CFR parts 210 and 211 relating to current good manufacturing practice have been approved under OMB control number 0910–0139.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: May 22, 2024.

Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2024–11686 Filed 5–28–24; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Office of the Secretary****Delegation of Authorities**

Notice is hereby given that I have delegated to the Deputy Secretary within the Office of the Secretary (OS)/ Immediate Office of the Secretary (IOS)/ Office of the Deputy Secretary the authority vested in me as the Secretary of Health and Human Services (HHS) pursuant to section 41 U.S.C. 4712(c)(1), to issue an order denying relief as a final agency action for cases in which the Office of the Inspector General (OIG)/ Office of Investigations has found allegations of whistleblower retaliation to be unsubstantiated. This delegation supersedes any and all delegations of authority within IOS or in any other U.S. Department of Health and Human Services Operating Division or Staff Division relating to denying relief as a final agency action for unsubstantiated whistleblower complaints as determined by OIG (pursuant to 41 U.S.C. 4712(c)(1)). I hereby affirm and ratify any actions taken by the Deputy Secretary of HHS, or other officials, which involve the exercise of these authorities prior to the effective date of this delegation.

This delegation of authority is effective immediately.

This delegation of authority may be re-delegated.

This delegation of authority does not impact any other delegations of authority within any other Department of Health and Human Services Operating Division or Staff Division.

Xavier Becerra,
Secretary.

[FR Doc. 2024–11683 Filed 5–28–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Office of the Director; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Scientific & Technical Review Board on Biomedical & Behavioral Research Facilities, STOD to review grant applications.

Date: June 24, 2024, to June 25, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Santanu Banerjee, Scientific Review Officer (SRO), Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, (RK2)/808–M, Bethesda, MD 20892, (301) 435–5947, santanu.banerjee@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: May 22, 2024.

David W Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11729 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review

Group; Microbiology and Infectious Diseases B Research Study Section.

Date: June 20–21, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Mario Cerritelli, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, MSC 9823, Rockville, MD 20892, 240–669–5199, cerritem@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11696 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Cancer Institute; Amended Notice of Meeting**

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, National Cancer Institute, July 8, 2024, 10:00 a.m. to July 9, 2024, 02:00 p.m., National Cancer Institute, 9609 Medical Center Drive, Bethesda, MD 20892 which was published in the **Federal Register** on May 13, 2024, FR Doc. No. 2024–10293, 89 FR 41445.

This meeting notice is being amended to change the meeting type from closed to partially closed. On July 8, 2024, the open session will be held from 10:00 a.m. to 10:35 a.m. and the closed session will now be held from 10:35 a.m. to 1:45 p.m. On July 9, 2024, the closed session will now be held from 10:00 a.m. to 3:00 p.m. The meeting is partially closed to the public.

Dated: May 22, 2024.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11728 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: June 28, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Sandip Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852, (240) 292-0189, sandip.bhattacharyya@nih.gov.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: July 9, 2024.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Sandip Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G42, Rockville, MD 20852, (240) 292-0189, sandip.bhattacharyya@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856,

Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-11695 Filed 5-28-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Mental Health; Notice of Closed Meeting**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; SSPsyGene RM1 Review Meeting.

Date: June 26, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Evon Abisaid, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Rockville, MD 20852, (301) 827-0399, ereifejes@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: 05/22/2024.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-11730 Filed 5-28-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute on Drug Abuse; Notice of Closed Meetings**

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA Animal Genomics Program + Functional Validation and/or Characterization of Genes or Variants Implicated in Substance Use Disorders.

Date: July 12, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Devon Rene Oskvig, Ph.D., Scientific Review Officer, Division of Extramural Research, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 402-6965, devon.oskvig@nih.gov.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Tools for Decentralized Clinical Trials for Substance Use Disorder.

Date: July 24, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Preethy Nayar, Ph.D., Scientific Review Officer, Division of Extramural Research, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443-4577, nayarp2@csr.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11694 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Community-Engaged Health Equity Research in Neuroscience Initiative.

Date: July 11–12, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: W. Ernest Lyons, Ph.D., Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH/DHHS, NSC, 6001 Executive Boulevard, Rockville, MD 20852, 301–496–4056, lyonse@ninds.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11693 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Planning for Product Development Strategy (R34 Clinical Trial Not Allowed).

Date: July 1, 2024.

Time: 10:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G34, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Vishakha Sharma, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G34, Rockville, MD 20852, 301–761–7036, vishakha.sharma@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11697 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Limited Competition: Revision Applications of Existing NIH Centers for AIDS Research (CFAR) and Developmental Centers for AIDS Research (D–CFAR) Grants (P30 Clinical Trial Not Allowed).

Date: June 20–21, 2024.

Time: 10:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E71, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Samita S. Andreansky, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E71, Rockville, MD 20852, 240–669–2915, samita.andreansky@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 22, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–11699 Filed 5–28–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of

proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer at (240) 276–1243.

Comments are invited on: (a) whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Project: Minority AIDS Initiative-Management Reporting Tools (MAI-MRTs)—(OMB No. 0930–0357)—Renewal

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Substance Abuse Prevention (CSAP) is requesting from the Office of Management and Budget (OMB) approval for the renewal of Minority AIDS Initiative (MAI)

monitoring tools, which includes both youth and adult questionnaires, as well as the quarterly progress report. This revision includes the inclusion of new cohorts, substantial revisions to the youth and adult questionnaires, updates to the data used to estimate response rates and expected numbers of participants by service duration (see Table 1 below).

The cohorts of grantees funded by the MAI and included in this clearance request are:

- Prevention Navigators 2019
- Prevention Navigators 2020
- Prevention Navigators 2021
- Prevention Navigators 2022
- Prevention Navigators 2023

The target population for the grantees will be at-risk minority adolescents and young adults. All MAI grantees are expected to report their monitoring data using SAMHSA’s Strategic Prevention Framework (SPF) and to target minority populations, as well as other high-risk groups residing in communities of color with high prevalence of Substance Abuse and HIV/AIDS. The primary objectives of the monitoring tools include:

- Assess the success of the MAI in reducing risk factors and increasing protective factors associated with the

transmission of the Human Immunodeficiency Virus (HIV), Hepatitis C Virus (HCV) and other sexually transmitted diseases (STD).

- Measure the effectiveness of evidence-based programs and infrastructure development activities such as: outreach and training, mobilization of key stakeholders, substance abuse and HIV/AIDS counseling and education, testing, referrals to appropriate medical treatment and/or other intervention strategies (*i.e.*, cultural enrichment activities, educational and vocational resources, social marketing campaigns, and computer-based curricula).
- Investigate intervention types and features that yield the best outcomes for specific population groups.
- Assess the extent to which access to health care was enhanced for population groups and individuals vulnerable to behavioral health disparities residing in communities targeted by funded interventions.
- Assess the process of adopting and implementing the SPF with the target populations.
- Added questions to capture details on the intervention and the referrals to the record management section (completed by grantee staff).

TABLE 1—ESTIMATES OF ANNUALIZED HOUR BURDEN

Type of respondent activity	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Quarterly Progress Report	183	4	732	4	2,928
Adult questionnaire	10,000	3	30,000	.20	6,000
Youth questionnaire	2,500	3	7,500	.20	1,500
Total	12,683	.....	38,232	.....	10,428

Send comments to SAMHSA Reports Clearance Officer, 5600 Fishers Lane, Room 15E45, Rockville, Maryland 20857, *OR* email a copy to samhsapra@samhsa.hhs.gov. Written comments should be received by July 29, 2024.

Alicia Broadus,
Public Health Advisor.
[FR Doc. 2024–11739 Filed 5–28–24; 8:45 am]
BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2024–0007; OMB No. 1660–0103]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Property Acquisition and Relocation for Open Space.

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will

submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. FEMA invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the property acquisition and relocation for open space process as part of FEMA’s administration of mitigation grants programs and the removal of five instruments from the inventory of this collection that are approved under other OMB Control Numbers.

DATES: Comments must be submitted on or before June 28, 2024.

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: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address FEMA-Information-Collections-Management@fema.dhs.gov or Jennie Orenstein, Branch Chief, FEMA/Mitigation Directorate’s Policy, Tools and Training Branch, at jennie.gallardy@fema.dhs.gov or (202) 212-4071.

SUPPLEMENTARY INFORMATION: On September 16, 2009, FEMA published a Final Rule on Property Acquisition and Relocation for Open Space (44 CFR part 80) that governs property acquisitions for FEMA’s four Hazard Mitigation Assistance (HMA) grant programs, three of which, Pre-Disaster Mitigation, the Hazard Mitigation Grant Program, and the Safeguarding Tomorrow Revolving Loan Fund (RLF) program are authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Pub. L. 93-288, as amended) (42 U.S.C. 5133, 5170c, and 5135) and the fourth (Flood Mitigation Assistance) under Section 1366 of the National Flood Insurance Act (NFIA) of 1968 (Pub. L. 90-448, as amended) (42 U.S.C. 4104c). 44 CFR part 80 requires the collection of information from grant applicants to ensure the voluntary nature of the property acquisitions and to ensure that the property acquired remains in open space in perpetuity.

States, Federally-recognized Tribes (Tribes) and territories as applicants/recipients, per 44 CFR 80.5(b)(3), are responsible for collecting and reviewing applications for acquisition projects to ensure that the proposed activities comply with 44 CFR part 80. States, territories and Tribes must ensure that the property acquisition is voluntary in nature. The subapplication they submit to FEMA for proposed projects must include information to enable FEMA’s determination of eligibility, technical feasibility, cost effectiveness, and environmental and historic preservation compliance (44 CFR 80.5(b)(4)). Per 44 CFR 80.5(b), once the property is

acquired, States, territories and Tribes, as well as FEMA and the subrecipients, must enforce the terms of 44 CFR part 80 and the deed restrictions to ensure that the property remains committed to open space use in perpetuity. States, territories and Tribes must report on property compliance with open space requirements after the grant is awarded.

With this revision, FEMA is removing five instruments off the inventory for this information collection because each of these five instruments are approved for use in a different information collection with its own OMB Control Number. These five instruments will still be used but do not require to be approved for use by OMB twice.

This proposed information collection previously published in the **Federal Register** on February 14, 2024, at 89 FR 11310 with a 60-day public comment period. One public comment was received that is not germane to this information collection. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Property Acquisition and Relocation for Open Space.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660-0103.

FEMA Forms: FEMA Form FF-206-FY-21-124 (formerly 086-0-31), Statement of Voluntary Participation for Acquisition of Property for Purpose of Open Space.

Abstract: FEMA and State, Tribal and local recipients of FEMA mitigation grant programs will use the information collected to meet the Property Acquisition requirements to implement acquisition activities under the terms of grant agreements for acquisition and relocation activities. FEMA and State/local grant recipients will also use the information to monitor and enforce the open space requirements for all properties acquired with FEMA mitigation grants.

Affected Public: State, Local or Tribal Governments.

Estimated Number of Respondents: 573.

Estimated Number of Responses: 573.

Estimated Total Annual Burden

Hours: 573.

Estimated Total Annual Respondent Cost: \$34,254.

Estimated Respondents’ Operation and Maintenance Costs: \$0.

Estimated Respondents’ Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$425,794.

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. 2024-11760 Filed 5-28-24; 8:45 am]

BILLING CODE 9111-BW-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA-2024-0009; OMB No. 1660-0047]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Request for Federal Assistance—How To Process Mission Assignments in Federal Disaster Operations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. FEMA invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the

requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the collection of information necessary to allow FEMA to support the needs of States, Federally-recognized Tribes, and Territories during disaster situations through the use of other Federal Agency resources.

DATES: Comments must be submitted on or before June 28, 2024.

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:

Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address FEMA-Information-Collections-Management@fema.dhs.gov or Courtney Keller, Emergency Management Specialist, Mission Assignment Program, by telephone at (202) 441-3642 or by email at FEMA-MissionAssignments@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: According to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121, *et seq.*, FEMA is authorized to provide assistance before, during, and after a disaster has impacted a State, Tribe, or Territory (STT). For a major disaster, the Stafford Act authorizes FEMA to direct any agency to utilize its existing authorities and resources in support of STT assistance response and recovery efforts. *See* 42 U.S.C. 5170(a)(1). For an emergency, the Stafford Act authorizes FEMA to direct any agency to utilize its existing authorities and resources in support of STT emergency efforts. *See* 42 U.S.C. 5192(a)(1). FEMA may task other Federal Agencies to assist during disasters and to support emergency efforts by STT governments by issuing a mission assignment to the appropriate agency. *See* 44 CFR 206.5, 206.208. FEMA collects the information necessary to determine what resources are needed and if a mission assignment is appropriate. The information collected explains which STT requires assistance, what needs to be accomplished, details any resource shortfalls, and explains what assistance is required to meet these needs.

This proposed information collection previously published in the **Federal Register** on February 28, 2024, at 89 FR

14673 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

The notice FEMA published at 89 FR 14673 published erroneous totals for the Estimated Number of Respondents, Estimated Number of Responses, Estimated Total Annual Burden Hours, Estimated Total Annual Respondent Cost, and Estimated Respondents' Operation and Maintenance Costs due to the clerical error of not including one instrument in the calculations for the totals. The burden and cost numbers for that instrument is included in the totals published in this notice.

Collection of Information

Title: Request for Federal Assistance—How to Process Mission Assignments in Federal Disaster Operations.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660-0047.

FEMA Forms: FEMA Form FF-104-FY-21-119 (formerly 010-0-8), Mission Assignment Form; FEMA Form FF-104-FY-21-120 (formerly 010-0-7), Resource Request Form; FEMA Form FF-104-FY-21-121 (formerly 010-0-8A), Mission Assignment Task Order Form.

Abstract: A written request for Federal assistance may be submitted on a Resource Request Form (RRF). The RRF is a working document requesting Federal assistance and may be sourced as a Mission Assignment. The Mission Assignment (MA) form is used to record a request for Federal assistance by States/Tribes/Territories to FEMA, and is the official FEMA obligating document that tasks another Federal agency to perform work.

Affected Public: State, Local, or Tribal Governments.

Estimated Number of Respondents: 104.

Estimated Number of Responses: 4,220.

Estimated Total Annual Burden Hours: 1,687.

Estimated Total Annual Respondent Cost: \$164,044.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$77,090.

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; 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. 2024-11757 Filed 5-28-24; 8:45 am]

BILLING CODE 9111-24-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

**[FWS-R3-ES-2024-N027;
FXES11130300000-245-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 June 28, 2024.

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
PER8956483	Jeff Klahn, Riverside, IA.	Rusty patched bumble bee (<i>Bombus affinis</i>).	IA	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, kill.	New.
ES02560A	Timothy Carter, Muncie, IN.	Add new species—tricolored bat (<i>Perimyotis subflavus</i>)—to existing authorized species: Indiana bat (<i>Myotis sodalis</i>), northern long-eared bat (<i>M. septentrionalis</i>), and gray bat (<i>M. grisescens</i>).	GA, IA, IL, IN, MI, MO, OH, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets and harp traps, enter hibernacula, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.
PER10215758 ..	Isle Royale National Park, Houghton, MI.	Gray wolf (<i>Canis lupus</i>)	MI	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with foothold traps, cable restraints, or net guns/aerial darting from helicopter, handle, hold, translocation, chemical immobilization, radio-tag, collect non-intrusive measurements, collect hair/whisker samples, collect blood/fecal samples, collect biopsy punches, euthanasia, and release.	New.
ES06778A	USDA Forest Service, Vienna, IL.	Indiana bat (<i>Myotis sodalis</i>), northern long-eared bat (<i>M. septentrionalis</i>), and gray bat (<i>M. grisescens</i>).	IL, IN, MO, OH; add KY, VA, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets and harp traps, enter hibernacula, bio sample, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.
ES26855C	Jeanette Bailly, Deerfield, IL.	Add new species—tricolored bat (<i>Perimyotis subflavus</i>)—to existing authorized species: Indiana bat (<i>Myotis sodalis</i>), northern long-eared bat (<i>M. septentrionalis</i>), and gray bat (<i>M. grisescens</i>).	AL, AR, CT, DE, GA, IA, IL, IN, KY, LA, MA, MD, ME MI, MN, MS, MO, NC, NE, NH, NJ, NY, OH, PA, RI, SC, TN, VA, VT, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets and harp traps, enter hibernacula, bio sample, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES64986C	Jeffrey Gordon, Columbus, OH.	Add new species—round hickorynut (<i>Obovaria subrotunda</i>) and longsolid (<i>Fusconaia subrotunda</i>)—to existing authorized species: 10 freshwater mussel species.	OH	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	Amend.
TE90423C	Barr Engineering, Shaughn Barnett, Ann Arbor, MI.	Add new species—round hickorynut (<i>Obovaria subrotunda</i>) and rabbitsfoot (<i>Quadrula cylindrica cylindrica</i>)—to existing authorized species: 14 freshwater mussel species.	IL, IN, OH	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	Renew/amend.
PER0039249	Meredith L. Hoggatt, Pittsboro, IN.	Add new species—tricolored bat (<i>Perimyotis subflavus</i>)—to existing authorized species: Indiana bat (<i>Myotis sodalis</i>), northern long-eared bat (<i>M. septentrionalis</i>), and gray bat (<i>M. grisescens</i>).	Add new States—AZ and NM—to existing authorized States: OK, TX, IL, IN, IA, MI, MN, MO, OH, WI, AL, AR, FL, GA, KY, LA, MS, NC, SC, TN, CT, DE, DC, ME, MD, MA, NH, NJ, NY, PA, RI, VT, VA, WV, KS, MT, NE, ND, SD, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets and harp traps, bio sample, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.

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. 2024–11738 Filed 5–28–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

National Park Service

[Docket No. FWS–HQ–NWRs–2023–0180; FXRS126109AQ000–245–FF09R23000]

Federal Land Managers' Air Quality Related Values Work Group (FLAG); Final Addendum to 2010 Phase 1 Report and Response to Comments

AGENCY: Fish and Wildlife Service and National Park Service, Interior (DOI).

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, in cooperation with the National Park Service and the U.S. Department of Agriculture's Forest Service (the agencies), announce the availability of the final addendum to the Federal Land Managers' Air Quality Related Values Work Group's (FLAG's) Phase 1 Report, which the agencies last revised in 2010 (FLAG 2010 report), and

responses to comments on the draft addendum.

DATES: The addendum to the FLAG 2010 Phase 1 Report is effective May 29, 2024.

ADDRESSES: The final addendum to the FLAG 2010 report, responses to comments on the draft addendum, and other materials are available for public inspection at <https://www.regulations.gov> in Docket No. FWS–HQ–NWRs–2023–0180.

FOR FURTHER INFORMATION CONTACT: Jaron Ming, Chief, Branch of Air and Water Resources, by phone at 720–926–3528 or via email at jaron_ming@fws.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:

Introduction

The United States Department of the Interior's U.S. Fish and Wildlife Service (FWS), in cooperation with the National Park Service (NPS) and the U.S. Department of Agriculture's U.S. Forest Service (USFS) (collectively, the

agencies), announce the availability of the final addendum to the Federal Land Managers' Air Quality Related Values Work Group's (FLAG's) Phase 1 Report, which the agencies last revised in 2010 (FLAG 2010 report). The addendum adds a contextual consideration provision to the FLAG 2010 report concerning the analysis by Federal land managers (FLMs) of temporary emissions for overall low-emitting facilities.

Background

The Federal Land Managers' Air Quality Related Values Work Group (FLAG) was formed by the NPS, FWS, and USFS to (1) develop a more consistent and objective approach for these agencies' FLMs to evaluate air pollution effects on their air quality related values (AQRVs) in Federal class I areas, as defined by the Clean Air Act, and (2) provide State permitting authorities and potential permit applicants consistency on how to assess the impacts of new and existing sources on AQRVs.

The FLAG effort focuses on the effects of the air pollutants that could affect the health and status of resources in areas managed by the agencies, primarily such pollutants as ozone, particulate matter, nitrogen dioxide, sulfur dioxide, nitrates, and sulfates.

The initial FLAG Phase 1 Report was published in 2000. On October 27, 2010, NPS, in cooperation with FWS and USFS, published a revised FLAG report (75 FR 66125).

Comments Received and Responses

On November 28, 2023, the agencies published a notice of availability and request for comments on the draft addendum to the FLAG Phase 1 Report (88 FR 83144). In response to the request for comments, we received comments from two entities. We reviewed and considered the comments prior to finalizing the addendum.

Comment 1: Epsilon Associates, Inc., expressed support for the addendum, noting the need for contextual clarity on short-lived emissions.

Response: We acknowledge the comment and appreciate the support for the addendum.

Comment 2: The Alaska Department of Environmental Conservation suggested including additional criteria concerning air permitting analysis and a date at which the addendum terminates. The commenter also sought clarity on other areas within the addendum. The following text summarizes those comments and our responses:

A. The addendum should include criteria that align with air permitting

analysis and should use generally accepted engineering practices for air permitting analysis of project emissions.

Response: The addendum does not modify any language or guidance in FLAG regarding general engineering practices. However, FWS agrees with the commenter that the FLM analysis should align with the air permitting analysis to the extent the analysis provides information relevant to AQRVs at the potentially impacted class I area. The draft addendum adds a contextual criterion for temporary air emissions that would occur alongside any considerations of generally accepted practices for emissions, modeling, and analysis.

B. It is not clear if the temporary emission criteria conflict with Environmental Protection Agency (EPA) guidance on a State's ability to make reasonable progress determinations.

Response: To address the commenter's request for clarity, the addendum adds a contextual criterion for FLMs to consider temporary emissions. It does not alter a permit authority's process to make reasonable progress determinations under the Regional Haze Rule or New Source Review, Prevention of Significant Deterioration determinations. Additionally, the addendum is consistent with existing regulations, as it applies only to the FLMs' discretionary determinations, as authorized under the Clean Air Act and implementing regulations.

C. It is not clear whether the outlined criteria are consistent with requirements under the Clean Air Act or EPA regulations. The comment questions whether the addendum introduces "extra-regulatory" factors, relying on the FLM's best professional judgment rather than on permitting requirements.

Response: The FLMs use these criteria to evaluate the effect a project may have on the AQRVs in a class I area and how any predicted AQRV impacts may affect the FLM's ability to manage public lands consistent with statutory mandates for the area (e.g., to provide for resource protection and visitor experience). The addendum does not alter a permit authority's Clean Air Act regulatory role in evaluating FLM determinations.

D. The addendum should include a sunset date.

Response: While the guidance does not include a sunset date in the addendum, FWS, in coordination with NPS and USFS, will periodically evaluate whether this addendum continues to articulate the FLM's contextual considerations for temporary emission increases.

This notice announces the availability of complete responses to comments on the draft addendum and the final addendum to the FLAG 2010 revision to add a contextual consideration to the FLAG 2010 report concerning the FLM's analysis of temporary emissions for overall low-emitting facilities. The final addendum does not change the FLM's role or affirmative responsibilities under the Clean Air Act. The final addendum is expected to assist FLAG 2010 report users by describing how the FLMs, as part of their responsibilities under the Clean Air Act, will consider temporary emissions for overall low-emitting facilities in analyzing effects to AQRVs in Federal class I areas.

Authority

We publish this notice under the authority of the Clean Air Act of 1970, as amended (42 U.S.C. 7401 *et seq.*).

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2024-11742 Filed 5-28-24; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500179340]

Notice of Public Meeting of the Western Oregon Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) announces that the Western Oregon Resource Advisory Council (RAC) will host a meeting and field tour.

DATES: The Western Oregon RAC will participate in an in-person meeting with a virtual participation option on July 10, 2024, from 8:30 a.m. to 10 a.m. Pacific Time (PT). In addition, a field tour will occur on the same day from 10 a.m. to 4:30 p.m. PT. The field tour and meeting are open to the public.

ADDRESSES: The meeting will be held, and the field tour will commence and conclude, at the BLM Coos Bay District Office, 1300 Airport Lane, North Bend, OR 97459. The field tour will be of BLM Coos Bay District lands along Highway 38, east of Coos Bay, Oregon. The RAC will travel to the BLM Loon Lake

Recreation Site, then proceed to public lands near Ash Valley, Oregon.

Individuals wishing to participate virtually must contact Megan Harper, Public Affairs Specialist for the Coos Bay District, at (541) 751-4353 or m1harper@blm.gov to receive a link to attend the Zoom meeting.

FOR FURTHER INFORMATION CONTACT:

Megan Harper, Public Affairs Specialist, Coos Bay District, 1300 Airport Lane, North Bend, OR 97459; phone: (541) 751-4353; email: m1harper@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 15-member Western Oregon RAC advises the Secretary of the Interior, through the BLM, on a variety of public land issues across public lands in Western Oregon, including the Coos Bay, Medford, Northwest Oregon, and Roseburg Districts and part of the Lakeview District. At the July 10 meeting, the RAC will receive information on the statuses of Secure Rural Schools grant applications and hear from the District Managers about current events in Western Oregon.

On the field tour, the RAC will tour the Loon Lake Recreation Site and discuss infrastructure improvements, recreation management, and fee collection. The RAC will then travel to BLM-managed forestlands to discuss forest management and habitat creation. The final agenda will be posted online two weeks in advance of the meeting on the RAC's web page at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/oregon-washington/western-oregon-rac>.

The public is welcome to attend the meeting and the field tour but must provide their own transportation and meals. Individuals who plan to attend must RSVP to the BLM Coos Bay District Office at least one week in advance of the field tour to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Please make requests in advance for sign language interpreter services, assistive listening devices, language translation services, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven business days prior to the meeting to give the BLM

sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

The meeting is open to the public, and a public comment period will be held on July 10, 2024, at 9:30 a.m. PT. Depending on the number of persons wishing to comment and the time available, time allotted for individual oral comments may be limited. The public may submit written comments to the RAC by emailing the RAC coordinator at m1harper@blm.gov.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Previous minutes, membership information, and upcoming agendas are available at: <https://www.blm.gov/get-involved/resource-advisory-council/near-you/oregon-washington/western-oregon-rac>. Detailed minutes for the RAC meetings are also maintained in the Coos Bay District Office and will be available for public inspection and reproduction during regular business hours within 90 days following the meeting.

(Authority: 43 CFR 1784.4-2)

Heather L. Whitman,

Roseburg District Manager.

[FR Doc. 2024-11770 Filed 5-28-24; 8:45 am]

BILLING CODE 4331-24-P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM-2023-0042]

Notice of Availability of a Final Environmental Assessment for a Wind Energy Research Lease on the Atlantic Outer Continental Shelf Offshore Maine

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the final environmental assessment (EA) for the potential issuance of a wind energy research lease to the State of Maine. The final EA analyzes the potential environmental impacts of the site characterization and site assessment activities that are

expected to take place should this research lease be issued. This notice of availability (NOA) announces the availability of the final EA. The final EA will inform BOEM's decision whether to issue the research lease.

FOR FURTHER INFORMATION CONTACT:

Brandi Sangunett, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787-1015 or brandi.sangunett@boem.gov.

SUPPLEMENTARY INFORMATION:

Proposed Action: The final EA considers reasonably foreseeable environmental consequences of routine and non-routine activities associated with issuance of a wind energy research lease and related site assessment and site characterization activities within and around the lease and potential future project easements. The State of Maine provided information about planned site assessment and site characterization activities including the general location, timing, and frequency of the activities and the types of equipment and vessels likely to be used. BOEM has identified standard operating conditions (SOCs) and mitigation to reduce or eliminate the potential risks to or conflicts with specific environmental resources. These SOCs and mitigation were developed through the analyses presented in Section 3 of the final EA and through consultations with other Federal agencies. A summary of the SOCs and mitigation are listed in Appendix D of the final EA. If the research lease is issued, BOEM will require the lessee to comply with the SOCs and mitigation through lease stipulations and/or as conditions of the Site Assessment Plan and Research Activities Plan approval. This EA does not consider construction and operation of any wind energy-related research facilities within the Gulf of Maine, which, if proposed, would be evaluated by BOEM as a separate NEPA action.

Alternatives: In addition to the Proposed Action, BOEM considered a No Action Alternative. Under the No Action Alternative, BOEM would not issue a wind energy research lease to the State of Maine and site assessment activities would not occur within the leased area of the Gulf of Maine. BOEM's preferred alternative is the Proposed Action.

Finding of No Significant Impact: After carefully considering alternatives described and analyzed in the final EA and comments from the public and cooperating and consulting agencies on the draft EA, BOEM finds that the issuance of a wind energy research lease within the proposed lease area offshore

Maine and related site characterization and site assessment activities would have no significant impact on the environment.

Availability of the Final EA: The final EA and associated information are available on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/maine/gulf-maine>.

Authority: This NOA is published in accordance with regulations at 42 U.S.C. 4231 *et seq.* (NEPA, as amended) and 40 CFR 1506.6.

Karen Baker,

Chief, Office of Renewable Energy Programs,
Bureau of Ocean Energy Management.

[FR Doc. 2024–11766 Filed 5–28–24; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–671 & 731–TA–1571–1573 (Final) (Remand)]

Oil Country Tubular Goods From Argentina, Mexico, and Russia

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (“Commission”) hereby gives notice of the procedures it intends to follow to comply with the court-ordered remand of its final determination in the antidumping and countervailing duty investigations of Oil Country Tubular Goods (“OCTG”) from Argentina, Mexico, and Russia. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission’s Rules of Practice and Procedure.

DATES: May 22, 2024.

FOR FURTHER INFORMATION CONTACT:

Douglas Corkran ((202) 205–3057), Office of Investigations, or Noah Meyer ((202) 708–1521), Office of General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission’s TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for Investigation Nos. 701–TA–671–672 and 731–TA–1571–1573 (Final) may be

viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—In November 2022, the Commission unanimously determined that a domestic industry was materially injured by reason of imports of OCTG from Argentina, Mexico, Russia, and South Korea. *Oil Country Tubular Goods from Argentina, Mexico, Russia, and South Korea*, Inv. Nos. 701–TA–671–672 and 731–TA–1571–1573 (Final), USITC Pub. 5381 at 3 (Nov. 2022). Respondents Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, Siderca S.A.I.C., Tubos de Acero de Mexico, S.A., and TMK Group contested the Commission’s determinations regarding Argentina, Mexico, and Russia before the U.S. Court of International Trade (“CIT”). The CIT remanded the Commission’s determination for the agency to reconsider various legal and factual aspects of the Commission’s cumulation analysis. *Tenaris Bay City et al v. United States*, Consolidated Court No. 22–00344, Slip Op. 24–48 (Ct. Int’l Trade, Apr. 19, 2024).

Participation in the remand proceedings.—Only those persons who were interested parties that participated in the underlying investigations and were also parties to the appeal may participate in these remand proceedings. Such persons need not file any additional appearances with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information (“BPI”) under administrative protective order (“APO”). BPI referred to during the remand proceedings will be governed, as appropriate, by the APO issued in the investigations. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written submissions.—The Commission is reopening the record in these proceedings for the limited purposes of adding information compiled from detailed U.S. Census Bureau edited Customs and Border Protection data differentiating imports from South Korea by supplier, and revising tables considered in its cumulation analysis to exclude responses and data concerning nonsubject imports from South Korea.

The Commission will permit the parties entitled to participate in the remand proceedings to file comments concerning these data and revised tables, and concerning how the Commission could best comply with the court’s remand instructions.

The comments must be based solely on the information in the Commission’s record, as amended as described above. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other than those on which the court has remanded this matter. The deadline for filing comments is June 26, 2024. Comments must be limited to no more than thirty (30) double-spaced and single-sided pages of textual material, inclusive of attachments and exhibits.

Parties are advised to consult with the Commission’s Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions must conform to the provisions of section 201.8 of the Commission’s rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission’s rules. Please note the Secretary’s Office will accept only electronic filings at 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. The Commission’s *Handbook on E-Filing*, available on the Commission’s website at <http://edis.usitc.gov>, elaborates upon the Commission’s rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission’s rules, will not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission’s rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.

Issued: May 22, 2024.
Lisa Barton,
Secretary to the Commission.
[FR Doc. 2024–11726 Filed 5–28–24; 8:45 am]
BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE
Drug Enforcement Administration

[Docket No. DEA–1357]

**Bulk Manufacturer of Controlled
Substances Application: Pharmaron
Manufacturing Services (US) LLC;
Correction**

AGENCY: Drug Enforcement
Administration, Justice.
ACTION: Notice; correction.

SUMMARY: The Drug Enforcement Administration (DEA) published a document in the **Federal Register** on May 6, 2024, concerning an application for a Bulk Manufacturer of Controlled Substances. A request was made for the removal of the following information: “The company plans to bulk manufacture the listed controlled substances for the purpose of producing material for clinical trials.” Please correct notice to read as follows as stated under Supplementary Information.

SUPPLEMENTARY INFORMATION:
Correction

In the **Federal Register** on May 6, 2024, in FR Doc. 2024–09805, (89 FR 37260), 37260–37261 (2 pages). The purpose is to manufacture bulk noroxymorphone as an intermediate product to be sold to a customer who will indicate a Contract Manufacturer Organization (CMO), which the material will be shipped to, to be converted to a non-controlled substance. Oxymorphone (9652) will be used as a starting material to be converted to Noroxymorphone (9668).

No other activities for these drug codes are authorized for this registration.

Controlled substance	Drug code	Schedule
Oxymorphone	9652	II
Noroxymorphone	9668	II

Marsha L. Ikner,
Acting Deputy Assistant Administrator.
[FR Doc. 2024–11746 Filed 5–28–24; 8:45 am]
BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE
[OMB Number 1140–0114]

**Agency Information Collection
Activities; Proposed eCollection
eComments Requested; Prohibited
Persons Questionnaire—ATF Form
8620.57**

AGENCY: Bureau of Alcohol, Tobacco,
Firearms and Explosives, Department of
Justice.
ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.
DATES: Comments are encouraged and will be accepted for 30 days until June 28, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Jaclyn N. Wiltshire, by email at Niki.Wiltshire@atf.gov, or by telephone at 202–648–9260.

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register**, volume 89 page 19879, on Wednesday, March 20, 2024, allowing a 60-day comment period. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- 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.
Written comments and recommendations for this 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 information collection or the OMB Control Number 1140–0114. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.
DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.
Overview of This Information Collection
1. *Type of Information Collection:* Revision of a previously approved collection.
2. *Title of the Form/Collection:* Prohibited Persons Questionnaire.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 8620.57.
Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.
4. *Affected public who will be asked or required to respond, as well as a brief abstract:*
Affected Public: Individuals or households.
Abstract: The Prohibited Persons Questionnaire (ATF F 8620.57) is used to collect personally identifiable information (PII), to begin the eligibility determination process for granting a candidate (respondent) access to ATF information, IT systems, and/or unescorted access to ATF facilities. This collection relates to respondent prohibitions to possess or receive firearms or explosives as described in ATF-enforced statutes 18 U.S.C. 922(g) or (n), and/or 18 U.S.C. 842(i). The proposed information collection (IC) OMB 1140–0114 is being revised due to minor material changes to the form, such as removing references to the declination statement and signature/ date fields associated with the declination statement.

5. *Obligation to Respond*: Voluntary.
 6. *Total Estimated Number of Respondents*: 2,000 respondents.
 7. *Estimated Time per Respondent*: 5 minutes.
 8. *Frequency*: Once annually.
 9. *Total Estimated Annual Time Burden*: 167 hours.
 10. *Total Estimated Annual Other Costs Burden*: \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC 20530.

Dated: May 22, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-11662 Filed 5-28-24; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF JUSTICE

[OMB Number 1140-0009]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application To Register as an Importer of U.S. Munitions Import List Articles—ATF Form 4587 (5330.4)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until June 28, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Victoria Kenney, FEIB/FEST, either by email at Victoria.Kenney@atf.gov, or telephone at 304-616-3376.

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register**, volume 89 page 19877, on Wednesday, March 20, 2024, allowing a 60-day comment period. Written comments and suggestions from the

public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- 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.

Written comments and recommendations for this 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 information collection or the OMB Control Number 1140-0009. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection*: Revision of a previously approved collection.

2. *Title of the Form/Collection*: Application to Register as an Importer of U.S. Munitions Import List Articles.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection*: ATF Form 4587 (5330.4).

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract*: *Affected Public*: Individuals or households, Private Sector-for or not for profit institutions.

Abstract: The information on ATF Form 4587 (5330.4) is used to register an individual or company as an importer of U.S. Munitions Import List Articles. This Information Collection (IC) is being revised to include two attachment pages, one for Additional Responsible Persons and the other for Additional Locations. Revisions will also include sentence rephrasing/statement modification, an added definition, and renumbering.

5. *Obligation to Respond*: The obligation to respond is mandatory per title 22 U.S.C. 2778(1)(A)(i) and the implementing regulations in 27 CFR part 447.

6. *Total Estimated Number of Respondents*: 400 respondents.

7. *Estimated Time per Respondent*: 30 minutes.

8. *Frequency*: Once annually.

9. *Total Estimated Annual Time Burden*: 200 hours.

10. *Total Estimated Annual Other Costs Burden*: \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC 20530.

Dated: May 22, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-11666 Filed 5-28-24; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF JUSTICE

[OMB Number 1140-0113]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Licensing Questionnaire—ATF Form 8620.44

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for

review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until June 28, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Jacklyn N. Wiltshire, Niki.Wiltshire@atf.gov, 202-648-9260.

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register**, volume 89 page 19880, on Wednesday, March 20, 2024, allowing a 60-day comment period. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- 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.

Written comments and recommendations for this 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 information collection or the OMB Control Number 1140-0113. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Licensing Questionnaire.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 8620.44.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* *Affected Public:* Individuals or households.

Abstract: The Licensing Questionnaire (ATF F 8620.44) is used to determine if a candidate for federal or contractor employment at the Bureau of Alcohol, Tobacco, Firearms and Explosives, or his/her spouse or minor child, holds a financial interest in the alcohol, tobacco, firearms and/or explosives regulated industries, which may be in conflict with 5 *CFR* 3801, Supplemental Standards of Ethical Conduct for Employees of the Department of Justice. The proposed information collection (OMB 1140-0113) is being revised to make minor material changes to the form, such as removing the declination statement and signature/date fields, and include a note clarifying that personal ownership of a firearm and a permit/license to carry a firearm are not considered holding a Federal Firearms License.

5. *Obligation to Respond:* Voluntary.

6. *Total Estimated Number of Respondents:* 2,000 respondents.

7. *Estimated Time per Respondent:* 5 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 167 hours.

10. *Total Estimated Annual Other Costs Burden:* \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218 Washington, DC 20530.

Dated: May 22, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-11663 Filed 5-28-24; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF JUSTICE

[OMB Number 1140-0115]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Residency and Citizenship—ATF Form 8620.58

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until June 28, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Niki Wiltshire by email at Niki.Wiltshire@atf.gov, or by telephone at 202-648-9260.

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register**, volume 89 page 19881, on Wednesday, March 20, 2024, allowing a 60-day comment period. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or

—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.

Written comments and recommendations for this 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 information collection or the OMB Control Number 1140–0115. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Residency and Citizenship Questionnaire.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 8620.58.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected Public: Individuals or households.

Abstract: The Residency and Citizenship Questionnaire (ATF F 8620.58) is used to collect personally identifiable information (PII), to begin the eligibility determination process for granting a candidate (respondent) access to ATF information, IT systems, and/or unescorted access to ATF facilities. This collection gathers information to determine whether the respondent meets the Department of Justice’s

residency and citizenship/foreign national requirements. The proposed information collection (IC) OMB 1140–0115 is being revised to update information on the Department of State’s Treaties in Force listing and make minor material changes to the form, such as removing references to the declination statement and signature/date fields associated with the declination statement.

5. *Obligation to Respond:* Voluntary.

6. *Total Estimated Number of Respondents:* 2,000 respondents.

7. *Estimated Time per Respondent:* 5 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 167 hours.

10. *Total Estimated Annual Other Costs Burden:* \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–11668 Filed 5–28–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Fire Protection in Shipyard Employment Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before June 28, 2024.

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: Nicole Bouchet by telephone at 202–693–0213, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The standard requires employers to develop a written fire safety plan and written statements or policies that contain information about fire watches and fire response duties and responsibilities. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 6, 2024 (89 FR 16033).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Fire Protection in Shipyard Employment Standard.

OMB Control Number: 1218–0248.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 489.

Total Estimated Number of Responses: 185,473.

Total Estimated Annual Time Burden: 15,774 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,
Certifying Official.

[FR Doc. 2024–11681 Filed 5–28–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Claim for Consequential Illness Benefits Under the Energy Employees Occupational Illness Compensation Program Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before June 28, 2024.

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: Michelle Neary by telephone at 202–693–6312, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Form EE–1A, Claim for Consequential Illness Benefits Under the Energy Employees Occupational Illness Compensation Program Act, will be used to initiate claims for consequential illnesses under the Act. It requests information about the employee/claimant, the specific medical diagnoses that they claim as consequential illness(es), and previous awards or settlements received in connection with the claimed consequential illnesses. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 14, 2024 (89 FR 11320).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will

have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OWCP.

Title of Collection: Claim for Consequential Illness Benefits Under the Energy Employees Occupational Illness Compensation Program Act.

OMB Control Number: 1240–0NEW.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 2,425.

Total Estimated Number of Responses: 4,850.

Total Estimated Annual Time Burden: 810 hours.

Total Estimated Annual Other Costs Burden: \$1,120.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–11682 Filed 5–28–24; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2016–0005]

Notice of Public Meeting

AGENCY: Occupational Safety and Health Administration.

ACTION: Notice of public meeting.

SUMMARY: This notice is to advise interested persons that OSHA will conduct a virtual public meeting on June 11, 2024, in advance of the 46th session of the United Nations Subcommittee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals (UNSCCEGHS) to be held as an in-person meeting July 3–5, 2024, in Geneva, Switzerland. OSHA, along with the U.S. Interagency Globally Harmonized System of Classification and Labelling of Chemicals (GHS) Coordinating Group, plans to consider the comments and information gathered at the June 11, 2024, public meeting when developing the U.S. Government positions for the UNSCEGHS meeting July 3–5, 2024.

DATES: OSHA's virtual public meeting will take place on June 11, 2024. Specific information for the meeting will be posted when available on the OSHA website at <https://www.osha.gov/hazcom/international#meeting-notice>.

ADDRESSES: This meeting will be held virtually, meaning it will be held virtually and broadcasted by the Department of Labor, in Washington, DC, on June 11, 2024, from 1:00–3:00 p.m.

Written Comments: Interested parties may submit written comments until July 3, 2024, on the Working and Informal Papers for the 46th session of the UNSCEGHS to the docket established for International/Globally Harmonized System (GHS) efforts at: <http://www.regulations.gov>, Docket No. OSHA–2016–0005.

Registration to Attend and/or to Participate in the Public Meeting: Registration information including how to participate for the OSHA session will be posted when available on the OSHA website at <https://www.osha.gov/hazcom/international#meeting-notice>.

If you need interpretation or alternative formats or services because of a disability, such as sign language or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Please contact Ms. Janet Carter, OSHA Directorate of Standards and Guidance,

Department of Labor, telephone: (202) 693-2370, email carter.janet@dol.gov.

SUPPLEMENTARY INFORMATION: OSHA will conduct a virtual public meeting on June 11, 2024, to discuss proposals in preparation for the in-person 46th session of the UNSCEGHS July 3–5, 2024, in Geneva, Switzerland. Advanced registration information for OSHA's virtual public meeting will be posted on the OSHA website.

OSHA will solicit public input on U.S. government positions regarding proposals submitted by member countries until July 3, 2024. Information on the work of the UNSCEGHS, including meeting agendas, working and informal papers, reports, and documents from previous sessions can be found on the United Nations Economic Commission for Europe (UNECE) Transport Division website located at: <https://unece.org/info/Transport/Dangerous-Goods/events/385417>.

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this notice under the authority granted by sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), and Secretary's Order 1–2012 (77 FR 3912), (Jan. 25, 2012).

Signed at Washington, DC, on May 22, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–11684 Filed 5–28–24; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board hereby gives notice of the scheduling of a teleconference of the National Science Board/National Science Foundation Commission on Merit Review (MRX) for the transaction of National Science Board business pursuant to the NSF Act and the Government in the Sunshine Act.

TIME AND DATE: Wednesday, May 29, 2024, from 4 p.m.–6 p.m. EDT.

PLACE: This meeting will be in person and via videoconference through the National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

STATUS: Closed.

MATTERS TO BE CONSIDERED: *The agenda is:* Commission Chair's remarks about the agenda; Discussion of Commission

Timeline; Discussion of NSB Feedback on Preliminary Policy Recommendations; Discussion of Current Data Analysis; Discussion of External Data Collection Questions; Commission Chair's closing remarks.

CONTACT PERSON FOR MORE INFORMATION:

Point of contact for this meeting is: Chris Blair, cblair@nsf.gov, 703/292–7000. Meeting information and updates may be found at www.nsf.gov/nsb.

Ann E. Bushmiller,

Senior Counsel to the National Science Board Office.

[FR Doc. 2024–11905 Filed 5–24–24; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection.

DATES: Written comments on this notice must be received by July 29, 2024, to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT:

Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Foundation, including whether the information will have practical utility; (b) the accuracy of the Foundation's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the

use of automated collection techniques or other forms of information technology.

SUPPLEMENTARY INFORMATION:

Title of Collection: NSF's Evaluation of the Robert Noyce Teacher Scholarship Program.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of Request: Intent to seek approval to establish an information collection.

Abstract: The National Science Foundation (NSF) Robert Noyce Teacher Scholarship Program (Noyce) aims to address the critical need for highly effective elementary and secondary mathematics and science teachers in high-need school districts. The program supports the recruitment, preparation, and retention of STEM (science, technology, engineering, and mathematics) undergraduate majors and professionals to become K–12 STEM teachers, as well as experienced teachers to become teacher leaders. Noyce offers four program tracks:

1. *Scholarships and Stipends:* Supports undergraduate STEM majors and professionals with financial assistance and stipends to become K–12 STEM teachers in high-need school districts. Requires a teaching commitment of 2 years for each year of scholarship support.

2. *Teaching Fellowships:* Provides support to STEM professionals to become K–12 STEM teachers in high-need districts. Requires a 4-year teaching commitment.

3. *Master Teaching Fellowships:* Supports experienced K–12 STEM teachers to become teacher leaders in high-need districts. Requires a 5-year teaching commitment.

4. *Noyce Research:* Funds research projects focused on the effectiveness and retention of K–12 STEM teachers in high-need districts.

Additionally, the program accepts Capacity Building proposals from those preparing to submit proposals in any of the program's tracks and supports conference proposals aimed at improving STEM teacher preparation. The program also invites proposals for authentic Research Experiences in STEM Settings (RESS) for both Noyce and non-Noyce pre-service and in-service STEM teachers.

The NSF Directorate for STEM Education (EDU) Division of Undergraduate Education (DUE) requires evaluation and technical services for the Noyce program. Noyce has a 20-year history of responding to the critical need for highly effective K–

12 STEM teachers in high-need school districts by recruiting and preparing talented undergraduate STEM majors and STEM professionals to pursue teaching careers in elementary and secondary schools. Since its inception, the program has commissioned three program evaluations, the most recent in 2017. In 2023 Noyce sought contractor support to evaluate Noyce outcomes and processes to determine the effectiveness of program components in meeting established goals within the last 10 years. SRI was selected to complete this work.

The evaluation of Noyce focuses on three evaluation questions:

1. What are the goals of Noyce awards and what activities do teacher preparation programs use to diversify, recruit, select, prepare, empower, and support Noyce recipients?
2. What are the relationships between the types of support, activities, and training that Noyce recipients receive; the types of Noyce recipients; and the recipients' plans to go into and stay in teaching and leadership roles?
3. What is the impact of Noyce on teacher certification in STEM fields and employment in high-need schools?

The NSF EDU Directorate requests the Office of Management and Budget (OMB) approval of this clearance to initiate new data collections to be

conducted as part of an external evaluation of the Noyce program. These collections, to be conducted by the evaluation contractor, include:

Qualitative data collection. The qualitative data collection includes interviews and focus groups that will support the development of case studies, network analysis. We plan to conduct case studies with up to 12 Noyce hub grantees. The case studies will include the awardee institution, its partner organizations, Noyce project staff, project participants, and partner schools. Our primary method of data collection will be through interviews with key stakeholders. These stakeholders will include the Noyce project Principal Investigator (PI), co-PI(s), program staff, and teachers. This data will also be used to support Noyce network analysis to understand how Noyce-funded individuals and organizations are connected and the quality of their interactions. In addition, we plan to conduct an additional 20 interviews with Noyce principal investigators, scholars, and teachers, along with 10 focus groups.

Use of the Information: Noyce anticipates using the results of this evaluation to:

1. Identify "Noyce best, emerging, or promising practices" that can make the program more effective and efficient to

sustain and grow impacts of Noyce on diversifying, recruiting, selecting, preparing, empowering, and supporting K–12 STEM teachers.

2. Inform Noyce on sustainability mechanisms and goals appropriate for Noyce Principal Investigators (PIs) to maintain their successful outcomes.
3. To understand and disseminate how Noyce is impacting the field.
4. Provide insights into potential barriers PIs face that inhibit success.
5. Identify strategies Noyce projects can implement to optimize goal attainment, effectiveness, and efficiencies.

Expected Respondents: Data collection will primarily involve interviews with key stakeholders including the Noyce project Principal Investigator (PI), co-PI(s), program staff, and teachers.

Estimate of Burden

Estimates of Annualized Cost to Respondents for the Hour Burdens: The overall annualized cost to the respondents is estimated to be \$8,435. The following table shows the estimated burden and costs to respondents. The estimated hourly rates are based on a report from the Bureau of Labor Statistics' Occupational Employment and Wages, May 2023).¹

Collection title	Total number of respondents	Burden hours per respondent	Total hour burden	Average hourly rate	Estimated annual cost
Noyce PIs, program staff for case studies	60	1	60	\$48.87	\$2,932.20
Noyce-funded teachers for case studies	60	1	60	35.48	2,128.80
Noyce PIs, program staff	10	1	10	48.87	488.70
Noyce teacher interviews	10	1	10	35.48	354.80
Noyce PIs, program staff focus groups	30	1	30	48.87	1,466.10
Noyce teacher focus groups	30	1	30	35.48	1,064.40
Total	200	.....	200	.....	8,435.00

Estimated Number of Responses per Report: Data collection is estimated to involve a total number of 200 respondents.

Dated: May 23, 2024.

Suzanne H. Plimpton,
Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–11759 Filed 5–28–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION
[NRC–2023–0151]

Information Collection: Licenses and Radiation Safety Requirements for Irradiators

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an

existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, "Licenses and Radiation Safety Requirements for Irradiators."

DATES: Submit comments by June 28, 2024. 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: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

¹ <https://www.bls.gov/oes/>.

notice 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.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: Infocollects.Resource@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC-2023-0151 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-2023-0151.

- *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 supporting statement is available in ADAMS under Accession No. ML24107B149.

- *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.

- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: Infocollects.Resource@nrc.gov.

B. Submitting Comments

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to <https://www.reginfo.gov/>

[public/do/PRAMain](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 NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at <https://www.regulations.gov> and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, “Licenses and Radiation Safety Requirements for Irradiators.” The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on January 11, 2024, 89 FR 1946.

1. *The title of the information collection:* Licenses and Radiation Safety Requirements for Irradiators.

2. *OMB approval number:* 3150-0158.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Applications for new licenses and license amendments may be submitted at any time (on occasion). Applications for renewal are submitted every 15 years. Reports are submitted as events occur.

6. *Who will be required or asked to respond:* Applicants for and holders of specific licenses authorizing the use of licensed material for irradiators.

7. *The estimated number of annual responses:* 1,527.2 (19.2 for reporting [2.2 NRC licensees and 17 Agreement

State licensees], 52 for recordkeepers [6 NRC licensees and 46 Agreement State Licensees], and 1,456 for third-party disclosures [168 NRC licensees and 1,288 Agreement State licensees]).

8. *The estimated number of annual respondents:* 52 (6 NRC licensees and 46 Agreement State licensees).

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 29,781 hours (687 reporting hours + 21,762 recordkeeping hours + 7,332 third-party disclosure hours).

10. *Abstract:* Part 36 of title 10 of the *Code of Federal Regulations*, establishes radiation safety requirements for the use of radioactive material for irradiators. The information in the applications, reports, and records is used by the NRC staff to ensure that the health and safety of the public is protected and that the licensee possession and use of source or byproduct material is in compliance with license and regulatory requirements.

Dated: May 23, 2024.

For the Nuclear Regulatory Commission.

David Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2024-11733 Filed 5-28-24; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2023-198; MC2024-310 and CP2024-318; MC2024-311 and CP2024-319]

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: May 31, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* CP2023–198; *Filing Title:* USPS Notice of Amendment to Priority Mail Contract 782, Filed Under Seal; *Filing Acceptance Date:* May 22, 2024; *Filing Authority:* 39 CFR 3035.105; *Public Representative:*

Jennaca D. Upperman; *Comments Due:* May 31, 2024.

2. *Docket No(s):* MC2024–310 and CP2024–318; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 71 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 22, 2024; *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:* May 31, 2024.

3. *Docket No(s):* MC2024–311 and CP2024–319; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 72 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 22, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* May 31, 2024..

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2024–11754 Filed 5–28–24; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100129; File No. SR–CboeBZX–2024–032]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Rule 11.28(a) To Add Four Additional Market-on-Close Cut-off Times to Cboe Market Close

May 14, 2024.

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 April 29, 2024, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On May 13, 2024, the Exchange filed Amendment No. 1, which supersedes the original filing in its entirety.³ The Commission is

publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to amend Rule 11.28(a) to add four additional market-on-close (“MOC”) cut-off times (each a “MOC Cut-Off Time” and collectively “MOC Cut-Off Times”) To Cboe Market Close (“CMC”).

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BZX proposes to amend Rule 11.28(a) to add four additional CMC MOC Cut-Off times. These MOC Cut-Off times would be in addition to the existing MOC Cut-Off time of 3:49 p.m. ET, for a total of five matching sessions: 3:15 p.m. ET (new), 3:30 p.m. ET (new), 3:49 p.m. ET (current), 3:54 p.m. ET (new), and 3:58 p.m. ET (new).⁴ These proposed MOC Cut-Off Times are based on Member feedback. Specifically, in response to CMC's noticeable increase in executed volume (discussed below), there has been heightened interest in CMC from both existing users, as well

procedures with the proposed additional MOC Cut-Off times and (2) provided additional justification and support for the proposal. The full text of Amendment No. 1 is available on the Commission's website at https://www.sec.gov/rules/sro/national-securities-exchanges?aid=&sro_organization=192731.

⁴ Hereinafter, all times referenced are in Eastern Time.

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ In Amendment No. 1, the Exchange (1) amended paragraph (b) of Rule 11.28 and Interpretations and Policies .02 of Rule 11.28 to conform the CMC

as potential new users of CMC (collectively “Members”). Collectively, these Members have requested certain enhancements to CMC that would encourage existing users to increase their utilization of CMC, as well encourage prospective users to begin using CMC. Namely, Members have expressed a desire for: (1) MOC Cut-Off Times earlier in the trading day, and prior to the current MOC Cut-Off Time of 3:49 p.m.; (2) a MOC Cut-Off Time closer to Nasdaq’s MOC cut-off time of 3:55 p.m.; (3) a MOC Cut-Off Time Closer to the New York Stock Exchange’s (“NYSE”) Closing-D Order cut-off time of 3:59:50; and (4) a MOC Cut-Off Time that is subsequent to the MOC cut-off times of the NYSE’s and Nasdaq’s MOC cut-off times, and just prior to the NYSE’s Closing-D Order⁵ cut-off time of 3:59:50 p.m.

Both the Exchange and its Members believe that these enhancements will help to position CMC as more viable alternative to the primary exchanges’ closing auctions, NYSE’s Closing D Order, and off-exchange closing price services. Additionally, multiple MOC Cut-Off Times will make CMC more appealing to a larger segment of market participants by providing Members with different trading strategies and technical and operational capabilities more flexibility in how they manage their market-on-close (“MOC”) and closing price orders.

Procedural Background

On May 5, 2017, the Exchange filed a proposed rule change to adopt CMC, a match process for MOC orders in non-BZX listed securities and on December 1, 2017, filed Amendment No. 1⁶ to that proposal (the “Original Proposal”).⁷ On

January 17, 2018, the Commission, acting through authority delegated to the Division of Trading and Markets,⁸ approved the Original Proposal (“Approval Order”).⁹ On January 31, 2018, NYSE Group, Inc. (“NYSE”) and the Nasdaq Stock Market LLC (“Nasdaq”) filed petitions for review of the Approval Order (“Petitions for Review”). Pursuant to Commission Rule of Practice 431(e),¹⁰ the Approval Order was stayed by the filing with the Commission of a notice of intention to petition for review.¹¹ On March 1, 2018, pursuant to Commission Rule of Practice 431, the Commission issued a scheduling order granting the Petitions of Review of the Approval Order, and provided until March 22, 2018, for any party or other person to file a written statement in support of, or in opposition to, the Approval Order.¹² On April 12, 2018, NYSE and Nasdaq submitted written statements opposing the Approval Order and BZX submitted a statement in support of the Approval Order.¹³ On October 4, 2018, BZX filed Amendment No. 2¹⁴ to the Original Proposal.

Proposed Rule Change to Introduce Bats Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28).

⁸ 17 CFR 200.30–3(a)(12).

⁹ See Securities Exchange Act Release No. 34–82522 (January 17, 2018), 83 FR 3205 (January 23, 2018) (SR–BatsBZX–2017–34) (Notice of Filing of Amendment No. 1 and Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28).

¹⁰ 17 CFR 201.431(e).

¹¹ See Letter to Christopher Solgan, Assistant General Counsel, Cboe Global Markets, Inc. (Jan. 24, 2018) (providing notice of receipt of notices of intention to petition for review of delegated action and stay of order), available at: <https://www.sec.gov/rules/sro/batsbzx/2018/sr-batsbzx-2017-34-letter-from-secretary-to-cboe.pdf>.

¹² See Securities Exchange Act Release No. 82794, 83 FR 9561 (Mar. 6, 2018). On March 16, 2018, the Office of the Secretary, acting by delegated authority, issued an order on behalf of the Commission granting a motion for an extension of time to file statements on or before April 12, 2018. See Securities Exchange Act Release No. 82896, 83 FR 12633 (Mar. 22, 2018).

¹³ See Statement of NYSE Group, Inc., in Opposition to the Division’s Order Approving a Rule to Introduce Cboe Market Close (“NYSE Statement”); Statement of the Nasdaq Stock Market LLC in Opposition to Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Introduce Cboe Market Close (“Nasdaq Statement”); and Statement of Cboe BZX Exchange, Inc., in support of Commission Staff’s Approval Order (“BZX Statement”), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734.htm>.

¹⁴ See Securities Exchange Act Release No. 34–84670 (November 28, 2018), 83 FR 62646 (December 4, 2018) (SR–BatsBZX–2017–34) (“Notice of Filing of Amendment No. 2 to Proposed Rule Change to Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28”).

The Commission conducted a de novo review of the CMC proposal and associated public record, including Amendment No. 2, the Petitions for Review, and all comments and statements submitted by certain exchanges, issuers, and other market participants,¹⁵ to determine whether the proposal was consistent with the requirements of the Act and the rules and regulations issued thereunder that are applicable to a national securities exchange.¹⁶ The Commission noted that under Rule 700(b)(3) of the Commission’s Rule of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder. . . is on the self-regulatory organization that proposed the rule change.”¹⁷

Importantly, after reviewing the entire record, the Commission concluded that BZX met its burden to show that the proposed rule change was consistent with the Act, and pursuant to its January 21, 2020, order, set aside the Approval Order and approved BZX’s CMC proposal, as amended (“Final Approval Order”).¹⁸ Notably, the Commission stated that the record “demonstrate[d] that Cboe Market Close should introduce and promote competitive forces among national securities exchanges for the execution of MOC orders”¹⁹ and that “the record demonstrate[d] that Cboe Market Close should not disrupt the closing auction price discovery process nor should it materially increase the risk of manipulation of official closing prices.”²⁰

Subsequently, on August 5, 2022, the Exchange filed a proposed rule change to amend Rule 11.28(a) to extend CMC’s MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m. (“CMC Amendment”).²¹ On October 4, 2022, the Commission, acting through authority delegated to the Division of Trading and Markets, designated a longer period within which to take action on the Exchange’s CMC

¹⁵ See “Statements on File No. SR–BatsBZX–2017–34”, available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734.htm>.

¹⁶ See Securities Exchange Act Release No. 34–88008 (January 21, 2020), 85 FR 4726 (January 27, 2020) (SR–BatsBZX–2017–34) (“Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28”).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Securities Exchange Act Release No. 34–95529 (August 17, 2020), 87 FR 52092 (August 24, 2022) (SR–CboeBZX–2022–038).

⁵ See NYSE Rule 7.31 (c)(2) (“Closing-D Order”); see also “The Floor Broker’s Modern Trading Tool”, available at: <https://www.nyse.com/article/trading/d-order> (“While D-Orders are available for use throughout the trading day, most executions occur in the closing auction, where they’re known as Closing D Orders. At 3:55 p.m., Closing D Order interest eligible to participate in the closing auction is added to the order imbalance feed at their discretionary price range. Closing D Orders can also be submitted, modified or cancelled up to 3:59:50 p.m. These distinct features of Closing D Orders are designed to facilitate the Floor Broker’s traditional agency role on behalf of larger institutional interest, allowing Floor Brokers to work in conjunction with their customer to find larger liquidity opportunities.”).

⁶ The only change in Amendment No. 1 was to rename the proposed closing match process as Cboe Market Close. Per the Commission, because Amendment No. 1 was a technical amendment and did not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 was not subject to notice and comment.

⁷ See Securities Exchange Act Release No. 34–80683 (May 16, 2017), 82 FR 23320 (May 22, 2017) (SR–Bats–BZX–2017–34) (Notice of Filing of a

Amendment.²² Later, on November 11, 2022, BZX filed Amendment No. 1 to its CMC Amendment, and the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change as modified by Amendment No. 1.²³ Finally, on February 9, 2023, the Commission, approved the proposed CMC Amendment (“CMC Amendment Approval Order”).²⁴

In approving the CMC Amendment, the Commission stated that the proposal was consistent with Section 6(b)(5) of the Act,²⁵ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; as well as Section 6(b)(8) of the Act,²⁶ which requires that the rules of a national securities exchange not impose any burden on competition not

necessary or appropriate in furtherance of the purposes of the Act.

For the reasons discussed more fully below, the Exchange believes that when applying the Commission’s analysis in the Final Approval Order and the CMC Amendment Approval Order to the current proposal, such review would similarly conclude that this proposal is consistent with the Act.

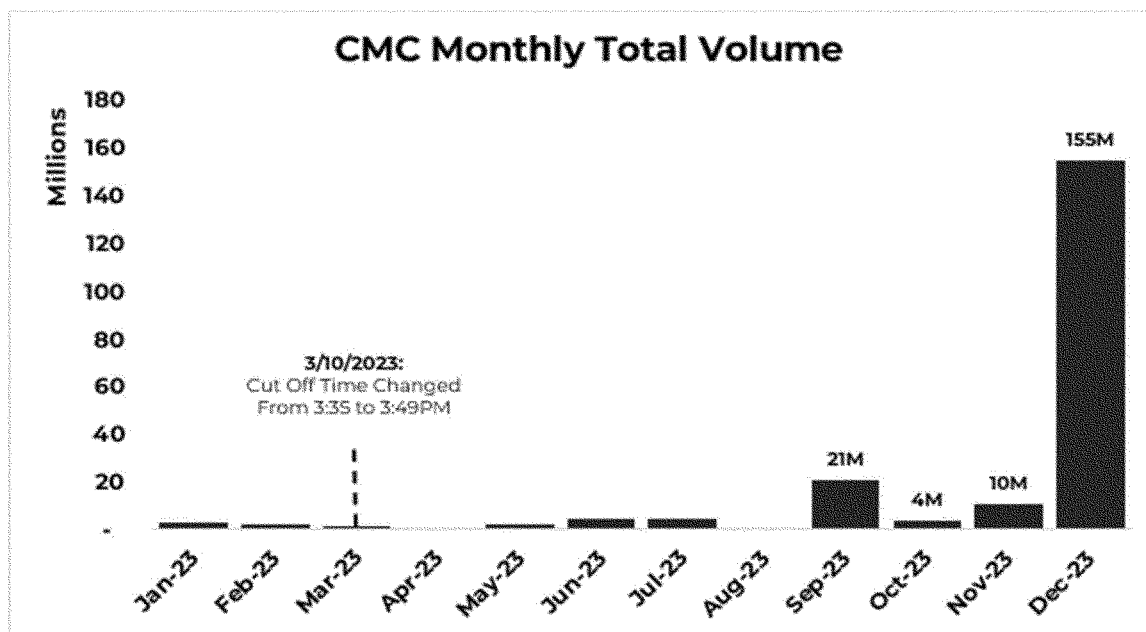
Increased Volume and New Demand for CMC

On March 10, 2023, the Exchange moved its MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m. As illustrated in Figure 1 below, since implementing the 3:49 p.m. MOC Cut-Off Time CMC has experienced noticeable growth in its trading volume, rising modestly beginning in May 2023 and more remarkably between September 2023 and November 2023, ultimately reaching a record-high of 155 million shares traded in December 2023. Based on CMC’s growing usage, the Exchange has received various feedback from both existing CMC users and prospective CMC users. Collectively, these Members have requested certain enhancements to CMC that would encourage existing users to increase their utilization of

CMC, as well encourage prospective users to begin using CMC. Namely, Members have expressed a desire for: (1) MOC Cut-Off Times earlier in the trading day, including prior to the current MOC Cut-Off Time of 3:49 p.m.; (2) a MOC Cut-Off Time closer to Nasdaq’s MOC cut-off time of 3:55 p.m.; (3) a MOC Cut-Off Time Closer to NYSE’s Closing-D Order cut-off time of 3:59:50; and (4) a MOC Cut-Off Time that is subsequent to the MOC cut-off times of the NYSE’s and Nasdaq’s MOC cut-off times, and just prior to NYSE’s Closing-D Order cut-off time of 3:59:50 p.m.

As noted, both the Exchange and its Members believe that these enhancements will help to position CMC as more viable alternative to the primary exchanges’ closing auctions, NYSE’s Closing-D Order, and off-exchange closing price services. Additionally, multiple MOC Cut-Off Times will make CMC more appealing to a larger segment of Members by providing Members with different trading strategies and technical and operational capabilities more flexibility in how they manage their MOC and closing price orders.

Figure 1 (Source: Internal Exchange Data)



²² See Securities Exchange Act Release No. 34–95967 (October 4, 2022), 87 FR 61425 (October 11, 2022) (SR–CboeBZX–2022–038).

²³ See Securities Exchange Act Release No. 34–96359 (November 18, 2022), 87 FR 72537 (November 25, 2022) (SR–CboeBZX–2022–038).

²⁴ See Securities Exchange Act Release No. 34–96861 (February 9, 2023), 88 FR 9940 (February 15, 2023) (SR–CboeBZX–2022–038).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ 15 U.S.C. 78f(b)(8).

Proposed Functionality

Accordingly, BZX proposes to amend Rule 11.28(a) to add four CMC MOC Cut-Off times. These MOC Cut-Off times would be in addition to the existing MOC Cut-Off time of 3:49 p.m., for a total of five matching sessions: 3:15 p.m. (new), 3:30 p.m. (new), 3:49 p.m. (current), 3:54 p.m. (new), and 3:58 p.m. (new). MOC orders may be entered for each matching session up to the relevant MOC Cut-Off Time, beginning each day at 6:00 a.m.²⁷ Members will have the ability to specify on their order instructions which CMC session(s) they wish to participate in. For orders that specify they are willing to match in multiple matching sessions, any unfilled quantity from an earlier session will carry forward to the next session(s). Any unfilled quantity remaining after a Member's specified final matching session will be canceled back to the Member. To illustrate the proposed functionality, consider the following examples.

Example 1: Order indicates matching in a single session

Order 1: Buy 100 @ MKT—CMC
Session: 3:49 p.m., Timestamp: 3:00:00 p.m.

Order 2: Sell 100 @ MKT—CMC
Session: 3:15 p.m., 3:30 p.m., 3:49 p.m., Timestamp: 3:01:00 p.m.

Results:

- Order 1 will not match with Order 2 in the 3:15 p.m. or 3:30 p.m. session. Order 2's unfilled quantity of 100 shares will first carry forward from the 3:15 session, then again from the 3:30 session, and finally to the 3:49 session.
- Order 1 and Order 2 match in the 3:49 p.m. session for 100 shares at the closing price.

Example 2: Order indicates matching in multiple sessions

Order 1: Buy 500 @ MKT—CMC
Session: 3:15 p.m., 3:30 p.m., 3:49 p.m., Timestamp: 3:00:00 p.m.

Order 2: Sell 100 @ MKT—CMC
Session: 3:30 p.m., Timestamp: 3:01:00 p.m.

Order 3: Sell 100 @ MKT—CMC
Session: 3:15 p.m., Timestamp: 3:02:00 p.m.

Order 4: Sell 100 @ MKT—CMC
Session: 3:49 p.m., Timestamp: 3:03:00 p.m.

Results:

²⁷ For instance, an MOC order specifying that it wishes to participate in the 3:15 MOC Cut-Off Time must be entered, cancelled, or replaced prior to 3:15 p.m. Similarly, a MOC order specified to participate in the 3:30 MOC Cut-Off Time may be entered, cancelled, or replaced anytime between 6:00 a.m. and 3:29:59 p.m.

- Order 1 and Order 3 match in the 3:15 p.m. session for 100 shares at the closing price and Order 1's 400 remaining shares are carried over to the next session.
- Order 1 and Order 2 match in the 3:30 p.m. session for 100 shares at the closing price and Order 1's 300 remaining shares are carried over to the next session.
- Order 1 and Order 4 match in the 3:49 p.m. session for 100 shares at the closing price and Order 1's 200 remaining shares are canceled back.

Example 3: Order's unfilled quantity retains its original timestamp for priority purposes

Order 1: Buy 500 @MKT—CMC Session: 3:15 p.m., 3:30 p.m., Timestamp: 3:00:00 p.m.

Order 2: Buy 100 @MKT—CMC Session: 3:30 p.m., Timestamp: 3:01:00 p.m.

Order 3: Sell 100 @MKT—CMC Session: 3:15 p.m., Timestamp: 3:02:00 p.m.

Order 4: Sell 100 @MKT—CMC Session: 3:30 p.m., Timestamp: 3:03:00 p.m.

Results:

- Order 1 and Order 3 match in the 3:15 p.m. session for 100 shares at the closing price and Order 1's 400 remaining shares are carried over to the next session.
- Order 1²⁸ and Order 4 match in the 3:30 p.m. session for 100 shares at the closing price and Order 1's 300 remaining shares are canceled back.
- Order 2's 100 shares are unfilled and canceled back at 3:30 p.m.

The Proposed 3:15 p.m. and 3:30 p.m. MOC Cut-Off Times

Members requesting MOC Cut-Off Times earlier in the trading day have expressed that these additional MOC Cut-Off Times will provide them more flexibility in managing their MOC and closing price order flow. For instance, some Members maintain multiple internal trading desks, each managing different types of order flow and trading strategies. One trading desk may manage orders that its traders actively trade throughout the trading day leading up to the close, making MOC Cut-Off Times closer to 4:00 p.m. more valuable for that trading desk. Separately, one of the Member's other trading desks may typically execute orders guaranteeing the closing price or perhaps manage orders on behalf of index funds or ETF providers, that are often benchmarked to

the official closing price. For this workflow, a Member may be agnostic as to when it commits MOC orders to CMC, a primary exchange's closing auction, or an off-exchange closing price service, and may view the ability to commit such order flow to CMC earlier in the trading day at 3:15 p.m. or 3:30 p.m. as a valuable tool to help them execute orders and de-risk their trading risk earlier in the trading day.

Additionally, Members have indicated the proposed 3:15 p.m. and 3:30 p.m. MOC Cut-Off Times will also assist them in managing any technological and operational risk associated with managing high volumes of order flow. Notional trading and trading volatility are typically at their highest towards the end of Regular Trading Hours. During this time, Members systems may be managing a significant number of MOC or closing price orders. Unless the Member is attempting to beat the closing price by trading such orders for as long as possible heading into the close, committing such orders to CMC earlier in the trading day will enable them to reduce the number of MOC and closing price orders their trading systems must manage. Notably, the Exchange noted in its CMC Amendment that today's market participants, including CMC's existing users, were technologically equipped²⁹ to handle CMC's current 3:49 p.m. MOC Cut-Off Time. While this remains the case today, the recent growth in CMC's executed volume has attracted potential new users with trading strategies, and technological and operational capabilities, that have presented new use cases for CMC.

²⁹ As a general matter, today's market participants, including CMC users, rely on electronic smart order routers, order management systems, and trading algorithms, which make routing and trading decisions on an automated basis, in times typically often measured in microseconds. See generally "Staff Report on Algorithmic Trading in U.S. Capital Markets" (August 5, 2020), available at https://www.sec.gov/tm/reports-and-publications/special-studies/algo_t_report_2020 ("Algorithmic Trading Report") ("Over the past decade, the manual handling of institutional orders is increasingly rare and has been replaced by sophisticated institutional order execution algorithms and smart order routing systems.") ("The secondary market for U.S.-listed equity securities that has developed within this structure is now primarily automated. The process of trading has changed dramatically primarily as a result of developments in technologies for generating, routing, and executing orders, as well as by the requirement imposed by law and regulation.") ("Modern equity markets are connected in part by the data flowing between market centers. An enormous volume of data is available to market participants. In recent years, there has been an exponential growth in the amount of market data available, the speed with which it is disseminated, and the computer power used to analyze and react to price movements.").

²⁸ Note that Order 1 in this scenario retains its priority over Order 2. Because Order 1 and Order 2 are both un-priced MOC orders, time priority takes precedent, with Order 1 maintaining its queue priority versus Order 2. See Rule 11.12, Priority of Orders, which provides that orders are ranked based on price, then time.

Overall, by having the ability to submit orders to the proposed 3:15 p.m., 3:30 p.m., and 3:49 p.m. MOC Cut-Off Times, Members will have a greater opportunity of being matched earlier in the trading day before potentially needing to re-route their unmatched MOC orders to the primary exchanges or off-exchange closing price offerings. On high-volume order days—e.g. Russell Rebalance Days where trading volume is high—the utility of being able to de-risk closing cross order volume earlier in the trading day is both a rational trading decision and a prudent way for Members to manage their operational and technological risk as such event days are marked by high volume and volatility that may utilize a significant portion of some Members' systems capacity.

The Proposed 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times

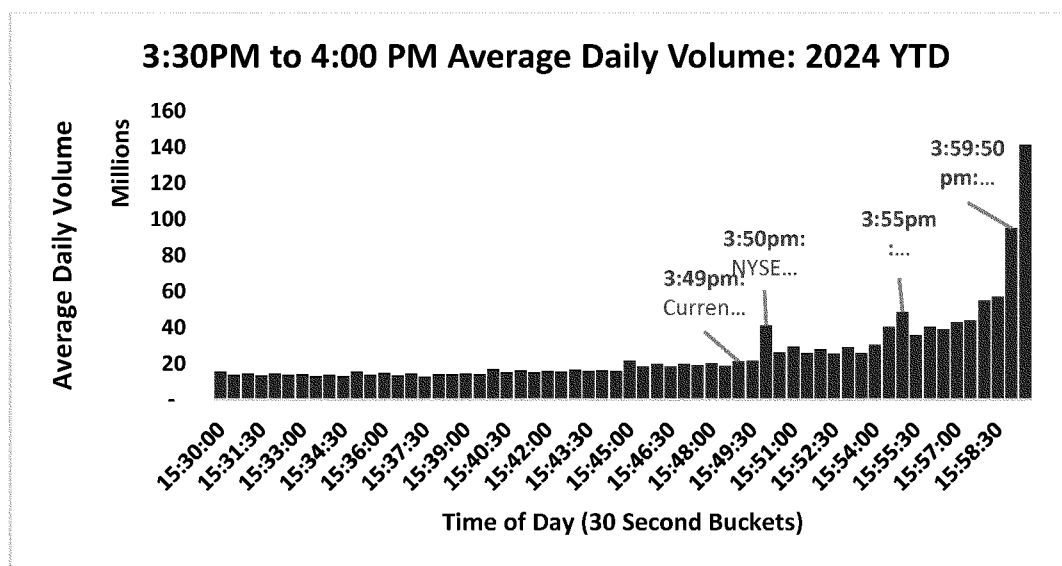
Members requesting the later MOC Cut-Off Time of 3:54 p.m. have indicated that these MOC Cut-Off Times will help to better align CMC with Nasdaq's MOC cut-off time of 3:55 p.m., thereby helping to make CMC a more viable alternative to Nasdaq's closing auction. Members requesting the later MOC Cut-Off Time of 3:58 p.m. have indicated that this MOC Cut-Off Time would provide Members with another option similar to NYSE's Closing D-

Order, thereby enabling Members to achieve the official closing price where they may have traded beyond the primary exchanges' closing auction cut-off times as they attempt to trade as close to 4:00 p.m. as possible.

Similar to the rationale for extending CMC's MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m., Members desire MOC Cut-Off Times that are closer to the end of Regular Trading Hours³⁰ so that they may retain control of their trading for a longer period of time. By being able to trade closer to the end of Regular Trading Hours, Members have more opportunities to seek better priced liquidity for their orders in a variety of ways and reducing the size of their outstanding orders they may need to commit to CMC or the primary auctions, including but not limited to, finding contra-side liquidity in the marketplace and trading directly against such interest, or guaranteeing a customer order at a price better than the national best bid or offer by committing capital to an order and filling it in a principal capacity, as well as continuing to trade algorithmically into the close. By adding the MOC Cut-Off Times of 3:54 p.m. and 3:58 p.m., CMC will be better positioned to serve as a viable option for market participants to consider when deciding which venues to route their MOC orders or Closing-D Orders, thus enhancing intermarket competition.

In support of the above, Figure 2 shows the total average *daily* volume across all market centers, from 3:30 p.m. to 4:00 p.m. in 30-seconds intervals, and includes labels for the different MOC cut-off times for CMC, NYSE, and Nasdaq. As illustrated, at NYSE's 3:50 p.m. MOC cut-off time, NYSE's 3:59:50 Closing-D Order cut-off time, Nasdaq's 3:55 p.m. MOC cut-off time, and 4:00 p.m. market close, there is a noticeable increase in traded volume in the overall marketplace, with volume relatively flat in the overall marketplace prior to those times. This analysis supports the Exchange's assertion that certain market participants do indeed prefer cut-off times later in the trading day. Therefore, the Exchange now seeks to implement the MOC Cut-Off Times of 3:54 p.m., and 3:58 p.m., to better align CMC with Nasdaq's 3:55 p.m. MOC cut-off time and NYSE's Closing-D Order cut-off time of 3:59:50. In doing so, the Exchange believes that CMC will be better positioned as a viable alternative to Nasdaq's closing auction, and as another option to NYSE's Closing D-Order, enabling Members to achieve the official closing price where they may have traded beyond the primary exchanges' closing auction cut-off times as they attempt to trade as close to 4:00 p.m., thereby "foster[ing] price competition and . . .decreas[ing] costs for market participants."³¹

Figure 2 (Source: Internal Exchange Data)



³⁰ The term "Regular Trading Hours" means the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

See Rule 1.2 (w), definition of, "Regular Trading Hours."

³¹ *Supra* note 15.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.³² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³³ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the addition of the proposed MOC Cut-Off Times would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed times would offer CMC users increased flexibility in how to manage their MOC and closing price order flow and their associated trading, and their technological and operational risk, as well help to better position CMC to serve as a viable alternative to the primary exchanges’ closing auctions, and off-exchange closing price mechanism. For instance, by having the option to allocate their MOC order flow across various MOC Cut-Off Times, Members will have the opportunity to receive matches earlier in the trading day, thereby reducing their trading risk, as well as the volume of orders their systems may need to handle at once, thereby reducing operational and technology risk. Furthermore, the proposed 3:54 p.m. MOC Cut-Off time will enable Members to actively trade orders in Nasdaq-listed securities for a longer period as they will no longer have to submit their MOC orders to CMC at 3:49 p.m.—*i.e.*, six-minutes prior to Nasdaq’s cut-off time. As discussed above, if a Member’s MOC orders are not matched in CMC they

will still have ample time to reroute any unmatched to CMC MOC orders to Nasdaq’s closing auction, thereby making CMC a more comparable alternative to Nasdaq’s closing auction.

Additionally, the Exchange has received feedback from Members that while moving the single MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m. (six-minutes prior to Nasdaq’s cut-off time, and nearly eleven-minutes prior to NYSE’s Closing-D Order cut-off time) has been helpful in managing their MOC and closing price order flow, Members desire later cut-off times that more closely align with the current Nasdaq cut-off time of 3:55 p.m., and a cut-off time closer to 4:00 p.m. As noted, the proposed 3:54 p.m. MOC Cut-Off Time will help make CMC a more practical alternative to the Nasdaq closing auction. Furthermore, the proposed MOC Cut-Off Time of 3:58 p.m. (*i.e.*, closer to 4:00 p.m.) would be of great value to Members because it would enable them to trade closer to 4:00 p.m.—*i.e.*, past the primary exchanges’ cut-off times—giving them control of their orders for a longer period of time and providing them with an option similar to NYSE’s Closing-D Order. The Exchange notes that the market participants that would primarily use the later MOC Cut-Off Times are technologically equipped³⁵ to handle the proposed 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times. Specifically, CMC’s current users utilize third-party providers or broker-dealers³⁶ that provide them with electronic trading technology enabling them to quickly react to market conditions and messages, such as the Cboe Auction

³⁵ *Supra* note 28.

³⁶ As a general matter, third-party technology providers and broker-dealers with electronic trading offerings provide automated trading and routing products and services to market participants that may not possess their own proprietary technology, or simply choose to leverage third party solutions they deem superior to their own internal technology. By way of example, portfolio managers responsible for reweighting their managed funds may not possess internal automated routing and algorithmic trading capabilities, and instead utilize third-party solutions enabling them to trade on an automated basis. As such, the proposed MOC Cut-Off Times of 3:54 p.m. and 3:58 p.m. are not likely to negatively impact market participants who may not possess the internal capabilities to reroute unmatched CMC MOC orders to the primary exchanges’ closing auctions. The Exchange further notes that the utilization of third parties and broker-dealers for technological trading solutions was even noted by the Commission in its Algorithmic Trading Report. *Supra* note 28 (“Institutions that do not create their own algorithms generally use algorithms provided to them by institutional brokers.”) (“Brokers are tasked by their customers with finding liquidity in a complex, fragmented market, achieving best execution, and minimizing information leakage and other implicit costs. To try to meet these goals, brokers use, and offer to their customers, a wide range of execution algorithms.”).

Feed.³⁷ Moreover, many market participants, including non-users of CMC, utilize electronic smart order routers, order management systems, and trading algorithms, which make routing and trading decisions on an automated basis in times often measured in microseconds. Therefore, the Exchange believes that both current users of CMC, as well as those that may utilize CMC following approval of this proposal, will be technologically equipped to efficiently respond to CMC’s publication of matched shares and, should they so choose, reroute any unmatched MOC orders to Nasdaq’s closing auction, utilize NYSE’s Closing-D Order,³⁸ or reroute to an off-exchange closing price offering.

The Exchange also notes that as CMC volume has increased, prospective new users³⁹ with different trading strategies and different technological and operational capabilities have expressed interest in utilizing CMC. This segment of Members has expressed a desire for earlier MOC Cut-Off Times, which they note will assist them in more efficiently managing their workflows and trading risk. For instance, some of these Members would prefer to commit certain of their closing price orders—*e.g.*, guaranteed close orders—to a closing auction mechanism earlier in the trading day. By submitting such orders to CMC and potentially receiving a match, a Member can reduce its trading risk. Additionally, by having the ability to allocate MOC orders across

³⁷ Per Rule 11.22(i), The Cboe Auction Feed is an uncompressed data product that provides information regarding the current status of price and size information related to auctions conducted by the Exchange as well as the total size of all buy and sell orders matched via Cboe Market Close described in Rule 11.28

³⁸ By way of background, CMC calculates the matched shares at the MOC Cut-Off Time (currently 3:49 p.m.) Importantly, the matching process happens quickly, and while the duration may vary, the total matching process typically takes a fraction of second (*e.g.*, ~948 microseconds), with the maximum being around 1-second. With these timeframes in mind, a user should in most instances, currently knows the paired CMC quantity no later than 3:49:01 p.m., leaving the user at least fifty-nine-seconds (59) to reroute any unpaired CMC MOC orders to the primary exchanges’ closing auctions. Similarly, applying these timeframes to the proposed MOC Cut-Off Times, a user should in most instances know the pair paired CMC quantities no later than 3:15.01, 3:30.01, 3:54.01, and 3:58.01. As noted by the Exchange throughout this filing, the speed of today’s trading technology is typically measured in microseconds, making fifty-nine-seconds (59) a significant amount of time for a user to make an automated trading decision. For reference, a microsecond is 1-millionth of a second.

³⁹ Prospective new users of CMC include both Members expressing interest in utilizing CMC for the first time, as well as new end-clients of Members that currently utilize CMC, and have inquired as to CMC’s functionality, and the proposed enhancements.

³² 15 U.S.C. 78f(b).

³³ *Supra* note 25.

³⁴ *Id.*

various MOC Cut-Off Times, Members can more capably manage their order volume and reduce the number of messages that their systems must manage and process heading into market close, where trading volume and volatility are typically highest. As such, Members will be better able to manage any operational or technology risk⁴⁰ associated with a high order volume day such as index rebalance days (e.g., Russell or MSCI index rebalance days) or unexpected high volatility trading days, as well as better manage the number of MOC orders a Member may need to send to an exchange or off-exchange venue at any one time.⁴¹

As noted in its CMC Amendment, the Exchange continues to believe that the extension of cut-off times by the primary exchanges since CMC's approval in 2020 as well as the growth of off-exchange venues⁴² with cut-off

times in such close proximity to the end of Regular Trading Hours is indicative of Members' desires for such offerings. Logically, such a change in market structure would not have occurred if market participants did not already possess the operational and technological capabilities to effectively manage the multitude of cut-off times offered by the exchanges and off-exchange venues.

The Exchange also believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because adding the MOC Cut-Off Times of 3:54 p.m. and 3:58 p.m. would more closely align the CMC with the cut-off time in place for the Nasdaq closing auction, as well as provide market participants with a tool similar to NYSE's Closing D-Order that enables them to trade closer to 4:00 p.m.⁴³ By adding the 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times, CMC has the ability to become a more comparable alternative to Nasdaq's closing auction and another option similar to NYSE's Closing D Orders, thereby "foster[ing] price competition and . . . decreas[ing] costs for market participants."⁴⁴

The primary exchanges' cut-off times are beneficial to market participants because of their proximity to the closing auctions, which occur at 4:00 p.m. Trading later into the day provides market participants with more time to seek better-priced liquidity for their orders in a variety of ways and provides additional time to determine the size of their outstanding orders that they may decide to commit to CMC, the primary auctions, or services offered by off-exchange venues such as ATSs. In this regard, by having the option to trade past the primary exchanges' cut-off times and still potentially receive the official closing price by participating in CMC at 3:58 p.m., Members will have had additional time to actively trade orders and attempt to access better priced liquidity for their orders or their client orders.

Importantly, even with the addition of the proposed MOC Cut-Off Times, CMC will remove any perceived impact on Nasdaq's or NYSE's closing auction by publishing the number of matched order shares, by security, in advance of

Nasdaq's cut-off time and NYSE's Closing-D Order cut-off time. The total matched shares would still be disseminated by the Exchange free of charge via the Cboe Auction Feed, albeit at each of the newly proposed MOC Cut-Off Times. Because of the speeds and widespread use of market technology the market makers on the primary exchanges could, should they choose to do so, incorporate the Cboe Auction Feed information (including information about total matched shares in CMC) into their closing processes.⁴⁵ Additionally, as discussed above, because of the market technology utilized by market participants in today's markets, those who choose to participate in CMC will still have ample time⁴⁶ to reroute any MOC orders not matched via CMC to reach Nasdaq's closing auction or NYSE's Closing-D Order offering, to be included in the primary exchanges' closing auctions. Notably, market participants that do not possess internal high-speed trading and routing capabilities often rely on third-party providers or broker-dealers⁴⁷ to handle and execute their orders electronically. Moreover, if market participants do not possess internal high-speed routing and trading technology, and do not utilize third-party solutions, the addition of the proposed MOC Cut-Off Times of 3:15 p.m. and 3:30 p.m. would allow such participants to try and receive CMC matches earlier in the day at 3:15 p.m.

⁴⁵ In connection with its CMC Amendment filing, the Exchange spoke with four (4) designated market makers for the primary exchanges and confirmed that while they do not currently monitor the Cboe Auction Feed, they are technically equipped to do so.

⁴⁶ *Supra* note 28.

⁴⁷ As a general matter, third-party technology providers and broker-dealers with electronic trading offerings provide automated trading and routing products and services to market participants that may not possess their own proprietary technology, or simply choose to leverage third party solutions they deem superior to their own internal technology. By way of example, portfolio managers responsible for reweighting their managed funds may not possess internal automated routing and algorithmic trading capabilities, and instead utilize third-party solutions enabling them to trade on an automated basis. As such, the proposed MOC Cut-Off Times of 3:54 p.m. and 3:58 p.m. are not likely to negatively impact market participants who may not possess the internal capabilities to reroute unmatched CMC MOC orders to the primary exchanges' closing auctions. The Exchange further notes that the utilization of third parties and broker-dealers for technological trading solutions was even noted by the Commission in its Algorithmic Trading Report. *Supra* note 28 ("Institutions that do not create their own algorithms generally use algorithms provided to them by institutional brokers.") ("Brokers are tasked by their customers with finding liquidity in a complex, fragmented market, achieving best execution, and minimizing information leakage and other implicit costs. To try to meet these goals, brokers use, and offer to their customers, a wide range of execution algorithms.")

⁴⁰ The Exchange notes that there are market participants that may not currently possess internal high-speed routing and trading technology. However, such market participants may, and likely already do, utilize routing and trading services offered by third-party providers or broker-dealers to handle and execute their orders electronically. Additionally, CMC is entirely voluntary and Members that do not possess internal high-speed trading and routing technology, or utilize third-party broker-dealers, are not required to use CMC. Accordingly, the Exchange believes that the proposed MOC Cut-Off Time is not likely to result in disparate treatment amongst CMC users and other market participants.

⁴¹ In this regard, the Exchange notes that some Members have expressed that while they have ample time to redirect any unmatched CMC orders to the primary exchanges, internal or external message rate checks (e.g., SEC Rule 15c3-5 risk checks or market center checks) may prohibit them from doing so if the Member is submitting a large volume of unmatched MOC orders at one time. In this regard, the proposed additional MOC Cut-Off Times may assist Members in allocating MOC orders across multiple CMC sessions, and should they be matched, reduce the volume of unmatched MOC orders the Member may have to submit to another market center.

⁴² For example, JP Morgan Securities' ATS, JPB-X, offers Close Price Match. This functionality utilizes a conditional order process to match orders and crosses them at the security's official closing prices, as determined by the closing auction at the primary exchange for a security. The Close Price Match time for an NMS stock is currently 30-seconds before the MOC cut-off time for that stock's primary exchange. Additionally, Instinet, LLC's ATS, CBX provides for three MOC Crossing Sessions, which consist of: a cross for securities where the primary listing exchange is the Nasdaq ("Nasdaq Cross"), a cross for securities where the primary listing exchange is the NYSE Arca ("Arca Cross"), and a cross for securities where the primary listing exchange is the NYSE ("NYSE Cross") (collectively, "MOC Crosses"). Each MOC Cross occurs two minutes prior to the relevant exchange's cut-off time; i.e., the Nasdaq Cross currently occurs at or near 3:53 p.m., the NYSE Cross at or near 3:48 p.m., and the Arca Cross at or near 3:57 p.m. See Form ATS-N, JPB-X, available at: https://www.sec.gov/Archives/edgar/data/782124/000001961722000459/xslATS-N_X01/primary_doc.xml; see also Form ATS-N, Instinet, LLC's ATS, CBX, available at: <https://www.sec.gov/>

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⁴³ As noted above, NYSE's Closing-D Order cut-off time is 3:50 p.m., and Nasdaq's cut-off time is 3:55 p.m. Additionally, the Exchange notes that NYSE Arca's cut-off time for MOC orders is 3:59 p.m. See "Trading Information—Closing Auctions", available at: <https://www.nyse.com/markets/nyse-arca/trading-info>.

⁴⁴ *Supra* note 15.

or 3:30 p.m., rather than limiting themselves to the later MOC Cut-Off Times of 3:49 p.m., 3:54 p.m., and 3:58 p.m., and having less time to re-route their unmatched MOC orders to the primary exchanges or off-exchange closing price mechanisms. Accordingly, the Exchange believes that the proposed MOC Cut-Off Times are not likely to result in disparate treatment amongst CMC users.

The proposed 3:58 p.m. MOC Cut-Off Time would also help to further align CMC's MOC Cut-Off Times with that of off-exchange venues that offer cut-off times that correspond with those currently offered by the primary exchanges, and as little as 30 seconds prior to market close.⁴⁸ As such, the Exchange believes that the proposed rule change is supported by both ample precedent as well as current market structure, and should not present any new or novel issues that market participants must consider when managing their trading and determining which exchange or off-exchange venue to route their MOC orders.

Price Discovery⁴⁹

As was the case with its CMC Amendment, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) requirements.⁵⁰ As previously noted by the Exchange,⁵¹ CMC accepts and matches only unpriced MOC orders. By matching only

unpriced MOC orders, and not priced Limit-On-Close ("LOC") orders and executing those matched MOC orders that naturally pair off with each other and effectively cancel each other out, CMC is designed to avoid impacting price discovery. The proposed rule change—i.e., the addition of additional MOC Cut-Off Times—does not change CMC's underlying functionality. As previously noted by the Exchange,⁵² matched MOC orders are merely recipients of price formation and do not directly contribute to the price formation process. Indeed, in its Final Approval Order for CMC, even the Commission noted that unpriced, paired-off MOC orders do not directly contribute to setting the official closing price of securities on the primary listing exchanges but, rather, are inherently the recipients of price formation information.⁵³

Moreover, the Exchange believes that even if the addition of MOC Cut-Off Times reduces the number of MOC orders routed to a security's primary listing market, CMC is still designed to remove any perceived adverse impact on the primary listing markets' close because the total matched shares for each CMC session would still be disseminated by the Exchange free of charge via the Cboe Auction Feed prior to the primary exchanges' cut-off times. Additionally, even with the addition of the new MOC Cut-Off Times, because of the technological capabilities of today's market participants discussed more fully above, the market makers on the primary exchanges would still have the ability to incorporate the Cboe Auction Feed information, including information about total matched shares in CMC, into their closing processes.

Furthermore, current users of CMC are either technologically equipped to manage the proposed CMC MOC-Cut Off Times or rely on third-party solutions that provide them with the technological capability to appropriately manage the proposed MOC Cut-Off Times and timely re-route unmatched CMC orders participate in the primary exchanges' closing auctions. Similarly, given the widespread use of routing and trading technology in today's markets, it is likely that potential new CMC users already possess the technological capabilities to manage the proposed

MOC Cut-Off Times, and if they do not, similarly rely on third-party providers with high-speed technology offerings. Alternatively, CMC users lacking high-speed trading and routing technology can simply utilize the earlier MOC Cut-Off Times of 3:15 p.m. and 3:30 p.m., providing themselves more flexibility to reroute unmatched CMC orders to the primary exchanges.

Fragmentation⁵⁴

Another matter addressed by the Commission in its review of the Original Proposal was fragmentation, and whether CMC would fragment the markets beyond what currently occurs through off-exchange close price matching venues offered by broker-dealers.⁵⁵ While comparisons to off-exchange MOC activity may not be a perfect measure of the potential resulting effect of CMC market fragmentation,⁵⁶ the proposed MOC Cut-Off Times are designed to enable CMC to better compete with off-exchange venues and for closing volume that is *already* executed away from the primary listing venues.

As illustrated in the first two charts below, a growing proportion of trading volume at the close occurs on off-exchange venues, where the TRF close volume, as a percent of Exchange close volume, has risen steadily since Q1 2019.⁵⁷ In the third chart the Exchange also studied the top ten most actively traded securities during the same time period and found that a significant portion of the total closing volume is executed off-exchange, following the dissemination of the official closing price.

⁵⁴ *Supra* note 49.

⁵⁵ *Supra* note 15.

⁵⁶ Id. ("... [C]omparisons to off-exchange activity are not a perfect measure of the potential resulting effect of the [CMC] proposal because the structures of the many off-exchange mechanisms differ from the structure of Cboe Market Close.").

⁵⁷ The Exchange conducted an analysis of off-exchange/Trade Reporting Facility ("TRF") closing volume that occurs after market close, 4:00 p.m. Eastern Time, where the price is equal to the closing price and for which such trades are reported with a Prior Reference Price ("PRP") trade reporting modifier. The TRF is a trade reporting facility where FINRA members may report trades in Nasdaq-listed and other exchange-listed securities, that were executed otherwise than on an exchange. The first two charts represent TRF executed volume at the close with the "PRP" flag that equals the closing auction price, divided by total on exchange auction volume.

⁴⁸ *Supra* note 41.

⁴⁹ As part of this proposed amendment, the Exchange is addressing several questions considered by the Commission in connection with the Exchange's Original Proposal, including price discovery and fragmentation, market complexity and operational risk, and manipulation. Importantly, in considering these questions, the Commission found that based on CMC's design and the record before the Commission, that the proposal was consistent with Section 6(b)(5) of the Act. *Supra* note 15.

⁵⁰ The Exchange notes that the Commission, in its Final Approval Order, carefully analyzed and considered CMC and its potential effects, if any, on the primary listing exchanges' closing auctions, including their price discovery functions. Importantly, the Commission found that, based on CMC's design, CMC should not disrupt the price discovery process in the closing auctions of the primary listing exchanges. *Supra* note 15.

⁵¹ See Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc. (August 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-2162452-157801.pdf>; see also Letter from Joanne Moffic-Silver (October 11, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-2634580-161229.pdf>.

⁵² *Id.*

⁵³ *Supra* note 15.

Figure 2 (Source: Internal Exchange Data)

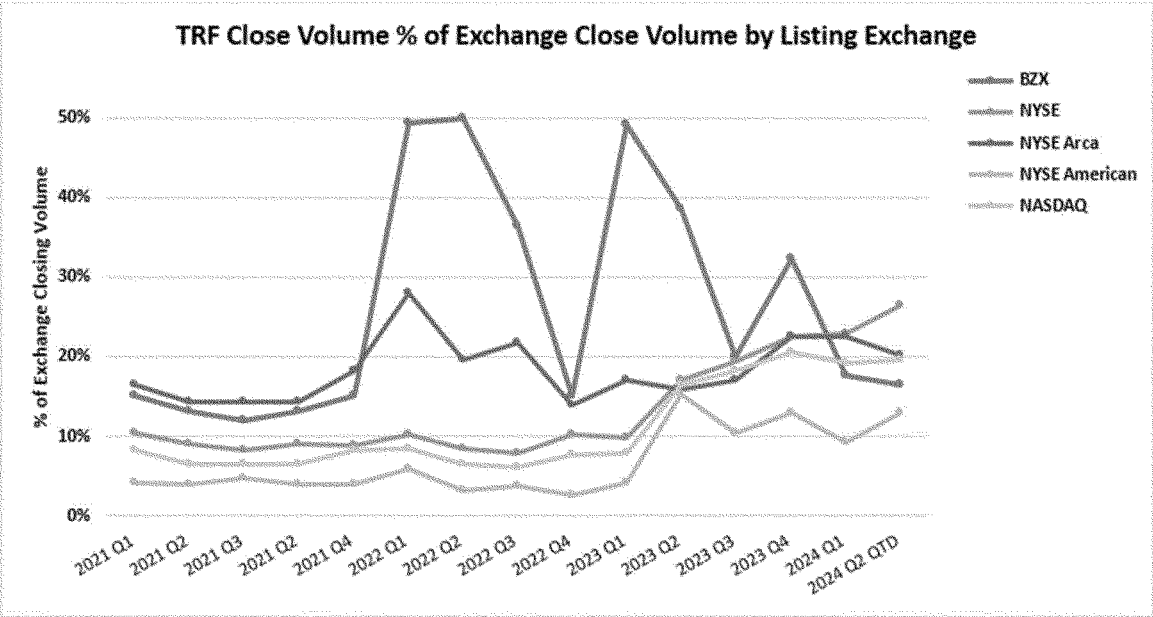


Figure 3 (Source: Internal Exchange Data)

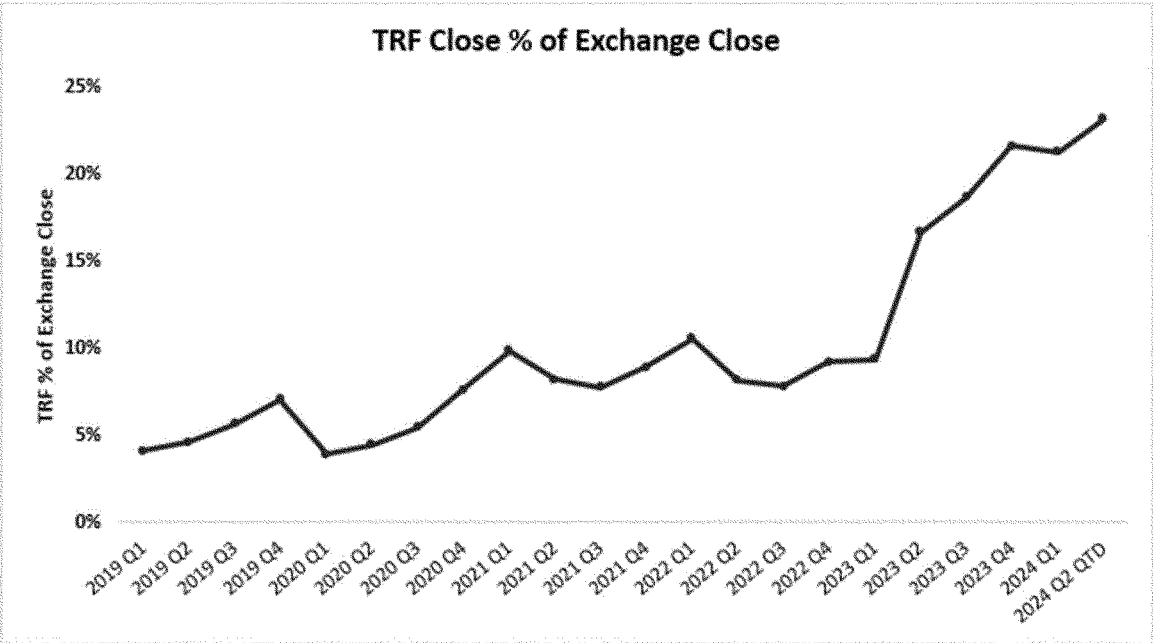


Figure 4 (Source: Internal Exchange Data)

	Symbol	Total ADV	Primary Listing Exchange	TRF Close % inc. PRP
1	TSLA	129,423,964	Nasdaq	12%
2	SQQQ	129,161,658	Nasdaq	21%
3	BBBY	122,763,238	Nasdaq	5%
4	SPY	80,346,142	NYSE Arca	13%
5	SOXS	73,944,691	NYSE Arca	16%
6	NKLA	67,493,708	Nasdaq	8%
7	AMD	64,632,893	Nasdaq	15%
8	PLTR	60,699,921	NYSE	15%
9	AAPL	59,750,017	Nasdaq	17%
10	PRTY	57,838,421	NYSE	7%

Given the significant volume of off-exchange MOC activity already occurring, the Exchange believes that there is still ample opportunity for the proposed MOC Cut-Off Times to attract *existing* MOC volume that is already being executed away from CMC and the primary listing venues. As discussed above, market participants have expressed the value of being able to trade closer to 4:00 p.m. In this regard, the proposed MOC Cut-Off Times of 3:55 p.m. and 3:58 p.m. satisfy the needs of today's market participants, and enable CMC to better compete with off-exchange venues, thereby "foster[ing] price competition and . . . decreas[ing] costs for market participants."⁵⁸ Members may prefer to execute their MOC orders via CMC rather than off-exchange venues for reasons such as the increased

transparency and reliability that exists when investors execute their orders on public, well-regulated exchanges. Moreover, by attracting such order flow, CMC can help to increase the amount of volume at the close executed on systems subject to the resiliency requirements of Regulation SCI.⁵⁹

Moreover, the Exchange's observations in Figure 5 below show that the closing auction volume on both NYSE and Nasdaq has increased despite the launch of CMC on March 6, 2020, and the subsequent implementation of the 3:49 p.m. MOC Cut-Off Time in 2023. Therefore, while the proposed amendment may lead to additional orders being routed to CMC rather than the primary exchanges' closing auctions, it cannot be said with certainty that such a change will cause additional fragmentation in the marketplace as it is

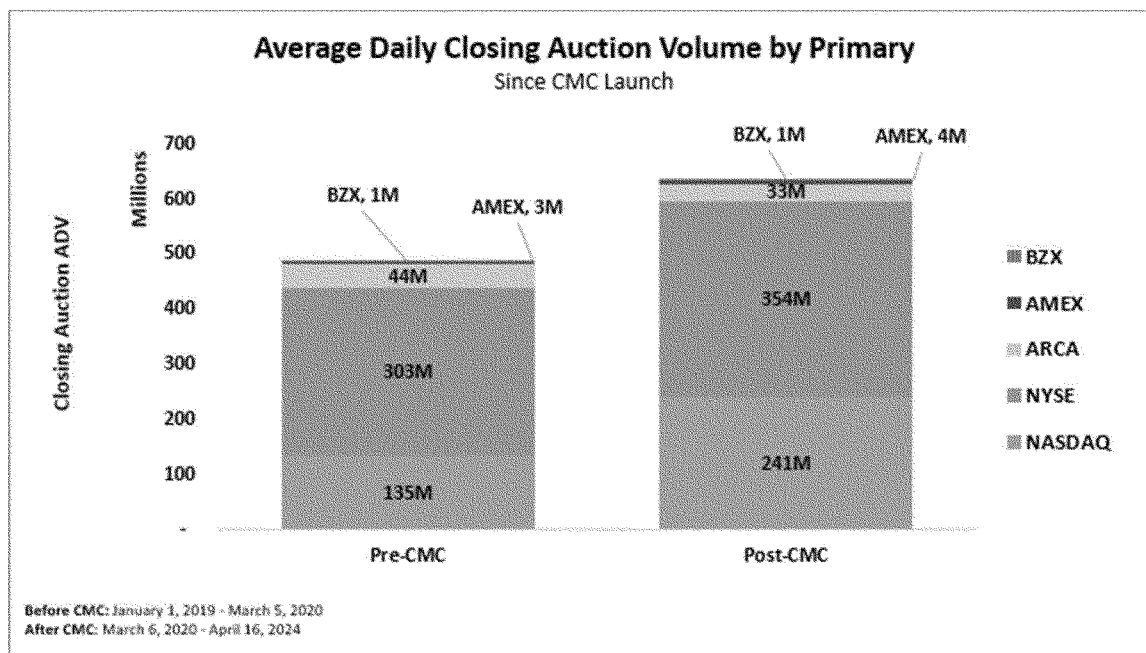
possible that existing MOC order flow that already executes on off-exchange venues may in fact migrate to CMC. In other words, MOC orders that are already being executed and matched away from the primary exchanges will continue to match and execute on away venues, but rather would match and execute pursuant to CMC rather than on an unregulated, non-transparent venue. In fact, the Exchange believes the proposed additional MOC Cut-Off Times are not likely to materially increase market fragmentation and therefore have a negative impact on the market because data shows that even with the implementation of CMC, there is still a significant amount of volume executed on the primary exchanges' suggesting that market participants continue to utilize the primary closing auctions.

⁵⁸ *Supra* note 15.

⁵⁹ See Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc., a Cboe Company (Oct. 11, 2017) ("Furthermore, [CMC]

would operate on the Exchange's reliable SCI systems . . . significant MOC liquidity is conducted today by off-exchange venues. These venues are not SCI systems and, therefore, not subject to Regulation SCI's enhanced resiliency

requirements. [CMC] could attract MOC orders from these off-exchange venues to the Exchange and its reliable SCI system, furthering the Commission's presumed desire for liquidity at the close to be conducted on SCI systems.")

Figure 5 (Source: Internal Exchange Data)

Market Complexity and Operational Risk ⁶⁰

The Exchange believes that the proposed rule change is simple and straightforward, and as such will not significantly increase market complexity or operational risk. The Exchange already received approval to change its MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m., which resulted in no increase in market complexity and operational risk. The Exchange now seeks only to offer additional MOC Cut-Off Times, none of which will increase market complexity or operational risk. Indeed, the 3:15 p.m. and 3:30 p.m. MOC Cut-Off Times are designed to help aid Members in managing their MOC order flow, and actually *mitigate* their operational and technological risk. The proposed 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times—like the approved 3:49 p.m. MOC Cut-Off Time—are intended only to help better align CMC with the cut-off times utilized by NYSE and Nasdaq for their Closing-D Orders and closing auction, respectively. While Members will now have the option to designate orders for participation in multiple MOC Cut-Off Times, and any unmatched quantities for such orders will carry forward to the next CMC session, the Exchange believes that Members are well equipped to manage any new workflow associated with these proposed enhancements. Indeed, the Exchange conferred with Members to

discuss the proposed workflow prior to submitting this proposal, and Members indicated that such changes did not present new or novel issues for them to consider. In addition, as previously noted,⁶¹ both current CMC users and market participants in general, possess high-speed routing and order handling technology, that will enable them to efficiently manage the proposed changes to CMC. Members continuing to only participate in a single CMC session will not have to consider new operational requirements of monitoring and consuming a new data feed or consider the utilization of a new order type or implementation of new Exchange code, other than perhaps needing to monitor the Cboe Auction Feed for the publication of CMC information at a different MOC Cut-Off Time. While Members electing to participate in multiple CMC sessions will need to monitor the Cboe Auction Feed for CMC information at multiple MOC Cut-Off Times, Members have indicated that the operational and technological requirements to do so are not complex, and do not present any new or novel issues. In addition, as previously noted,⁶² market participants today utilize high-speed technology that enables to receive and process market data in sub-second latencies. As such, given that the proposed MOC Cut-Off Times are multiple *minutes* apart, the proposed MOC Cut-Off Times should

not present any new or novel issues for Members.

Additionally, just as the Exchange did prior to proposing the 3:49 p.m. MOC Cut-Off Time, the Exchange discussed this current proposal with CMC users and learned that CMC's current users are technologically equipped⁶³ to manage the proposed 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times, and that they can respond to CMC's publication of matched shares and quickly reroute any unmatched MOC orders to the respective primary closing auction. Furthermore, the Exchange again notes that both off-exchange venues and other exchanges already offer MOC cut-off times that are closer in time to the end of Regular Trading Hours. Specifically, in 2018 Nasdaq received approval to move the cut-off times for the entry of MOC and Limit-On-Close ("LOC") orders from 3:50 to 3:55 p.m.⁶⁴ Similarly, in 2018 NYSE received approval from the SEC to extend cut-off times for order entry and cancellation

⁶³ *Id.*

⁶⁴ See Securities Exchange Act Release No. 34-84454 (October 19, 2018), 83 FR 53923 (October 25, 2018) (SR-Nasdaq-2018-068) (Order approving a rule change by Nasdaq) (The Commission approved a rule change by Nasdaq to move the cut-off times for the entry of MOC and LOC orders from 3:50 p.m. to 3:55 p.m.); see also Securities Exchange Act Release No. 34-85021 (January 31, 2019) (SR-NYSE-2018-58) (Order approving a rule change by NYSE) (The Commission approved a rule change by the NYSE to amend Rule 123C to extend the cut-off times for order entry and cancellation for participation in the closing auction, from 3:45 p.m. to 3:50 p.m.).

⁶⁰ *Supra* note 49.

⁶¹ *Supra*, note 28.

⁶² *Id.*

for participation in its closing auction, from 3:45 p.m. to 3:50 p.m.⁶⁵ NYSE also offers discretionary orders, which unlike MOC/LOC orders subject to NYSE's 3:50 p.m. cut-off, may be entered for participation in the closing auction until 3:59:50.⁶⁶ Additionally, market participants may enter MOC orders for participation in NYSE Arca's closing auction up to 3:59 p.m.⁶⁷ Finally, various off-exchange venues offer closing match processes with cut-off times aligned with those of the primary exchanges, and even as close to 30-seconds before market close, 4:00 p.m.⁶⁸

Moreover, the proposed 3:15 p.m. and 3:30 p.m. MOC Cut-Off Times will also enable new and existing CMC users that may not have high-speed trading and routing infrastructure, to still utilize CMC and not rely on high-speed technology to reroute unmatched CMC orders from the 3:49 p.m., 3:54 p.m., or 3:58 p.m. MOC Cut-Off Times. The Exchange also notes that CMC is a voluntary offering, and Members may freely decide whether to participate.

Accordingly, the Exchange believes that market participants are well accustomed to managing the various cut-off times in today's marketplace, and in incorporating these timelines into their trading decisions. The number of exchanges and off-exchange venues with extended cut-off times indicates that market participants find value in their ability to retain control of their trading heading into the end of Regular Trading Hours, and the primary exchanges and off-exchange venues have responded to such demand. Certainly, market participants would not desire cut-off times closer to the end of Regular Trading Hours if they could not technologically and operationally manage their trading accordingly. Therefore, the additional, later CMC MOC Cut-Off Times should not present market participants with any novel operational or technological complexities.

Manipulation ⁶⁹

In its CMC Amendment the Exchange noted that the value of the 3:49 p.m. MOC Cut-Off Time was not the proximity of CMC's matched share message to the cut-off times of the primary exchanges, but rather the ability of users to trade their orders for a longer period of time before deciding whether

to commit their MOC orders to CMC. The Exchange further stated that it did not expect that the proposed extension of the MOC Cut-Off Time to 3:49 p.m. would result in an increase in manipulative activity due to information asymmetries, or that it raised any unique manipulation concerns relative to how CMC existed with a MOC Cut-Off Time of 3:35 p.m. Importantly, the Exchange believes that this rationale also applies to the current proposal, and that the SEC should dismiss any manipulation concerns regarding this proposal, just as it did with the Original Proposal and CMC Amendment.

Here, the Exchange notes that the mere existence of multiple MOC Cut-Off Times does not make any information CMC participants may be able to glean from their paired-off MOC orders any more valuable. Rather, the value of any information learned by CMC participants is still limited in nature. For instance, any information that CMC participants may learn from receiving match MOC order messages is indeed limited in nature because the CMC participant would still only know the unexecuted size of its own order.⁷⁰ Even if a Member participated in all five CMC sessions—3:15 p.m., 3:30 p.m., 3:49 p.m., 3:54 p.m., and 3:58 p.m.—and received messages regarding matched MOC orders, the proposed MOC Cut-Off Times are many minutes apart, during which time new MOC orders may be entered, rendering useless any information a Member may have gleaned regarding an imbalance in the prior session. Moreover, even if a Member chose to participate in CMC only to gather information about the direction of an imbalance and use such information to manipulate the closing price, the Member's orders were still eligible for execution subjecting the Member to economic risk.

While this proposal would result in the total shares for buy and sell orders in CMC being disseminated several times during the last hour of trading, and with three MOC Cut-Off Times in close proximity to the primary exchanges' cut-off times, these changes

⁷⁰ The Exchange notes that in its Final Approval Order, even the Commission noted that, "In particular, a market participant would only be able to determine the direction of the imbalance and would have difficulty determining the magnitude of any imbalance, as it would only know the unexecuted size of its own order. In addition, the information would only be with regard to the pool of liquidity on BZX and would provide no insight into imbalances on the primary listing exchange, competing auctions, ATSS, or other off-exchange matching services which, as described above, can represent a significant portion of trading volume at the close." *Supra* note 15.

do not suddenly make such information more valuable or useful in terms of enhancing opportunities for gaming and manipulating the official closing price. The 3:49 p.m. and 3:54 p.m. MOC Cut-Off Times are one-minute prior to NYSE's and Nasdaq's MOC cut-off times, and the 3:58 p.m. MOC Cut-Off Time is one-minute prior to NYSE's Closing-D Order cut-off time. As noted throughout, today's markets are marked by technological solutions which typically operate in durations of microseconds. In this context, the separation between the CMC MOC Cut-Off Times and that of NYSE's and Nasdaq's is a substantial duration of time, during which much can change in the marketplace, thus limiting the value of information, if any, that can be gleaned from CMC's dissemination of matched shares at these times.

Moreover, the 3:15 p.m. MOC Cut-Off Time is thirty-five-minutes prior to NYSE's MOC cut-off time, forty-four-minutes and fifty-seconds prior to NYSE's Closing-D Order cut-off time, and forty-minutes prior to Nasdaq's MOC cut-off time. Similarly, the 3:30 p.m. MOC Cut-Off Time is twenty-minutes prior to the NYSE's MOC cut-off time, twenty-nine-minutes and fifty-seconds prior to NYSE's Closing-D Order cut-off time, and twenty-five-minutes prior to the Nasdaq MOC cut-off time. These proposed MOC Cut-Off Times are even further from the primary exchanges' cut-off times than the current CMC MOC Cut-Off Time, during which the marketplace and CMC will experience significant change, even further limiting the value of information, if any, that a Member may glean from the dissemination of matched shares.

Furthermore, as with the current MOC Cut-Off Time, the proposed MOC Cut-off Times do not present any information asymmetries that do not already exist in today's markets, as the very nature of trading creates short term asymmetries of information to those who are parties to a trade.⁷¹ Indeed, as noted by the Commission, any party to a trade gains valuable insight regarding the depth of the market when an order is executed or partially executed.⁷² Additionally, NYSE imbalance information is already disseminated to

⁷¹ The Exchange also notes that in its Final Approval Order, even the Commission noted that, "Further, the Commission believes information asymmetries as those described by commenters exist today and are inherent in trading, including with respect to closing auctions. For example, any party to a trade gains valuable insight regarding the depth of the market when an order is executed or partially executed." *Id.*

⁷² *Id.*

⁶⁵ *Id.*

⁶⁶ *Supra* note 4.

⁶⁷ See "Closing Auction Timeline", available at: <https://www.nyse.com/markets/nyse-arca/trading-info>.

⁶⁸ *Supra* note 14.

⁶⁹ *Supra* note 49.

NYSE floor brokers, who are permitted to share with their customers specific data from the imbalance feed.⁷³ Even in this case, though, the Commission stated that the value of such information is limited because the imbalance information does not represent overall supply and demand for a security, is subject to change, and is only one relevant piece of information.⁷⁴ Similarly, because any information gleaned by a CMC participant is limited only to the unexecuted size of their order, and relative to the depth of only the BZX pool of liquidity, the Exchange believes that the proposed extension of the MOC Cut-Off Time does not create an increased risk of manipulative trading activity.

Moreover, there are currently controls and processes in place to monitor for manipulative trading activity, such as the supervisory responsibilities and capabilities of exchanges and the expansive cross market surveillance conducted by FINRA. Following approval of this proposal, the Exchange, FINRA and others will continue to surveil for potential manipulative activity and when appropriate, bring enforcement actions against market participants engaged in manipulative trading activity.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendment applies equally to all Members, and is intended to offer additional MOC Cut-Off Times, enabling a broader segment of Members to utilize CMC at times that better accommodate different trading strategies, and Members' technological and operational capabilities. Similar to how current CMC users are technologically equipped to participate in CMC at 3:49 p.m. and timely reroute any unmatched CMC MOC orders to the NYSE or Nasdaq closing auction, today's CMC users will be able to utilize the 3:54 p.m. MOC Cut-Off Time and still have time to reroute any unmatched MOC orders to the Nasdaq closing auction. Similarly, Members are also technologically equipped to utilize the 3:58 p.m. MOC Cut-Off Times and still have time to reroute their orders as NYSE Closing-D Orders.. Members that may lack internal high-speed routing and trading technology may utilize third-party providers (discussed above) should they

desire to make use of the 3:54 p.m. and 3:58 p.m. MOC Cut-Off Times.

Alternatively, the proposed MOC Cut-Off Times of 3:15 p.m. and 3:30 p.m. will allow CMC users that may lack high-speed trading and routing infrastructure to utilize CMC without having to quickly re-route unmatched CMC orders to the primary exchanges just prior to their cut-off times, as well as attract new users who may desire a mechanism that allows them to match their MOC orders earlier in the trading day. Moreover, CMC is a voluntary closing match process, and Members are not required to participate in CMC.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the proposed rule change more closely aligns the CMC MOC Cut-Off Times to the cut-off times of other exchanges, while still providing CMC participants with an opportunity to reroute any of their unpaired MOC orders to the primary exchanges. In this regard, the proposed rule change may make CMC a more viable alternative to the primary auctions and "should foster price competition and thereby decrease costs for market participants."⁷⁵

Additionally, the proposed MOC Cut-Off Times of 3:15 p.m. and 3:30 p.m. will help make CMC a more attractive alternative to market participants that may not feel comfortable attempting to match in CMC at 3:49 p.m. and still have time to re-route unmatched CMC orders to NYSE and Nasdaq, as well as market participants that simply wish to reduce their MOC trading obligations earlier in the trading day by attempting to match in CMC. Collectively, the proposed MOC Cut-Off Times will enable the Exchange to compete with the primary exchanges more effectively, as well as with off-exchange venues that have cut-off times much closer in time to the market close and comprise a growing percentage of closing volume.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal**

Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By Order Approve or Disapprove Such Proposed Rule Change, as Modified by Amendment No. 1, or

B. Institute proceedings to determine whether the proposed rule change, as modified by Amendment No. 1, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2024-032 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBZX-2024-032. 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;

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Supra* note 15.

you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2024–032 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁶

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–10945 Filed 5–28–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100217; File No. SR–NYSEARCA–2023–70]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To List and Trade Shares of the Grayscale Ethereum Trust

May 22, 2024.

On October 10, 2023, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder, ² a proposed rule change to list and trade shares of the Grayscale Ethereum Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the *Federal Register* on October 27, 2023. ³ On December 5, 2023, pursuant to Section 19(b)(2) of the Act, ⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. ⁵ On January 25, 2024, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act ⁶ to determine whether to approve or disapprove the proposed rule change. ⁷ On March 15, 2024, the

Exchange filed Amendment No. 1, which replaced and superseded the proposed rule change in its entirety. On April 2, 2024, the Commission published notice of Amendment No. 1 to the proposed rule change. ⁸ On April 23, 2024, the Commission designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1. ⁹ On May 21, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 2 replaced and superseded the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Rule 8.201–E: Grayscale Ethereum Trust (ETH) (the “Trust”). ¹⁰ This Amendment No. 2 to SR–NYSEARCA–2023–70 replaces Amendment No. 1 to SR–NYSEARCA–2023–70 and supersedes such filing in its entirety. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NYSE Arca Rule 8.201–E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges “Commodity-Based Trust Shares.” ¹¹ The Exchange proposes to list and trade shares (“Shares”) ¹² of the Trust pursuant to NYSE Arca Rule 8.201–E. ¹³

¹¹ Commodity-Based Trust Shares are securities issued by a trust that represent investors’ discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

¹² The Shares are expected to be listed under the ticker symbol “ETHE.”

¹³ On April 17, 2020, the Trust confidentially filed its draft registration statement on Form 10 under the “34 Act” (File No. 337–03131) (the “Draft Registration Statement on Form 10”). On June 16, 2020, the Trust confidentially filed Amendment No. 1 to the Draft Registration Statement on Form 10. The Jumpstart Our Business Startups Act (the “JOBS Act”), enacted on April 5, 2012, added Section 6(e) to the Securities Act of 1933 (the “Securities Act” or “33 Act”). Section 6(e) of the Securities Act provides that an “emerging growth company” may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Draft Registration Statement on Form 10 to the Commission on a confidential basis. On August 6, 2020, the Trust filed its registration statement on Form 10 under the Securities Act (File No. 000–56193) (the “Registration Statement on Form 10”). On October 2, 2020, the Trust filed Amendment No. 1 to the Registration Statement on Form 10. On October 5, 2020, the Registration Statement on Form 10 was automatically deemed effective. On March 5, 2021, February 25, 2022, March 1, 2023, and February 23, 2024, the Trust filed its annual report on Form 10–K under the Securities Act (File No. 000–56193) (the “Annual Reports”). On November 6, 2020, May 7, 2021, August 6, 2021, November 5, 2021, May 6, 2022, August 5, 2022, November 4, 2022, May 5, 2023, August 4, 2023, and November 3, 2023, the Trust filed its quarterly reports on Form 10–Q under the Securities Act (File No. 000–56193) (the “Quarterly Reports”). The descriptions of the Trust, the Shares, and Ether contained herein are based, in part, on the Annual Reports and Quarterly Reports. On January 17, 2019, the Trust submitted to the Commission an amended Form D as a business trust. Shares of the Trust have been quoted on OTC Market’s OTCQX Best Marketplace under the symbol “ETHE” since June 20, 2019. On May 23, 2019 and March 20, 2020, the Trust published annual reports for ETHE for the periods ended December 31, 2018 and December 31, 2019, respectively. On May 23, 2019, August 8, 2019, November 11, 2019, May 8, 2020, and August 6, 2020, the Trust published quarterly reports for ETHE for the periods ended March 31, 2019, June 30, 2019, September 30, 2019, March 31,

Continued

⁷⁶ 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. 98780 (Oct. 23, 2023), 88 FR 73892. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nysearca-2023-70/srnysearca202370.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99082, 88 FR 85962 (Dec. 11, 2023).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99428, 89 FR 6155 (Jan. 31, 2024).

⁸ See Securities Exchange Act Release No. 99887, 89 FR 24534 (Apr. 8, 2024).

⁹ See Securities Exchange Act Release No. 100014, 89 FR 33414 (Apr. 29, 2024).

¹⁰ The Trust was previously named Ethereum Investment Trust, whose name was changed pursuant to a Certificate of Amendment to the Certificate of Trust of Ethereum Investment Trust filed with the Delaware Secretary of State on January 11, 2019.

The Trust is the world's largest ether ("Ether") investment fund by assets under management as of the date of this filing. The Trust has approximately \$11.8 billion in assets under management¹⁴ (representing 2.5% of all Ether in circulation), its Shares trade millions of dollars in daily volume and are held by more than a quarter of a million American investor accounts seeking exposure to Ether without the cost and complexity of purchasing the asset directly.¹⁵ However, because the Trust is not currently listed as an exchange-traded product ("ETP"), the value of the Shares has not been able to closely track the value of the Trust's underlying Ether. The Sponsor thus believes that allowing Shares of the Trust to list and trade on the Exchange as an ETP (*i.e.*, converting the Trust to a spot Ether ETP) would unlock over \$1.73 billion of value¹⁶ for the Trust's shareholders and provide other investors with a safe and secure way to invest in Ether on a regulated national securities exchange.

The sponsor of the Trust is Grayscale Investments, LLC ("Sponsor"), a Delaware limited liability company. The Sponsor is a wholly owned subsidiary of Digital Currency Group, Inc. ("Digital Currency Group"). The trustee for the Trust is Delaware Trust Company ("Trustee"). The custodian for the Trust is Coinbase Custody Trust Company,

LLC ("Custodian").¹⁷ The administrator and transfer agent of the Trust is BNY Mellon Asset Servicing, a division of The Bank of New York Mellon (the "Transfer Agent"). The distribution and marketing agent for the Trust will be Foreside Fund Services, LLC (the "Marketing Agent"). The index provider for the Trust is CoinDesk Indices, Inc. (the "Index Provider").

The Trust is a Delaware statutory trust, formed on December 13, 2017, that operates pursuant to a trust agreement between the Sponsor and the Trustee ("Trust Agreement"). The Trust has no fixed termination date.

Operation of the Trust

According to the Annual Report, the Trust's assets consist solely of Ether.¹⁸

Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust's assets as determined by reference to the Index Price,¹⁹ less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of Ether. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of Ether represented by a Share will gradually decrease over

time as the Trust's Ether are used to pay the Trust's expenses.

The activities of the Trust are limited to (i) issuing "Baskets" (as defined below) in exchange for Ether transferred to the Trust as consideration in connection with creations, (ii) transferring or selling Ether as necessary to cover the "Sponsor's Fee"²⁰ and/or certain Trust expenses, (iii) transferring Ether in exchange for Baskets surrendered for redemption (subject to obtaining regulatory approval from the Commission and approval of the Sponsor), (iv) causing the Sponsor to sell Ether on the termination of the Trust, and (v) engaging in all administrative and security procedures necessary to accomplish such activities in accordance with the provisions of the Trust Agreement, the Custodian Agreement, the Index License Agreement, and the Participant Agreements (each as defined below).²¹

The Trust will not be actively managed. It will not engage in any activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the market prices of Ether.

Investment Objective

According to the Annual Report, and as further described below, the Trust's investment objective is for the value of the Shares (based on Ether per Share) to reflect the value of the Ether held by the Trust, determined by reference to the Index Price, less the Trust's expenses and other liabilities. While an investment in the Shares is not a direct investment in Ether, the Shares are designed to provide investors with a cost-effective and convenient way to gain investment exposure to Ether. Generally speaking, a substantial direct investment in Ether may require expensive and sometimes complicated arrangements in connection with the acquisition, security and safekeeping of

2020, and June 30, 2020, respectively. Reports published before October 5, 2020, the date on which the Trust's Shares became registered pursuant to Section 12(g) of the Act, can be found on OTC Market's website (<https://www.otcmatrix.com/stock/ETHE/disclosure>), and reports published on or after October 5, 2020 can be found on OTC Market's website and the Commission's website (<https://www.sec.gov/edgar/browse/?CIK=1725210&owner=exclude>). The Shares will be of the same class and will have the same rights as shares of ETHE. According to the Sponsor, freely tradeable shares of ETHE will remain freely tradeable Shares on the date of the listing of the Shares that are unregistered under the Securities Act. Restricted shares of ETHE will remain subject to private placement restrictions on such date, and the holders of such restricted shares will continue to hold those Shares subject to those restrictions until they become freely tradable Shares. On April 23, 2024, the Trust filed a registration statement on Form S-3 under the Securities Act (File No. 333-278880) (the "Registration Statement"). The descriptions of the Trust and Shares contained herein are based, in part, on the Registration Statement. The Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹⁴ As of March 13, 2024.

¹⁵ As of the date of the initial filing of this proposed rule change. See Securities Exchange Act Release No. 98780 (October 23, 2023), 88 FR 73892 (October 27, 2023) (Notice of Filing of Proposed Rule Change To List and Trade Shares of the Grayscale Ethereum Trust Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares)).

¹⁶ As of March 13, 2024.

¹⁷ According to the Annual Report, Digital Currency Group owns a minority interest in Coinbase, Inc., which is the parent company of the Custodian, representing less than 1.0% of its equity.

¹⁸ The Trust will not hold cash or engage a cash custodian other than in connection with creations and redemptions. The Trust may from time to time come into possession of Incidental Rights and/or IR Virtual Currency by virtue of its ownership of Ethereum, generally through a fork in the Ethereum Blockchain, an airdrop offered to holders of Ethereum or other similar event. "Incidental Rights" are rights to acquire, or otherwise establish dominion and control over, any virtual currency or other asset or right, which rights are incident to the Trust's ownership of Ethereum and arise without any action of the Trust, or of the Sponsor or Trustee on behalf of the Trust. "IR Virtual Currency" is any virtual currency tokens, or other asset or right, acquired by the Trust through the exercise (subject to the applicable provisions of the Trust Agreement) of any Incidental Right. Although the Trust is permitted to take certain actions with respect to Incidental Rights and IR Virtual Currency in accordance with its Trust Agreement, at this time the Trust will prospectively irrevocably abandon any Incidental Rights and IR Virtual Currency. In the event the Trust seeks to change this position, the Exchange would file a subsequent proposed rule change with the Commission.

¹⁹ The "Index Price" means the U.S. dollar value of an Ether derived from the Digital Asset Trading Platforms that are reflected in the CoinDesk Ether Price Index (ETX), calculated at 4:00 p.m., New York time, on each business day. For purposes of the Trust Agreement, the term Ether Index Price has the same meaning as the Index Price as defined herein.

²⁰ The Sponsor's Fee means a fee, payable in Ether, which accrues daily in U.S. dollars at an annual rate of currently 2.5%, but which will be lowered in connection with the Trust becoming an ETP, of the NAV Fee Basis Amount of the Trust as of 4:00 p.m., New York time, on each day, provided that for a day that is not a business day, the calculation of the Sponsor's Fee will be based on the NAV Fee Basis Amount from the most recent business day, reduced by the accrued and unpaid Sponsor's Fee for such most recent business day and for each day after such most recent business day and prior to the relevant calculation date. The "NAV Fee Basis Amount" is calculated in the manner set forth under "Valuation of Ether and Determination of NAV" below.

²¹ Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's Ether becomes subject to Ethereum proof-of-stake validation or is used to earn additional Ether or generate income or other earnings.

the Ether and may involve the payment of substantial fees to acquire such Ether from third-party facilitators through cash payments of U.S. dollars. Because the value of the Shares is correlated with the value of Ether held by the Trust, it is important to understand the investment attributes of, and the market for, Ether.

The Trust uses the Index Price to calculate its “NAV,” which is the aggregate value, expressed in U.S. dollars, of the Trust’s assets (other than U.S. dollars or other fiat currency), less the U.S. dollar value of the Trust’s expenses and other liabilities calculated in the manner set forth under “Valuation of Ether and Determination of NAV.” “NAV per Share” is calculated by dividing NAV by the number of Shares then outstanding.

Valuation of Ether and Determination of NAV

The following is a description of the material terms of the Trust Agreement as they relate to valuation of the Trust’s Ether and the NAV calculations.²²

On each business day at 4:00 p.m., New York time, or as soon thereafter as practicable (the “Evaluation Time”), the Sponsor will evaluate the Ether held by the Trust and calculate and publish the NAV of the Trust. To calculate the NAV, the Sponsor will:

1. Determine the Index Price as of such business day.
2. Multiply the Index Price by the Trust’s aggregate number of Ether owned by the Trust as of 4:00 p.m., New York time, on the immediately preceding day, less the aggregate number of Ether payable as the accrued and unpaid Sponsor’s Fee as of 4:00 p.m., New York time, on the immediately preceding day.
3. Add the U.S. dollar value of Ether, calculated using the Index Price, receivable under pending creation orders, if any, determined by multiplying the number of the Baskets represented by such creation orders by the Basket Amount and then multiplying such product by the Index Price.²³
4. Subtract the U.S. dollar amount of accrued and unpaid Additional Trust Expenses, if any.²⁴

²² While the Sponsor uses the terminology “NAV” in this filing, the term used in the Trust Agreement is “Digital Asset Holdings.”

²³ “Baskets” and “Basket Amount” have the meanings set forth in “Creation and Redemption of Shares” below.

²⁴ “Additional Trust Expenses” are any expenses incurred by the Trust in addition to the Sponsor’s Fee that are not Sponsor-paid expenses, including, but not limited to, (i) taxes and governmental charges, (ii) expenses and costs of any extraordinary services performed by the Sponsor (or any other

5. Subtract the U.S. dollar value of the Ether, calculated using the Index Price, to be distributed under pending redemption orders, if any, determined by multiplying the number of Baskets to be redeemed represented by such redemption orders by the Basket Amount and then multiplying such product by the Index Price (the amount derived from steps 1 through 5 above, the “NAV Fee Basis Amount”).

6. Subtract the U.S. dollar amount of the Sponsor’s Fee that accrues for such business day, as calculated based on the NAV Fee Basis Amount for such business day.

In the event that the Sponsor determines that the primary methodology used to determine the Index Price is not an appropriate basis for valuation of the Trust’s Ether, the Sponsor will utilize the cascading set of rules as described in “Determination of the Index Price When Index Price is Unavailable” below.

Ether and the Ethereum Network²⁵

According to the Annual Report, Ether is a digital asset that is created and transmitted through the operations of the peer-to-peer “Ethereum Network,” a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value, called Ether, which are recorded on a public transaction ledger known as a blockchain. Ether can be used to pay for goods and services, including computational power on the Ethereum Network, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on “Digital Asset Markets”²⁶ or in

service provider) on behalf of the Trust to protect the Trust or the interests of shareholders, (iii) any indemnification of the Custodian or other agents, service providers or counterparties of the Trust, (iv) the fees and expenses related to the listing, quotation or trading of the Shares on any marketplace or other alternative trading system, as determined by the Sponsor, on which the Shares may then be listed, quoted or traded, including but not limited to, NYSE Arca, Inc. (including legal, marketing and audit fees and expenses) to the extent exceeding \$600,000 in any given fiscal year and (v) extraordinary legal fees and expenses, including any legal fees and expenses incurred in connection with litigation, regulatory enforcement or investigation matters.

²⁵ The description of Ether and the Ethereum Network in this section was provided by the Sponsor and is based on the Annual Report.

²⁶ A “Digital Asset Market” is a “Brokered Market,” “Dealer Market,” “Principal-to-Principal Market” or “Exchange Market,” as each such term is defined in the Financial Accounting Standards Board Accounting Standards Codification Master Glossary.

individual end-user-to-end-user transactions under a barter system.

Furthermore, the Ethereum Network also allows users to write and implement smart contracts—that is, general-purpose code that executes on every computer in the network and can instruct the transmission of information and value based on a sophisticated set of logical conditions. Using smart contracts, users can create markets, store registries of debts or promises, represent the ownership of property, move funds in accordance with conditional instructions and create digital assets other than Ether on the Ethereum Network. Smart contract operations are executed on the Ethereum Blockchain in exchange for payment of Ether. The Ethereum Network is one of a number of projects intended to expand blockchain use beyond just a peer-to-peer money system.

The Ethereum Network went live on July 30, 2015. Unlike other digital assets, such as Bitcoin, which are solely created through a progressive mining process, 72.0 million Ether were created in connection with the launch of the Ethereum Network. At the time of the network launch, a non-profit called the Ethereum Foundation was the sole organization dedicated to protocol development.

The Ethereum Network is decentralized in that it does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of Ether. Rather, following the initial distribution of Ether, Ether is created, burned, and allocated by the Ethereum Network protocol through a process that is currently subject to an issuance and burn rate. The value of Ether is determined by the supply of and demand for Ether on the Digital Asset Trading Platforms or in private end-user-to-end-user transactions.

New Ether are created and rewarded to the validators of a block in the Ethereum Blockchain for verifying transactions. The Ethereum Blockchain is effectively a decentralized database that includes all blocks that have been validated, and it is updated to include new blocks as they are validated. Each Ether transaction is broadcast to the Ethereum Network and, when included

The “Digital Asset Trading Platform Market” is the global trading platform market for the trading of Ether, which consists of transactions on electronic Digital Asset Trading Platforms.

A “Digital Asset Trading Platform” is an electronic marketplace where trading participants may trade, buy and sell Ether based on bid-ask trading. The largest Digital Asset Trading Platforms are online and typically trade on a 24-hour basis, publishing transaction price and volume data.

in a block, recorded in the Ethereum Blockchain. As each new block records outstanding Ether transactions, and outstanding transactions are settled and validated through such recording, the Ethereum Blockchain represents a complete, transparent and unbroken history of all transactions of the Ethereum Network.

Among other things, Ether is used to pay for transaction fees and computational services (*i.e.*, smart contracts) on the Ethereum Network; users of the Ethereum Network pay for the computational power of the machines executing the requested operations with Ether. Requiring payment in Ether on the Ethereum Network incentivizes developers to write quality applications and increases the efficiency of the Ethereum Network because wasteful code costs more, while also ensuring that the Ethereum Network remains economically viable by compensating for contributed computational resources.

Smart Contracts and Development on the Ethereum Network

Smart contracts are programs that run on a blockchain that can execute automatically when certain conditions are met. Smart contracts facilitate the exchange of anything representative of value, such as money, information, property, or voting rights. Using smart contracts, users can send or receive digital assets, create markets, store registries of debts or promises, represent ownership of property or a company, move funds in accordance with conditional instructions and create new digital assets.

Development on the Ethereum Network involves building more complex tools on top of smart contracts, such as decentralized apps (“DApps”); organizations that are autonomous, known as decentralized autonomous organizations (“DAOs”); and entirely new decentralized networks. For example, a company that distributes charitable donations on behalf of users could hold donated funds in smart contracts that are paid to charities only if the charity satisfies certain pre-defined conditions.

Moreover, the Ethereum Network has also been used as a platform for creating new digital assets and conducting their associated initial coin offerings. As of December 31, 2023, a majority of digital assets were built on the Ethereum Network, with such assets representing a significant amount of the total market value of all digital assets.

More recently, the Ethereum Network has been used for decentralized finance (“DeFi”) or open finance platforms,

which seek to democratize access to financial services, such as borrowing, lending, custody, trading, derivatives and insurance, by removing third-party intermediaries. DeFi can allow users to lend and earn interest on their digital assets, exchange one digital asset for another and create derivative digital assets such as stablecoins, which are digital assets pegged to a reserve asset such as fiat currency. Over the course of 2023, between \$20 billion and \$30 billion worth of digital assets were locked up as collateral on DeFi platforms on the Ethereum Network.²⁷

In addition, the Ethereum Network and other smart contract platforms have been used for creating non-fungible tokens, or “NFTs.” Unlike digital assets native to smart contract platforms which are fungible and enable the payment of fees for smart contract execution. Instead, NFTs allow for digital ownership of assets that convey certain rights to other digital or real-world assets. This new paradigm allows users to own rights to other assets through NFTs, which enable users to trade them with others on the Ethereum Network. For example, an NFT may convey rights to a digital asset that exists in an online game or a DApp, and users can trade their NFT in the DApp or game, and carry them to other digital experiences, creating an entirely new free-market, internet-native economy that can be monetized in the physical world.

Overview of the Ethereum Network’s Operations

In order to own, transfer, or use Ether directly on the Ethereum Network (as opposed to through an intermediary, such as a custodian), a person generally must have internet access to connect to the Ethereum Network. Ether transactions may be made directly between end-users without the need for a third-party intermediary. To prevent the possibility of double-spending Ether, a user must notify the Ethereum Network of the transaction by broadcasting the transaction data to its network peers. The Ethereum Network provides confirmation against double-spending by memorializing every transaction in the Ethereum Blockchain, which is publicly accessible and transparent. This memorialization and verification against double-spending is accomplished through the Ethereum Network validation process, which adds “blocks” of data, including recent transaction information, to the Ethereum Blockchain.

Summary of an Ether Transaction

Prior to engaging in Ether transactions directly on the Ethereum Network, a user generally must first install on its computer or mobile device an Ethereum Network software program that will allow the user to generate a private and public key pair associated with an Ether address, commonly referred to as a “wallet.” The Ethereum Network software program and the Ether address also enable the user to connect to the Ethereum Network and transfer Ether to, and receive Ether from, other users.

Each Ethereum Network address, or wallet, is associated with a unique “public key” and “private key” pair. To receive Ether, the Ether recipient must provide its public key to the party initiating the transfer. This activity is analogous to a recipient for a transaction in U.S. dollars providing a routing address in wire instructions to the payor so that cash may be wired to the recipient’s account. The payor approves the transfer to the address provided by the recipient by “signing” a transaction that consists of the recipient’s public key with the private key of the address from where the payor is transferring the Ether. The recipient, however, does not make public or provide to the sender its related private key.

Neither the recipient nor the sender reveal their private keys in a transaction, because the private key authorizes transfer of the funds in that address to other users. Therefore, if a user loses his or her private key, the user may permanently lose access to the Ether contained in the associated address. Likewise, Ether is irretrievably lost if the private key associated with them is deleted and no backup has been made. When sending Ether, a user’s Ethereum Network software program must validate the transaction with the associated private key. In addition, since every computation on the Ethereum Network requires processing power, there is a transaction fee involved with the transfer that is paid by the payor. The resulting digitally validated transaction is sent by the user’s Ethereum Network software program to the Ethereum Network validators to allow transaction confirmation.

Ethereum Network validators record and confirm transactions when they validate and add blocks of information to the Ethereum Blockchain. In proof-of-stake, validators compete to be randomly selected to validate transactions. When a validator is selected to validate a block, it creates that block, which includes data relating to (i) the verification of newly submitted

²⁷ DeFiLlama, “Ethereum Total Value Locked,” <https://defillama.com/chain/Ethereum>.

and accepted transactions and (ii) a reference to the prior block in the Ethereum Blockchain to which the new block is being added. The validator becomes aware of outstanding, unrecorded transactions through the data packet transmission and distribution discussed above.

Upon the addition of a block included in the Ethereum Blockchain, the Ethereum Network software program of both the spending party and the receiving party will show confirmation of the transaction on the Ethereum Blockchain and reflect an adjustment to the Ether balance in each party's Ethereum Network public key, completing the Ether transaction. Once a transaction is confirmed on the Ethereum Blockchain, it is irreversible.

Some Ether transactions are conducted "off-blockchain" and are therefore not recorded in the Ethereum Blockchain. These "off-blockchain transactions" involve the transfer of control over, or ownership of, a specific digital wallet holding Ether or the reallocation of ownership of certain Ether in a pooled-ownership digital wallet, such as a digital wallet owned by a Digital Asset Trading Platform. In contrast to on-blockchain transactions, which are publicly recorded on the Ethereum Blockchain, information and data regarding off-blockchain transactions are generally not publicly available. Therefore, off-blockchain transactions are not truly Ether transactions in that they do not involve the transfer of transaction data on the Ethereum Network and do not reflect a movement of Ether between addresses recorded in the Ethereum Blockchain. For these reasons, off-blockchain transactions are subject to risks, as any such transfer of Ether ownership is not protected by the protocol behind the Ethereum Network or recorded in, and validated through, the blockchain mechanism.

Creation of New Ether

Initial Creation of Ether

Unlike other digital assets such as Bitcoin, which are solely created through a progressive mining process, 72.0 million Ether were created in connection with the launch of the Ethereum Network. The initial 72.0 million Ether were distributed as follows:

Initial Distribution: 60.0 million Ether, or 83.33% of the supply, was sold to the public in a crowd sale conducted between July and August 2014 that raised approximately \$18 million.

Ethereum Foundation: 6.0 million Ether, or 8.33% of the supply, was

distributed to the Ethereum Foundation for operational costs.

Ethereum Developers: 3.0 million Ether, or 4.17% of the supply, was distributed to developers who contributed to the Ethereum Network.

Developer Purchase Program: 3.0 million Ether, or 4.17% of the supply, was distributed to members of the Ethereum Foundation to purchase at the initial crowd sale price.

Following the launch of the Ethereum Network, Ether supply initially increased through a progressive mining process. Following the introduction of EIP-1559, described below, Ether supply and issuance rate varies based on factors such as recent use of the network.

Proof-of-Work Mining Process

Prior to September 2022, Ethereum operated using a proof-of-work consensus mechanism. Under proof-of-work, in order to incentivize those who incurred the computational costs of securing the network by validating transactions, there was a reward given to the computer that was able to create the latest block on the chain. Every 14 seconds, on average, a new block was added to the Ethereum Blockchain with the latest transactions processed by the network, and the computer that generated this block was awarded a variable amount of Ether, depending on use of the network at the time. In certain mining scenarios, Ether was sometimes sent to another miner if they were also able to find a solution, but their block was not included. This scenario is referred to as an uncle/aunt reward. Due to the nature of the algorithm for block generation, this process (generating a "proof-of-work") was guaranteed to be random. The process by which a digital asset was "mined" resulted in new blocks being added to such digital asset's blockchain and new digital assets being issued to the miners. Prior to the Merge upgrade, described below, computers on the Ethereum Network engaged in a set of prescribed complex mathematical calculations in order to add a block to the Ethereum Blockchain and thereby confirm Ether transactions included in that block's data.

Proof-of-Stake Process

In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade that was initially known as "Ethereum 2.0" and eventually became known as the "Merge" to transition the Ethereum Network from a proof-of-work consensus mechanism to a proof-of-stake consensus mechanism. The Merge was completed on September 15, 2022,

and the Ethereum Network has operated on a proof-of-stake model since such time.

Unlike proof-of-work, in which miners expend computational resources to compete to validate transactions and are rewarded coins in proportion to the amount of computational resources expended, in proof-of-stake, miners (sometimes called validators) risk or "stake" coins to compete to be randomly selected to validate transactions and are rewarded coins in proportion to the amount of coins staked. Any malicious activity, such as validating multiple blocks, disagreeing with the eventual consensus, or otherwise violating protocol rules, results in the forfeiture or "slashing" of a portion of the staked coins. Proof-of-stake is viewed as more energy efficient and scalable than proof-of-work and is sometimes referred to as "virtual mining." As of December 31, 2023, every 12 seconds, approximately, a new block is added to the Ethereum Blockchain with the latest transactions processed by the network, and the validator that generated this block is awarded Ether.

Limits on Ether Supply

The rate at which new Ether are issued and put into circulation is expected to vary. As of December 31, 2023, following the Merge, approximately 2,400 Ether are issued per day, though the issuance rate varies based on the number of validators on the network. In addition, the issuance of new Ether could be partially or completely offset by the burn mechanism introduced by the EIP-1559 modification, under which Ether are removed from supply at a rate that varies with network usage. On occasion, the Ether supply has been deflationary over a 24-hour period as a result of the burn mechanism. The attributes of the new consensus algorithm are subject to change, but in sum, the new consensus algorithm and related modifications reduced total new Ether issuances and could turn the Ether supply deflationary over the long term.

As of December 31, 2023, approximately 120 million Ether were outstanding.²⁸

Modifications to the Ether Protocol

The Ethereum Network is an open source project with no official developer or group of developers that controls it. However, the Ethereum Network's development has historically been overseen by the Ethereum Foundation

²⁸ CoinMarketCap, "Ethereum," <https://coinmarketcap.com/currencies/ethereum/>.

and other core developers. The Ethereum Foundation and core developers are able to access and alter the Ethereum Network source code and, as a result, they are responsible for quasi-official releases of updates and other changes to the Ethereum Network's source code.

For example, in 2019, the Ethereum Network completed a network upgrade called Metropolis that was designed to enhance the usability of the Ethereum Network and was introduced in two stages. The first stage, called Byzantium, was implemented in October 2017. The purpose of Byzantium was to increase the network's privacy, security, and scalability and reduce the block reward from 5.0 Ether to 3.0 Ether. The second stage, called Constantinople, was implemented in February 2019, along with another upgrade, called St. Petersburg. Another network upgrade, called Istanbul, was implemented in December 2019. The purpose of Istanbul was to make the network more resistant to denial of service attacks, enable greater Ether and Zcash interoperability as well as other Equihash-based proof-of-work digital assets, and to increase the scalability and performance for solutions on zero-knowledge privacy technology like SNARKs and STARKs. The purpose of these upgrades was to prepare the Ethereum Network for the introduction of a proof-of-stake algorithm and reduce the block reward from 3.0 Ether to 2.0 Ether. In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade culminating in the Merge. The Merge amended the Ethereum Network's consensus mechanism to include proof-of-stake. In April 2023, the Ethereum Network completed a network upgrade called Shapella, which enabled users to unstake their previously-staked Ether and remove it from the relevant smart contract. Forthcoming planned upgrades include Dencun, which will enable "proto-danksharding." The purpose of proto-danksharding is to increase scalability of the Ethereum Network by allowing easy synchronization with Layer 2 networks capable of processing many more transactions than the Ethereum Blockchain alone. The intended effect would be to increase the rate of transactions that can be processed by the Ethereum Network.

In 2021, the Ethereum Network implemented the EIP-1559 upgrade. EIP-1559 changed the methodology used to calculate the fees paid to miners (now validators). This new methodology splits fees into two components: a base cost and priority fee. The base cost is now removed from circulation, or

"burnt", and the priority fee is paid to validators. EIP-1559 has reduced the total net issuance of Ether fees to validators. The release of updates to the Ethereum Network's source code does not guarantee that the updates will be automatically adopted. Users and validators must accept any changes made to the Ethereum source code by downloading the proposed modification of the Ethereum Network's source code. A modification of the Ethereum Network's source code is effective only with respect to the Ethereum users and validators that download it. If a modification is accepted by only a percentage of users and validators, a division in the Ethereum Network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a "fork." Consequently, as a practical matter, a modification to the source code becomes part of the Ethereum Network only if accepted by participants collectively having most of the validation power on the Ethereum Network.

Core development of the Ethereum source code has increasingly focused on modifications of the Ethereum protocol to increase speed and scalability and also allow for financial and non-financial next generation uses. The Trust's activities will not directly relate to such projects, though such projects may utilize Ether as tokens for the facilitation of their non-financial uses, thereby potentially increasing demand for Ether and the utility of the Ethereum Network as a whole. Conversely, projects that operate and are built within the Ethereum Blockchain may increase the data flow on the Ethereum Network and could either "bloat" the size of the Ethereum Blockchain or slow confirmation times.

Custody of the Trust's Ether

Digital assets and digital asset transactions are recorded and validated on blockchains, the public transaction ledgers of a digital asset network. Each digital asset blockchain serves as a record of ownership for all of the units of such digital asset, even in the case of certain privacy-preserving digital assets, where the transactions themselves are not publicly viewable. All digital assets recorded on a blockchain are associated with a public blockchain address, also referred to as a digital wallet. Digital assets held at a particular public blockchain address may be accessed and transferred using a corresponding private key.

Key Generation

Public addresses and their corresponding private keys are generated by the Custodian in secret key generation ceremonies at secure locations inside faraday cages, which are enclosures used to block electromagnetic fields and thus mitigate against attacks. The Custodian uses quantum random number generators to generate the public and private key pairs.

Once generated, private keys are encrypted, separated into "shards," and then further encrypted. After the key generation ceremony, all materials used to generate private keys, including computers, are destroyed. All key generation ceremonies are performed offline. No party other than the Custodian has access to the private key shards of the Trust, including the Trust itself.

Key Storage

Private key shards are distributed geographically in secure vaults around the world, including in the United States. The locations of the secure vaults may change regularly and are kept confidential by the Custodian for security purposes.

The "Digital Asset Account" is a segregated custody account controlled and secured by the Custodian to store private keys, which allows for the transfer of ownership or control of the Trust's Ether on the Trust's behalf. The Digital Asset Account uses offline storage, or "cold," mechanisms to secure the Trust's private keys. The term cold storage refers to a safeguarding method by which the private keys corresponding to digital assets are disconnected and/or deleted entirely from the internet. Cold storage of private keys may involve keeping such keys on a non-networked (or "air-gapped") computer or electronic device or storing the private keys on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus, paper, or a metallic object). A digital wallet may receive deposits of digital assets but may not send digital assets without use of the digital assets' corresponding private keys. In order to send digital assets from a digital wallet in which the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into an online, or "hot," digital asset software program to sign the transaction, or the unsigned transaction must be transferred to the cold server in which the private keys are held for signature by the private keys and then transferred back to the online digital asset software

program. At that point, the user of the digital wallet can transfer its digital assets.

Security Procedures

The Custodian is the custodian of the Trust's private keys (which, as noted above, facilitate the transfer of ownership or control of the Trust's Ether) in accordance with the terms and provisions of the custodian agreement by and between the Custodian, the Sponsor and the Trust (the "Custodian Agreement"). Transfers from the Digital Asset Account require certain security procedures, including, but not limited to, multiple encrypted private key shards, usernames, passwords and 2-step verification. Multiple private key shards held by the Custodian must be combined to reconstitute the private key to sign any transaction in order to transfer the Trust's assets. Private key shards are distributed geographically in secure vaults around the world, including in the United States.

As a result, if any one secure vault is ever compromised, this event will have no impact on the ability of the Trust to access its assets, other than a possible delay in operations, while one or more of the other secure vaults is used instead. These security procedures are intended to remove single points of failure in the protection of the Trust's assets.

Transfers of Ether to the Digital Asset Account will be available to the Trust once processed on the Blockchain.

Subject to obtaining regulatory approval to operate a redemption program and authorization of the Sponsor, the process of accessing and withdrawing Ether from the Trust to redeem a Basket by an Authorized Participant²⁹ will follow the same general procedure as transferring Ether to the Trust to create a Basket by an Authorized Participant, only in reverse.

The Sponsor will maintain ownership and control of the Trust's Ether in a manner consistent with good delivery requirements for spot commodity transactions.

Ether Value

Digital Asset Trading Platform Valuation

According to the Annual Report, the value of Ether is determined by the

value that various market participants place on Ether through their transactions. The most common means of determining the value of an Ether is by surveying one or more Digital Asset Trading Platforms where Ether is traded publicly and transparently (e.g., Coinbase, Kraken, LMAX Digital, and *Crypto.com*). Additionally, there are over-the-counter dealers or market makers that transact in Ether.

Digital Asset Trading Platform Public Market Data

On each online Digital Asset Trading Platform, Ether is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or euro, or by the widely used cryptocurrency Bitcoin. Over-the-counter dealers or market makers do not typically disclose their trade data.

As of December 31, 2023, the Digital Asset Trading Platforms included in the Index were Coinbase, Kraken, LMAX Digital, and *Crypto.com*. As further described below, the Sponsor and the Trust reasonably believe each of these Digital Asset Trading Platforms are in material compliance with applicable U.S. federal and state licensing requirements and maintain practices and policies designed to comply with know-your-customer ("KYC") and anti-money-laundering ("AML") regulations.

Coinbase: A U.S.-based trading platform registered as a money services business ("MSB") with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") and licensed as a virtual currency business under the New York State Department of Financial Services ("NYDFS") BitLicense, as well as a money transmitter in various U.S. states.

Crypto.com: A Singapore-based trading platform registered as an MSB with FinCEN and licensed as a money transmitter in various U.S. states.

Crypto.com does not hold a BitLicense.

Kraken: A U.S.-based trading platform registered as an MSB with FinCEN and licensed as a money transmitter in various U.S. states. Kraken does not hold a BitLicense.

LMAX Digital: A U.K.-based trading platform registered as a broker with the Financial Conduct Authority. LMAX Digital does not hold a BitLicense.

Currently, there are several Digital Asset Trading Platforms operating worldwide, and online Digital Asset

Trading Platforms represent a substantial percentage of Ether buying and selling activity and provide the most data with respect to prevailing valuations of Ether. These trading platforms include established trading platforms such as those included in the Index, which provide a number of options for buying and selling Ether. The below table reflects the trading volume in Ether and market share³⁰ of the Ether-U.S. dollar trading pairs of each of the Digital Asset Trading Platforms included in the Index as of December 31, 2023 (collectively, "Constituent Trading Platforms"),³¹ using data reported by the Index Provider from December 14, 2017 to December 31, 2023:

³⁰ Market share is calculated using trading volume (in Ether) for certain Digital Asset Trading Platforms, including Coinbase, Kraken, LMAX Digital and *Crypto.com*, as well as certain other large U.S.-dollar denominated Digital Asset Trading Platforms that were not included in the Index as of December 31, 2023, including Bitstamp, Binance.US (data included from April 1, 2020), Bittrex (data included from July 31, 2018), Bitfinex, Bitflyer (data included from November 13, 2022), Choe Digital (data included from October 1, 2020), Gemini, HitBTC (data included from June 13, 2019 through March 31, 2020), itBit (data included from December 27, 2018), OKCoin (data included from December 25, 2018) and FTX.US (data included from July 1, 2021 through November 12, 2022).

³¹ On January 19, 2020, the Index Provider removed itBit due to a lack of trading volume and added LMAX Digital to the Index based on the trading platform meeting the liquidity thresholds as part of its scheduled quarterly review. On July 23, 2022, the Index Provider removed Bitstamp from the Index due to the trading platform's failure to meet the minimum liquidity requirement, and added FTX.US as a Constituent Trading Platform based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. On November 10, 2022, the Index Provider removed FTX.US from the Index due to the trading platform's announcement that trading on the trading platform would be halted, which would impact FTX.US's ability to reliably publish trade prices and volume on a real-time basis through APIs, and did not add any Constituent Trading Platforms as part of its review. On January 28, 2023, the Index Provider added Binance.US to the Index due to the trading platform meeting the minimum liquidity requirement, and did not remove any Constituent Trading Platforms as part of its quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index due to Binance.US's announcement that the trading platform was suspending U.S. dollar ("USD") deposits and withdrawals and planned to delist its USD trading pairs, and did not add any Constituent Trading Platforms as part of its review. On October 28, 2023, the Index Provider added *Crypto.com* to the Index due to the trading platform meeting the minimum liquidity requirement, and did not remove any Constituent Trading Platforms as part of its scheduled quarterly review.

²⁹ "Authorized Participant" has the meaning set forth in "Creation and Redemption of Shares" below.

Digital asset trading platforms included in the index as of December 31, 2023	Volume (ether)	Market share (%)
Coinbase	416,006,668	34.75
Kraken	135,358,403	11.31
LMAX Digital	69,287,707	5.79
Crypto.com	14,750,030	1.23
Total Ether-U.S. Dollar trading pair	635,402,808	53.08

The domicile, regulation, and legal compliance of the Digital Asset Trading Platforms included in the Index varies. Information regarding each Digital Asset Trading Platform may be found, where available, on the websites for such Digital Asset Trading Platforms, among other places.

The Index and the Index Price

The Index is a U.S. dollar-denominated composite reference rate for the price of Ether. The Index is designed to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the Ether reference rate, (ii) provide a real-time, volume-weighted fair value of Ether and (iii) appropriately handle and adjust for non-market related events.

The Index Price is determined by the Index Provider through a process in which trade data is cleansed and compiled in such a manner as to algorithmically reduce the impact of anomalous or manipulative trading. This is accomplished by adjusting the weight of each data input based on price deviation relative to the observable set, as well as recent and long-term trading volume at each venue relative to the observable set.

The value of the Index is calculated and disseminated on a 24-hour basis and will be available on a continuous basis at <https://www.coindesk.com/indices>.

Constituent Trading Platform Selection

According to the Annual Report, the Digital Asset Trading Platforms that are included in the Index are selected by the Index Provider utilizing a methodology that is guided by the International Organization of Securities Commissions (“IOSCO”) principles for financial benchmarks. For a trading platform to become a Constituent Trading Platform, it must satisfy the criteria listed below (the “Inclusion Criteria”):

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the

trading platform’s eligibility requirements to trade;

- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;³²
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the U.S., including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a U.S.-domiciled trading platform or a non-U.S. domiciled trading platform that is able to service U.S. investors; and

- Offer programmatic spot trading of the trading pair³³ and reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

A Digital Asset Trading Platform is removed as a Constituent Trading Platform when it no longer satisfies the Inclusion Criteria. The Index Provider does not currently include data from over-the-counter markets or derivatives platforms among the Constituent Trading Platforms. According to the Annual Report, over-the-counter data is not currently included because of the potential for trades to include a significant premium or discount paid for larger liquidity, which creates an uneven comparison relative to more active markets. There is also a higher potential for over-the-counter transactions to not be arms-length, and thus not be representative of a true market price. Ether derivative markets data, including Ether futures markets and perpetuals markets data, are also not currently included. While the Index Provider has no plans to include data from over-the-counter markets or derivative platforms at this time, the

³² “Capital controls” in this context means governmental sanctions that would limit the movement of capital into, or out of, the jurisdiction in which such Digital Asset Trading Platforms operate.

³³ Trading platforms with programmatic trading offer traders an application programming interface that permits trading by sending programmed commands to the trading platform.

Index Provider will consider IOSCO principles for financial benchmarks, the management of trading venues of Ether derivatives and the aforementioned Inclusion Criteria when considering whether to include over-the-counter or derivative platform data in the future.

The Index Provider and the Sponsor have entered into the index license agreement, dated as of February 1, 2022 (as amended, the “Index License Agreement”), governing the Sponsor’s use of the Index Price.³⁴ Pursuant to the terms of the Index License Agreement, the Index Provider may adjust the calculation methodology for the Index Price without notice to, or consent of, the Trust or its shareholders. The Index Provider may decide to change the calculation methodology to maintain the integrity of the Index Price calculation should it identify or become aware of previously unknown variables or issues with the existing methodology that it believes could materially impact its performance and/or reliability. The Index Provider has sole discretion over the determination of Index Price and may change the methodologies for determining the Index Price from time to time. Shareholders will be notified of any material changes to the calculation methodology or the Index Price in the Trust’s current reports and will be notified of all other changes that the Sponsor considers significant in the Trust’s periodic or current reports. The Sponsor will determine the materiality of any changes to the Index Price on a case-by-case basis, in consultation with external counsel.

The Index Provider may change the trading venues that are used to calculate the Index or otherwise change the way in which the Index is calculated at any time. For example, the Index Provider has scheduled quarterly reviews in which it may add or remove Constituent Trading Platforms that satisfy or fail the Inclusion Criteria. The Index Provider does not have any obligation to consider the interests of the Sponsor, the Trust, the shareholders, or anyone else in

³⁴ Upon entering into the Index License Agreement, the Sponsor and the Index Provider terminated the license agreement between the parties dated as of February 28, 2019.

connection with such changes. While the Index Provider is not required to publicize or explain the changes or to alert the Sponsor to such changes, it has historically notified the Trust (and other subscribers to the Index) of any material changes to the Constituent Trading Platforms, including any additions or removals, contemporaneous with its issuance of press releases in connection with the same. The Sponsor will notify investors of any such material event by filing a current report on Form 8-K. Although the Index methodology is designed to operate without any manual intervention, rare events would justify manual intervention. Intervention of this kind would be in response to non-market-related events, such as the halting of deposits or withdrawals of funds on a Digital Asset Trading Platform, the unannounced closure of operations on a Digital Asset Trading Platform, insolvency or the compromise of user funds. In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.

Determination of the Index Price

The Index applies an algorithm to the price of Ether on the Constituent Trading Platforms calculated on a per second basis over a 24-hour period. The Index's algorithm is expected to reflect a four-pronged methodology to calculate the Index Price from the Constituent Trading Platforms:

- *Volume Weighting:* Constituent Trading Platforms with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.*, replicate) the Index in the underlying spot markets.

- *Price-Variance Weighting:* The Index Price reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Trading Platforms. As the price at a particular trading platform diverges from the prices at the rest of the Constituent Trading Platforms, its weight in the Index Price consequently decreases.

- *Inactivity Adjustment:* The Index Price algorithm penalizes stale activity from any given Constituent Trading Platform. When a Constituent Trading Platform does not have recent trading data, its weighting in the Index Price is gradually reduced until it is de-weighted entirely. Similarly, once trading activity at a Constituent Trading Platform resumes, the corresponding weighting for that Constituent Trading Platform is gradually increased until it reaches the appropriate level.

- *Manipulation Resistance:* In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Trading Platforms that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

The Index Provider re-evaluates the weighting algorithm on a periodic basis, but maintains discretion to change the way in which an Index Price is calculated based on its periodic review or in extreme circumstances and does not make the exact methodology to calculate the Index Price publicly available. Nonetheless, the Sponsor believes that the Index is designed to limit exposure to trading or price distortion of any individual Digital Asset Trading Platform that experiences periods of unusual activity or limited liquidity by discounting, in real-time, anomalous price movements at individual Digital Asset Trading Platforms.

The Sponsor believes the Index Provider's selection process for Constituent Trading Platforms as well as the methodology of the Index Price's algorithm provides a more accurate picture of Ether price movements than a simple average of Digital Asset Trading Platform spot prices, and that the weighting of Ether prices on the Constituent Trading Platforms limits the inclusion of data that is influenced by temporary price dislocations that may result from technical problems, limited liquidity or fraudulent activity elsewhere in the Ether spot market. By referencing multiple trading venues and weighting them based on trade activity, the Sponsor believes that the impact of any potential fraud, manipulation or anomalous trading activity occurring on any single venue is reduced.

If the Index Price becomes unavailable, or if the Sponsor determines in good faith that such Index Price does not reflect an accurate price for Ether, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact such Index Price remains unavailable or the Sponsor continues to believe in good faith that such Index Price does not reflect an accurate price for Ether, then the Sponsor will employ a cascading set of rules to determine the Index Price, as described below in "Determination of the Index Price When Index Price is Unavailable."

The Trust values its Ether for operational purposes by reference to the Index Price. The Index Price is the value

of an Ether as represented by the Index, calculated at 4:00 p.m., New York time, on each business day.

Illustrative Example

For the purposes of illustration, outlined below are examples of how the attributes that impact weighting and adjustments in the aforementioned methodology may be utilized to generate the Index Price for a digital asset. For example, Constituent Trading Platforms used to calculate the Index Price of the digital asset may include trading platforms such as Coinbase, Kraken, LMAX Digital, and *Crypto.com*.

The Index Price algorithm, as described above, accounts for manipulation at the outset by only including data from executed trades on Constituent Trading Platforms that charge trading fees. Then, the below-listed elements may impact the weighting of the Constituent Trading Platforms on the Index Price as follows:

- *Volume Weighting:* Each Constituent Trading Platform will be weighted to appropriately reflect the trading volume share of the Constituent Trading Platform relative to all the Constituent Trading Platforms during this same period. For example, an average hourly weighting of 67.06%, 14.57%, 11.88%, and 6.49% for Coinbase, Kraken, LMAX Digital, and *Crypto.com*, respectively, would represent each Constituent Trading Platform's share of trading volume during the same period.

- *Inactivity Adjustment:* Assume that a Constituent Trading Platform represented a 14% weighting on the Index Price of the digital asset, which is based on the per-second calculations of its trading volume and price-variance relative to the cohort of Constituent Trading Platforms included in such Index, and then went offline for approximately two hours. The index algorithm would automatically recognize inactivity and start de-weighting the Constituent Trading Platform at the 3-minute mark and continue to do so over a 7-minute period until its influence was effectively zero, 10 minutes after becoming inactive. As soon as trading activity resumed at the Constituent Trading Platform, the index algorithm would re-weight it to the appropriate weighting based on trading volume and price-variance relative to the cohort of Constituent Trading Platforms included in the Index. Due to the period of inactivity, it would re-weight the Constituent Trading Platform activity to a weight lower than its original weighting—for example, to 12%.

• *Price-Variance Weighting:* The price-variance weighting adjustment is a relative measure of each Constituent Trading Platform versus the cohort of Constituent Trading Platforms. The further the price at a Constituent Trading Platform is from the mean price of the cohort, the less influence that trading platform's price will have on the algorithm that produces the Index Price, as the trading platform data is discretely weighted in proportion to their variance from the rest of the trading platforms on a per-second basis and there is no minimum threshold the variance must meet for this adjustment to take place. For example, assume that for a one-hour period, the digital asset's execution prices on one Constituent Trading Platform were trading more than 7% higher than the average execution prices on another Constituent Trading Platform. The algorithm will automatically detect the anomaly (price variance) and reduce that specific Constituent Trading Platform's weighting during that one-hour period, ensuring a reliable spot reference price that is unaffected by the localized event and that is reflective of broader market activity.

Determination of the Index Price When Index Price Is Unavailable

The Sponsor uses the following cascading set of rules to calculate the Index Price when the Index Price is unavailable.³⁵ For the avoidance of doubt, the Sponsor will employ the below rules sequentially and in the order as presented below, should one or more specific rule(s) fail:

1. **Index Price = The price set by the Index as of 4:00 p.m., New York time, on the valuation date.**³⁶ If the Index becomes unavailable, or if the Sponsor determines in good faith that the Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact the Index remains unavailable or the Sponsor continues to believe in good faith that the Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

2. **Index Price = The price set by Coin Metrics Real-Time Rate (the "Secondary Index") as of 4:00 p.m., New York time,**

on the valuation date (the "Secondary Index Price"). The Secondary Index Price is a real-time reference rate price, calculated using trade data from constituent markets selected by Coin Metrics, Inc. (the "Secondary Index Provider"). The Secondary Index Price is calculated by applying weighted-median techniques to such trade data where half the weight is derived from the trading volume on each constituent market and half is derived from inverse price variance, where a constituent market with high price variance as a result of outliers or market anomalies compared to other constituent markets is assigned a smaller weight. If the Secondary Index becomes unavailable, or if the Sponsor determines in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Secondary Index Provider to obtain the Secondary Index Price directly from the Secondary Index Provider. If after such contact the Secondary Index remains unavailable or the Sponsor continues to believe in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

3. **Index Price = The price set by the Trust's principal market (as defined in the Annual Report) (the "Tertiary Pricing Option") as of 4:00 p.m., New York time, on the valuation date.** The Tertiary Pricing Option is a spot price derived from the principal market's public data feed that is believed to be consistently publishing pricing information as of 4:00 p.m., New York time, and is provided to the Sponsor via an application programming interface. If the Tertiary Pricing Option becomes unavailable, or if the Sponsor determines in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Tertiary Pricing Provider to obtain the Tertiary Pricing Option directly from the Tertiary Pricing Provider. If after such contact the Tertiary Pricing Option remains unavailable after such contact or the Sponsor continues to believe in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

4. **Index Price = The Sponsor will use its best judgment to determine a good**

faith estimate of the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

In the event of a fork, the Index Provider may calculate the Index Price based on a digital asset that the Sponsor does not believe to be an appropriate asset of the Trust (*i.e.*, a digital asset other than Ether).³⁷ In this event, the Sponsor has full discretion to use a different index provider or calculate the Index Price itself using its best judgment. In such an event, the Exchange will submit a proposed rule filing to contemplate the assets that would subsequently be held by the Trust.

The Sponsor may, in its sole discretion, select a different index provider, select a different index price provided by the Index Provider,

³⁷ According to the Annual Report, when a modification is introduced and a substantial majority of users and validators consent to the modification, the change is implemented and the network remains uninterrupted. However, if less than a substantial majority of users and validators consent to the proposed modification, and the modification is not compatible with the software prior to its modification, the consequence would be what is known as a "hard fork" of the Ethereum Network, with one group running the pre-modified software and the other running the modified software. The effect of such a fork would be the existence of two versions of Ether running in parallel, yet lacking interchangeability. For example, in July 2016, Ethereum "forked" into Ethereum and a new digital asset, Ethereum Classic, as a result of the Ethereum Network community's response to a significant security breach in which an anonymous hacker exploited a smart contract running on the Ethereum Network to siphon approximately \$60 million of Ether held by the DAO, a distributed autonomous organization, into a segregated account. In response to the hack, most participants in the Ethereum community elected to adopt a "fork" that effectively reversed the hack. However, a minority of users continued to develop the original blockchain, with the digital asset on that blockchain now referred to as Ethereum Classic, or ETC. ETC now trades on several Digital Asset Trading Platforms. In the event of a hard fork of the Ethereum Network, the Sponsor will, if permitted by the terms of the Trust Agreement, use its discretion to determine, in good faith, which peer-to-peer network, among a group of incompatible forks of the Ethereum Network, is generally accepted as the Ethereum Network and should therefore be considered the appropriate network for the Trust's purposes. The Sponsor will base its determination on a variety of then relevant factors, including, but not limited to, the Sponsor's beliefs regarding expectations of the core developers of Ether, users, services, businesses, miners, and other constituencies, as well as the actual continued acceptance of, validating power on, and community engagement with, the Ethereum Network. There is no guarantee that the Sponsor will choose the digital asset that is ultimately the most valuable fork, and the Sponsor's decision may adversely affect the value of the Shares as a result. The Sponsor may also disagree with shareholders, security vendors, and the Index Provider on what is generally accepted as Ether and should therefore be considered "Ether" for the Trust's purposes, which may also adversely affect the value of the Shares as a result.

³⁵ The Sponsor updated these rules on January 11, 2022.

³⁶ The valuation date is any day for which the value of the Ether in the Trust may be calculated utilizing the Index Price.

calculate the Index Price by using the cascading set of rules set forth above, or change the cascading set of rules set forth above at any time.³⁸

The Impact of the Approval of Ether Futures ETFs on Spot Ether ETPs Like the Trust

On October 2, 2023, the first Ether-based exchange-traded funds (“ETFs”) were approved by the Commission for trading.³⁹ The ETFs hold Ether futures contracts that trade on the Chicago Mercantile Exchange (“CME”) and settle using the CME CF Ethereum Reference Rate (“ERR”), which is priced based on the spot Ether markets Coinbase, Kraken, LMAX Digital, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its Ether holdings. Given that the Commission has approved ETFs that offer exposure to CME Ether futures, which themselves are priced based on the underlying spot Ether market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot Ether, like the Trust.

In the context of other digital asset-based ETF and ETP proposals for Bitcoin, the Commission has sought to justify treating futures-based ETFs differently from spot-based ETPs because of (i) distinctions between the regulations under which the two products would be registered (the Investment Company Act of 1940 (the “’40 Act”) for digital-asset futures ETFs and ’33 Act for spot digital-asset ETPs) and (ii) the existence of regulation and surveillance-sharing over the CME digital-asset futures market through the Intermarket Surveillance Group (“ISG”), as compared to the spot market for those digital assets.⁴⁰ The Sponsor believes

that this reasoning is unsupported for the following reasons.

The ’40 Act Offers no More Investor Protections Than the ’33 Act in the Context of Ether-Based ETF and ETP Proposals

While the ’40 Act has certain added investor protections that the ’33 Act does not require, these protections do not seek to allay harms arising from underlying assets or markets of assets that ETFs hold, such as the potential for fraud or manipulation in such markets. In other words, the Sponsor does not believe that the application of the ’40 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the ’40 Act seeks to remedy certain abusive practices in the *management* of investment companies such as ETFs, and thus places certain restrictions on ETFs and ETF sponsors. The ’40 Act explicitly lists out the types of abuses it seeks to prevent, and places certain restrictions related to accounting, borrowing, custody, fees, and independent boards, among others. Notably, none of these restrictions address an ETF’s underlying assets, whether Ether futures or spot Ether, or the markets from which such assets’ pricing is derived, whether the Ether futures market or spot Ether markets. As a result, the Sponsor believes that the distinction between registration of Ether futures ETFs under the ’40 Act and the registration of spot Ether ETPs under the ’33 Act is one without a difference in

the context of Ether-based ETP proposals.

Surveillance-Sharing With the CME Ether Futures Market Is Sufficient To Protect Against Fraud and Manipulation in the Underlying Spot Ether Market

The Sponsor believes that, because the CME Ether futures market is priced based on the underlying spot Ether market, any fraud or manipulation in the spot market would necessarily affect the price of CME Ether futures, thereby affecting the net asset value of an ETP holding spot Ether or an ETF holding CME Ether futures, as well as the price investors pay for such product’s shares.⁴¹ The Sponsor also believes that a correlation analysis conducted by Coinbase, Inc. further corroborates this conclusion. Coinbase, Inc.’s analysis found that the CME Ether futures market has been consistently and highly correlated with the spot Ether market throughout the past (nearly) three years, with an even greater correlation than that cited by the Commission with respect to the CME Bitcoin futures and spot Bitcoin market in approving proposed rule changes to list and trade spot Bitcoin-based ETPs.⁴²

Given the similarity between an ETP holding spot Ether and an ETF holding CME Ether futures, the Sponsor believes that it must be the case that CME surveillance can either detect spot-market fraud that affects both futures ETFs and spot ETPs, or that such surveillance cannot do so for either type of product. Having approved CME Ether futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and

³⁸ The Sponsor will provide notice of any such changes in the Trust’s periodic or current reports and, if the Sponsor makes such a change other than on an ad hoc or temporary basis, will file a proposed rule change with the Commission.

³⁹ These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF.

⁴⁰ See, e.g., Chair Gary Gensler Public Statement, “Remarks Before the Aspen Security Forum,” (August 3, 2021), stating that the Chair looked forward to the Commission’s review of Bitcoin-based ETF proposals registered under the ’40 Act, “particularly if those are limited to [the] CME-traded Bitcoin futures,” noting the “significant investor protection” offered by the ’40 Act, <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03>; Securities Exchange Act Release No. 93559 (November 12, 2021), 86 FR 64539 (November 18, 2021) (SR-CboeBZX–2021–019) (Order Disapproving a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin

Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares) (“VanEck Order”) (denying the first spot bitcoin ETP registered under the ’33 Act following the first approval of a bitcoin futures ETF registered under the ’40 Act, noting the differences in the standard of review that applies to such products); Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR-NYSEARCA–2021–53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE ARCA Rule 8.200–E, Commentary .02 (Trust Issued Receipts)) (“Teucrium Order”) (approving the first bitcoin futures ETP registered under the ’33 Act, stating that “With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 (“1940 Act”) that hold CME bitcoin futures (“Bitcoin Futures ETFs”)—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.”).

⁴¹ See Grayscale Investments, LLC v. Securities and Exchange Commission (“Grayscale v. SEC”), No. 22–1142, Brief of Petitioner Grayscale Investments, LLC (October 11, 2022) (advancing the same argument regarding CME Bitcoin futures and the underlying spot Bitcoin market).

⁴² See Comment Letter from Paul Grewal, Chief Legal Officer, Coinbase, Inc. (February 21, 2024), available at: <https://www.sec.gov/comments/sr-nysearca-2023-70/srnysearca202370-432799-1074283.pdf> (noting that “the correlation between the CME ETH futures market and the spot ETH market for the full sample period is 99.3% using data at an hourly interval, 96.2% using data at a five-minute interval, and 84.7% using data at a one-minute interval”); Securities Exchange Act Release No. 34–99306 (January 10, 2024), 89 FR 3008 at 3010–11 (January 17, 2024) (SR-NYSEARCA–2021–90; SR-NYSEARCA–2023–44; SRNYSEARCA–2023–58; SR-NASDAQ–2023–016; SR-NASDAQ–2023–019; SR-CboeBZX–2023028; SR-CboeBZX–2023–038; SR-CboeBZX–2023–040; SR-CboeBZX–2023–042; SRCboeBZX–2023–044; SR-CboeBZX–2023–072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units).

the Sponsor thus believes that it must also approve spot Ether ETPs on that basis.

* * * * *

In summary, the Sponsor believes that the distinctions between the '40 Act and the '33 Act, and the surveillance-sharing available for the CME Ether futures market versus the spot Ether market, are not meaningful in the context of Ether-based ETF and ETP proposals, and that such reasoning cannot be a basis for the Commission treating Ether futures ETFs differently from spot Ether ETPs like the Trust. The Sponsor believes that the Commission's approval of CME Ether futures ETFs means it must also approve spot Ether ETPs like the Trust.

The Structure and Operation of the Trust Protects Investors and Satisfies Commission Requirements for Ether-Based Exchange Traded Products

Even if the Commission had not approved CME Ether futures ETFs, the Sponsor still believes the Commission should approve the listing and trading of Shares of the Trust. In the context of prior spot digital asset ETP proposal disapproval orders for Bitcoin, the Commission expressed concerns about the underlying Digital Asset Market due to the potential for fraud and manipulation and has outlined the reasons why such ETP proposals have been unable to satisfy these concerns.⁴³

⁴³ See Securities Exchange Act Release Nos. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR-BatsBZX-2016-30) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust) (the "Winklevoss Order"); 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E) (the "Bitwise Order"); 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E) (the "Wilshire Phoenix Order"); 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR-NYSEArca-2017-139) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF) (the "ProShares Order"); 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR-NYSEArca-2018-02) (Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200-E) (the "Direxion Order"); 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR-CboeBZX-2018-01) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the

For purposes of the Trust's Ether-based ETP proposal, the Sponsor anticipates that the Commission may have the same concerns and addresses each of these in turn below.

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission outlined that a proposal relating to a digital asset-based ETP could satisfy its concerns regarding potential for fraud and manipulation by demonstrating:

(1) *Inherent Resistance to Fraud and Manipulation*: that the underlying commodity market is inherently resistant to fraud and manipulation;

(2) *Other Means to Prevent Fraud and Manipulation*: that there are other means to prevent fraudulent and manipulative acts and practices that are sufficient; or

(3) *Surveillance Sharing*: that the listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size relating to the underlying or reference assets.

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission may have with respect to potential fraud and manipulation in the context of an Ether-based ETP.

How the Trust Meets Standards in the Prior Spot Digital Asset ETP Disapproval Orders

1. Resistance to or Prevention of Fraud and Manipulation

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission disagreed with the proposition that a digital asset's fungibility, transportability and exchange tradability combine to provide unique protections against, and allow such digital asset to be uniquely resistant to, attempts at price manipulation. The Commission reached its conclusion based on concessions by one issuer that 95% of the reported trading in the digital asset, Bitcoin, is "fake" or non-economic, effectively admitting that the properties of Bitcoin do not make it inherently resistant to manipulation. Such issuer's concessions were further compounded by evidence of potential and actual fraud and manipulation in the historical trading of Bitcoin on certain marketplaces such as (1) "wash" trading, (2) trading based on material, non-public information, including the

GraniteShares Short Bitcoin ETF) (the "GraniteShares Order") (together, the "Prior Spot Digital Asset ETP Disapproval Orders").

dissemination of false and misleading information, (3) manipulative activity involving Tether, and (4) fraud and manipulation.⁴⁴

The Sponsor acknowledges the possibility that fraud and manipulation may exist in commodity markets and that digital asset trading, such as Ether, on any given trading platform may be no more uniquely resistant to fraud and manipulation than other commodity markets.⁴⁵ However, the Sponsor believes that the fundamental features of digital assets, including fungibility, transportability and exchange tradability offer novel protections beyond those that exist in traditional commodity markets or equity markets when combined with other means, as discussed further below.

2. Other Means To Prevent Fraud and Manipulation

The Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁴⁶ In evaluating the effectiveness of this type of resistance, the Commission does not apply a "cannot be manipulated" standard. Instead, the Commission requires that such resistance to fraud and manipulation be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.⁴⁷

The Sponsor believes the Index represents a novel means to prevent fraud and manipulation from impacting a reference price for Ether and that it offers protections beyond those that exist in traditional commodity markets or equity markets. The Index operates materially similarly to CoinDesk Bitcoin

⁴⁴ See Bitwise Order, 84 FR at 55383 (discussing analysis of the Bitcoin spot market that asserts that 95% of the spot market is dominated by fake and non-economic activity, such as wash trades), 55391 (discussing possible sources of fraud and manipulation in the bitcoin spot market). See also Winklevoss Order, 83 FR at 37585-86 (discussing pending litigation against a Bitcoin trading platform for fraudulent conduct relating to Tether); Bitwise Order, 84 FR at 55391 n.140, 55402 & n.331 (same); Winklevoss Order, 83 FR at 37584-86 (discussing potential types of manipulation in the Bitcoin spot market). The Commission has also noted that fraud and manipulation in the Bitcoin spot market could persist for a significant duration. See, e.g., Bitwise Order, 84 FR at 55405 & n.379.

⁴⁵ See generally Bitwise Order.

⁴⁶ See Winklevoss Order, 84 FR at 37580, 37582-91; Bitwise Order, 84 FR at 55383, 55385-406; Wilshire Phoenix Order, 85 FR at 12597.

⁴⁷ See Winklevoss Order, 84 FR at 37582; Wilshire Phoenix Order, 85 FR at 12597.

Price Index (XBX). Specifically, digital assets, such as Ether, are novel and exist outside traditional commodity markets. It therefore stands to reason that the methods by which they trade will be novel and that the market for digital assets like Ether will have different attributes than traditional commodity markets. Digital assets like Ether were only introduced within the past decade, twenty years after the first U.S. ETFs were offered⁴⁸ and 150 years after the first futures were offered.⁴⁹ In contrast to older commodities such as gold, silver, platinum, palladium or copper, which the Commission has noted all had at least one significant, regulated market for trading futures on the underlying commodity at the time commodity trust ETPs were approved for listing and trading, the first trading in digital assets like Ether took place entirely in an open, transparent and online setting where other commodities cannot trade.

The Trust has priced its Shares consistently for more than six years based on the Index. The Sponsor believes the Trust's use of the Index specifically addresses the Commission's concerns in that the Index serves as an alternative means to prevent fraud and manipulation. Specifically, the Index can (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Ether reference rate, (ii) provide a real-time, volume-weighted fair value of Ether and (iii) appropriately handle and adjust for non-market related events.

As described in more detail below, the Sponsor believes that the Index accomplishes those objectives in the following ways:

1. The Index tracks the Digital Asset Trading Platform Market price through trading activity at "U.S.-Compliant Trading Platform";⁵⁰

2. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments;

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate.

1. The Index tracks the Digital Asset Trading Platform Market price through trading activity at "U.S.-Compliant Trading Platforms".

To reduce the risk of fraud, manipulation, and other anomalous trading activity from impacting the Index, only U.S.-Compliant Trading Platforms are eligible to be included in the Index.

The Index maintains a minimum number of three trading platforms and a maximum number of five trading platforms to track the Digital Asset Trading Platform Market while offering replicability for traders and market makers.⁵¹

U.S.-Compliant Trading Platforms possess safeguards that protect against fraud and manipulation. For example, U.S.-Compliant Trading Platforms regulated by the NYDFS under the BitLicense program have regulatory requirements to implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, market manipulation, and similar wrongdoing, and to monitor, control, investigate and report back to the NYDFS regarding any wrongdoing.⁵² These trading platforms also have the following obligations:⁵³

- Submission of audited financial statements including income

statements, statements of assets/liabilities, insurance, and banking;

- Compliance with capitalization requirements set at NYDFS's discretion;

- Prohibitions against the sale or encumbrance to protect full reserves of custodian assets;

- Fingerprints and photographs of employees with access to customer funds;

- Retention of a qualified Chief Information Security Officer and annual penetration testing/audits;

- Documented business continuity and disaster recovery plan, independently tested annually; and

- Participation in an independent exam by NYDFS.

Other U.S.-Compliant Trading Platforms have voluntarily implemented measures to protect against common forms of market manipulation.⁵⁴

Furthermore, all U.S.-Compliant Trading Platforms are considered MSBs that are subject to FinCEN's federal and state reporting requirements that provide additional safeguards. For example, unscrupulous traders may be less likely to engage in fraudulent or manipulative acts and practices on trading platforms that (1) report suspicious activity to FinCEN as money services businesses, (2) report to state regulators as money transmitters, and/or (3) require customer identification through KYC procedures. U.S.-Compliant Trading Platforms are required to:⁵⁵

- Identify people with ownership stakes or controlling roles in the MSB;

- Establish a formal Anti-Money Laundering (AML) policy in place with documentation, training, independent review, and a named compliance officer;

- Implement strict customer identification and verification policies and procedures;

- File Suspicious Activity Reports (SARs) for suspicious customer transactions;

- File Currency Transaction Reports (CTRs) for cash-in or cash-out transactions greater than \$10,000; and

- Maintain a five-year record of currency exchanges greater than \$1,000 and money transfers greater than \$3,000.

Lastly, because of Ether's classification as a commodity, the CFTC has authority to police fraud and manipulation on U.S.-Compliant Trading Platforms.⁵⁶

⁴⁸ SEC, "Investor Bulletin: Exchange-Traded Funds (ETFs)," August 2012, <https://www.sec.gov/investor/alerts/etfs.pdf>.

⁴⁹ Commodity Futures Trading Commission ("CFTC"), "History of the CFTC," https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html.

⁵⁰ "U.S.-Compliant Trading Platforms" are trading platforms in the Digital Asset Trading Platform Market that are compliant with applicable U.S. federal and state licensing requirements and practices regarding AML and KYC regulations. All Constituent Trading Platforms are U.S.-Compliant Trading Platforms. "Non-U.S.-Compliant Trading Platforms" are all other trading platforms in the Digital Asset Trading Platform Market. As of December 31, 2023, the U.S.-Compliant Trading Platforms that the Index Provider considered for inclusion in the Index were Coinbase, Kraken, LMAX Digital and Crypto.com.

From these U.S.-Compliant Trading Platforms, the Index Provider then applies additional Inclusion Criteria to determine the Constituent Trading Platforms.

⁵¹ According to the Sponsor, the more trading platforms included in the Index, the more ability there is for traders and market makers to trade against the Index by arbitraging price differences. For example, in the event of variances between Ether prices on Constituent Trading Platforms and non-Constituent Trading Platforms, arbitrage trading opportunities would exist. These discrepancies generally consolidate over time, as price differences across trading platforms are realized and capitalized upon by traders and market makers.

⁵² See, e.g., "DFS Takes Action to Deter Fraud and Manipulation in Virtual Currency Markets," available at: <https://www.dfs.ny.gov/about/press/pr1802071.htm>.

⁵³ See "New York's Final 'BitLicense' Rule: Overview and Changes from July 2014 Proposal," June 5, 2015, Davis Polk, available at: https://www.davispolk.com/files/new_yorks_final_bitlicense_rule_overview_changes_july_2014_proposal.pdf.

⁵⁴ As of the date of this filing, one of the four Constituent Trading Platforms, Coinbase, is regulated by NYDFS.

⁵⁵ See BSA Requirements for MSBs, FinCEN website: <https://www.fincen.gov/bsarequirements-msbs>.

⁵⁶ "U.S. CFTC Chief Behnam Reinforces View of Ether as Commodity," CoinDesk (Mar. 28, 2023),

The Sponsor acknowledges that there are substantial differences between FinCEN and New York state regulations and the Commission's regulation of the national securities exchanges.⁵⁷ The Sponsor does not believe the inclusion of U.S.-Compliant Trading Platforms is in and of itself sufficient to prove that the Index is an alternative means to prevent fraud and manipulation such that surveillance sharing agreements are not required, but does believe that the inclusion of only U.S.-Compliant Trading Platforms in the Index is one significant way in which the Index is protected from the potential impacts of fraud and manipulation.

2. The Index mitigates the impact of instances of fraud, manipulation, and other anomalous trading activity in real-time through systematic adjustments.

The Index is calculated once every second according to a systematic methodology that relies on observed trading activity on the Constituent Trading Platforms. While the precise methodology underlying the Index is currently proprietary, the key elements of the Index are outlined below:

- **Volume Weighting:** Constituent Trading Platforms with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.*, replicate) the Index in the underlying spot markets.

- **Price-Variance Weighting:** The Index reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Trading Platforms. As the price at a Constituent Trading Platform diverges from the prices at the rest of the Constituent Trading Platforms, its weight in the Index consequently decreases.

- **Inactivity Adjustment:** The Index algorithm penalizes stale activity from any given Constituent Trading Platform. When a Constituent Trading Platform does not have recent trading data, its weighting in the Index is gradually reduced, until it is de-weighted entirely. Similarly, once trading activity at the Constituent Trading Platform resumes, the corresponding weighting for that Constituent Trading Platform is gradually increased until it reaches the appropriate level.

- **Manipulation Resistance:** In order to mitigate the effects of wash trading

and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Trading Platforms that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events.

The Index Provider reviews and periodically updates which trading platforms are included in the Index by utilizing a methodology that is guided by the IOSCO principles for financial benchmarks.

According to the Index methodology, for a trading platform to become a Constituent Trading Platform, it must satisfy the following Inclusion Criteria:

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the trading platform's eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a U.S.-domiciled trading platform or a non-U.S. domiciled trading platform that is able to service U.S. investors;
- Offer programmatic spot trading of the trading pair and reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

Although the Index methodology is designed to operate without any human interference, rare events would justify manual intervention. Manual intervention would only be in response to "non-market-related events" (*e.g.*, halting of deposits or withdrawals of funds, unannounced closure of trading platform operations, insolvency, compromise of user funds, etc.). In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established

communication channels with its clients.⁵⁸

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate.

The Index is based on the price and volume data of multiple U.S.-Compliant Trading Platforms that satisfy the Index Provider's Inclusion Criteria. By referencing multiple trading venues and weighting them based on trade activity, the impact of any potential fraud, manipulation, or anomalous trading activity occurring on any single venue is reduced. Specifically, the effects of fraud, manipulation, or anomalous trading activity occurring on any single venue are de-weighted and consequently diluted by non-anomalous trading activity from other Constituent Trading Platforms.

Although the Index is designed to accurately capture the market price of Ether, third parties may be able to purchase and sell Ether on public or private markets included or not included among the Constituent Trading Platforms, and such transactions may take place at prices materially higher or lower than the Index Price. For example, based on data provided by the Index Provider, on any given day during the twelve months ended December 31, 2023, the maximum differential between the 4:00 p.m., New York time spot price of any single Digital Asset Trading Platform included in the Index and the Index Price was 2.76% and the average of the maximum differentials of the 4:00 p.m., New York time spot price of each Digital Asset Trading Platform included in the Index and the Index Price was 0.75%. During this same period, the average differential between the 4:00 p.m., New York time spot prices of all the Digital Asset Trading Platforms included in the Index and the Index Price was 0.012%.⁵⁹

Since inception of the Trust, the Trust has consistently priced its Shares at 4:00 p.m., New York time based on the Index Price. While that pricing would be known to the market, the Sponsor believes that, even if efforts to manipulate the price of Ether at 4:00 p.m., E.T. were successful on any trading platform, such activity would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index.

⁵⁸ To the extent any such intervention has a material impact on the Trust, the Sponsor will also issue a public announcement.

⁵⁹ All Digital Asset Trading Platforms that were included in the Index throughout the period were considered in this analysis.

<https://www.coindesk.com/policy/2023/03/28/us-cftc-chief-behnam-reinforces-view-of-ether-as-commodity/>; CME Group, https://www.cmegroup.com/markets/cryptocurrencies/ether/ether.html?gad=1&gclid=EAlaIqobChMI44KBmu7ygAMVavjBx2P4g5yEAAIASAAEgJSZfD_BwE&gclid=aw.ds.

⁵⁷ See Bitwise Order, 84 FR at 55392; Wilshire Phoenix Order, 85 FR at 12603.

Accordingly, the Sponsor believes that the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Ether reference rate, (ii) provide a real-time, volume-weighted fair value of Ether and (iii) appropriately handle and adjust for non-market related events. For these reasons, the Sponsor believes that the Index represents an effective alternative means to prevent fraud and manipulation and the Trust's reliance on the Index addresses the Commission's concerns with respect to potential fraud and manipulation.

3. A Significant, Regulated and Surveilled Market Exists and Is Closely Connected With Spot Market for Ether

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission described both the need for and the definition of a surveilled market of significant size for commodity-trust ETPs like the Trust to date.⁶⁰ Specifically, the Commission explained that:

for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.⁶¹

Further, the Commission stated that its interpretation of the term “market of significant size” depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.⁶² Accordingly, the terms “significant market” and “market of significant size” could mean:

a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁶³

⁶⁰ See Winklevoss Order, 83 FR at 37593–94; Bitwise Order, 84 FR at 55383, 55410; Wilshire Phoenix Order, 85 FR at 12609.

⁶¹ See Winklevoss Order, 83 FR at 37594.

⁶² See Winklevoss Order, 83 FR at 37594; Bitwise Order, 84 FR at 55410; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43925; Direxion Order, 83 FR at 43914; Wilshire Phoenix Order, 85 FR at 12609.

⁶³ See Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of “significant markets” and “markets of significant size,” but this definition is

In the context of the Prior Spot Digital Asset ETP Disapproval Orders specifically, the Commission has stated that establishing a lead-lag relationship between the futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct.⁶⁴ In particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, even if arbitrage worked efficiently, because the futures price would move to meet the spot price.

While studies have found that the CME Bitcoin futures market does lead the spot market in the context of Bitcoin,⁶⁵ as explained in the Sponsor's briefs and argument in its prevailing case before the D.C. Circuit Court of Appeals regarding its Bitcoin-based ETP proposal, the lead/lag question is irrelevant. If a would-be manipulator were to attempt to manipulate either a spot ETP or futures ETP by trading futures on the CME, then a surveillance-sharing agreement with the CME would provide access to information concerning that activity.⁶⁶ If, on the other hand, a would-be manipulator were to attempt to manipulate either a spot ETP or a futures ETP by trading on the spot market, then a surveillance-sharing agreement with the CME would also be able to provide access to information concerning that activity. If that were not true, the Commission could not have approved the Bitcoin futures ETPs. Given that the

an example that will provide guidance to market participants.

⁶⁴ See Bitwise Order, 84 FR at 55411; Wilshire Phoenix Order, 85 FR at 12612.

⁶⁵ See Memorandum to File from Neel Maitra, Senior Special Counsel (Fintech & Crypto Specialist), Division of Trading and Markets, U.S. Securities and Exchange Commission re: Meeting with Representatives from Fidelity Digital Assets, et al. and attachment (SR–CboeBZX–2021–039) (September 8, 2021), available at: <https://www.sec.gov/comments/sr-cboebzx-2021-039/sr-cboebzx2021039-250110.pdf>; Letter from Bitwise Asset Management, Inc. re: File Number SR–NYSEArca–2021–89 (February 25, 2022), available at: <https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20117902-270822.pdf>; Letter from Wilson Sonsini Goodrich and Rosati, P.C. and Chapman and Cutler LLP, on behalf of Bitwise Asset Management, Inc. re: File No. SR–NYSEArca–2021–89 (March 7, 2022), available at: <https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20118794-271630.pdf>.

⁶⁶ *Grayscale v. SEC*, Commission Reply Br. 27.

Commission has approved Bitcoin futures ETPs, the Commission must have concluded that the CME is capable of detecting manipulation attempts in the spot Bitcoin market. And given that the Commission has now approved CME Ether futures ETFs, it must have concluded that the CME is capable of detecting manipulation attempts in the spot Ether market as well. Accordingly, the Sponsor believes that disapproval of the instant proposal on such grounds would be arbitrary given that Shares of the Trust would be just as protected from fraud as shares of previously approved CME Ether futures ETFs.

Regardless of the irrelevance of the lead/lag relationship and the mixed findings regarding the lead/lag relationship between the CME futures and spot markets in the context of Ether, the Sponsor believes that the CME Ether futures market represents a large, surveilled and regulated market and meets the Commission's definition of a “significant market.” For example, from November 1, 2019 to December 31, 2023, the CME Ether futures market trading volume was over \$461 billion, compared to \$732 billion in trading volume across the Constituent Trading Platforms included in the Index. With over 60% of the Index trading volume, the CME Ether futures market represents significant coverage of U.S.-Compliant Trading Platforms in the Ether market.

Given the size of the CME Ether futures markets, the Sponsor believes such markets meet the Commission's definition of “significant market” because there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the Exchange's ability to obtain information regarding trading in the Shares and futures from markets and other entities that are members of the Intermarket Trading Group (“ISG”), including the CME, would assist the Exchange in detecting and deterring misconduct.

The Sponsor also believes it is unlikely that the ETP would become the predominant influence on prices in the market. While future inflows to the proposed Trust cannot be predicted, to provide comparable data, the Sponsor examined the change in market capitalization of Ether with net inflows into the Trust, which currently trades on OTC Markets and is largest and most liquid Ether investment product in the

world.⁶⁷ From November 1, 2019 to December 31, 2023, the market capitalization of Ether grew from \$20 billion to \$273 billion, a \$250 billion increase. Over the same period, the Trust experienced \$1.2 billion of inflows. The cumulative inflow into the Trust over the stated time period was only 0.5% of the aggregate growth of Ether's market capitalization.

Additionally, the Trust experienced approximately \$71 billion of trading volume from November 1, 2019 to December 31, 2023, only 15% of the CME Ether futures market and 10% of the Index over the same period.

* * * * *

In summary, the Sponsor believes that the foregoing addresses concerns the Commission may have with respect to Ether-based ETPs, based on the Commission's articulated concerns with respect to potential fraud and manipulation in Bitcoin-based ETPs. Specifically, the Sponsor believes that, although Ether is not itself inherently resistant to fraud and manipulation, the Index represents an effective means to prevent fraudulent and manipulative acts and practices. As discussed above, the Trust has used the Index to price the Shares for more than six years, and the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Ether reference rate, (ii) provide a real-time, volume-weighted fair value of Ether and (iii) appropriately handle and adjust for non-market related events. The Sponsor also believes that the CME Ether futures market is a significant, surveilled and regulated market that is closely connected with the spot market for Ether and fulfills the requirements for surveillance sharing given the Exchange's ability to obtain information from markets and other entities that are members of the ISG to assist in detecting and deterring misconduct.

Creation and Redemption of Shares

Authorized Participants may submit orders to create or redeem Shares under procedures for "Cash Orders."

The Authorized Participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive Ether as part of the creation or redemption process or otherwise direct the Trust or a third

party with respect to purchasing, holding, delivering, or receiving Ether as part of the creation or redemption process.

The Trust will create Shares by receiving Ether from a third party that is not the Authorized Participant and the Trust, or an affiliate of the Trust (and in any event not the Authorized Participant), is responsible for selecting the third party to deliver the Ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the Ether to the Trust or acting at the direction of the Authorized Participant with respect to the delivery of the Ether to the Trust. The Trust will redeem Shares by delivering Ether to a third party that is not the Authorized Participant and the Trust, or an affiliate of the Trust (and in any event not the Authorized Participant), is responsible for selecting the third party to receive the Ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the Ether from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the Ether from the Trust.

Cash Orders are made through the participation of a Liquidity Provider⁶⁸ who obtains or receives Ether in exchange for cash, and are facilitated by the Transfer Agent and Grayscale Investments, LLC, acting in its capacity as the Liquidity Engager. Liquidity Providers are not party to the Participant Agreements and are engaged separately by the Liquidity Engager.

According to the Registration Statement, the Trust creates Baskets (as described below) of Shares only upon receipt of Ether and redeems Shares only by distributing Ether. "Authorized Participants" are the only persons that may place orders to create and redeem

⁶⁸ A "Liquidity Provider" means one or more eligible companies that facilitate the purchase and sale of Ether in connection with creations or redemptions pursuant to Cash Orders. The Liquidity Providers with which Grayscale Investments, LLC, acting other than in its capacity as the Sponsor (in such other capacity, the "Liquidity Engager") will engage in Ether transactions are third parties that are not affiliated with the Sponsor or the Trust and are not acting as agents of the Trust, the Sponsor, or any Authorized Participant, and all transactions will be done on an arms-length basis. Except for the contractual relationships between each Liquidity Provider and Grayscale Investments, LLC in its capacity as the Liquidity Engager, there is no contractual relationship between each Liquidity Provider and the Trust, the Sponsor, or any Authorized Participant. When seeking to buy Ether in connection with creations or sell Ether in connection with redemptions, the Liquidity Engager will seek to obtain commercially reasonable prices and terms from the approved Liquidity Providers. Once agreed upon, the transaction will generally occur on an "over-the-counter" basis.

Baskets. Each Authorized Participant must (i) be a registered broker-dealer and (ii) enter into an agreement with the Sponsor and Transfer Agent that provides the procedures for the creation and redemption of Baskets and for the delivery of Ether required for the creation and redemption of Baskets via a Liquidity Provider (each, a "Participant Agreement"). An Authorized Participant may act for its own account or as agent for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to create or redeem their Shares through an Authorized Participant.

The Trust issues Shares to and redeems Shares from Authorized Participants on an ongoing basis, but only in one or more "Baskets" (with a Basket being a block of 10,000 Shares). The Trust will not issue fractions of a Basket.

The creation and redemption of Baskets will be made only in exchange for the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional Ether represented by each Basket being created or redeemed, which is determined by dividing (x) the number of Ether owned by the Trust at 4:00 p.m., New York time, on the trade date of a creation or redemption order, after deducting the number of Ether representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index Price at such time, and carried to the eighth decimal place), by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one Ether (*i.e.*, carried to the eighth decimal place)), and multiplying such quotient by 10,000 (the "Basket Amount"). The U.S. dollar value of a Basket is calculated by multiplying the Basket Amount by the Index Price as of the trade date (the "Basket NAV"). The Basket NAV multiplied by the number of Baskets being created or redeemed is referred to as the "Total Basket NAV." All questions as to the calculation of the Basket Amount will be conclusively determined by the Sponsor and will be final and binding on all persons interested in the Trust. The number of Ether represented by a Share will gradually decrease over time as the Trust's Ether are used to pay the Trust's expenses. As of December 31, 2023, each Share represented approximately 0.0096 of one Ether.

The creation of Baskets requires the delivery by the Authorized Participant

⁶⁷ To further illustrate the size and liquidity of the Trust, as of March 8, 2024, compared with global commodity ETPs, the Trust would rank 8th in assets under management and 10th in notional trading volume for the preceding 30 days.

of the Total Basket Amount and the redemption of Baskets requires the distribution to the Authorized Participant of the Total Basket Amount.

Although the Trust creates Baskets only upon the receipt of Ether, and redeems Baskets only by distributing Ether, an Authorized Participant will submit Cash Orders, pursuant to which the Authorized Participant will deposit cash with, or accept cash from, the Transfer Agent in connection with the creation and redemption of Baskets.

Cash Orders will be facilitated by the Transfer Agent and Liquidity Engager, acting other than in its capacity as Sponsor. On an order-by-order basis, the Liquidity Engager will engage one or more Liquidity Providers to obtain or receive Ether in exchange for cash in connection with such order, as described in more detail below.

Unless the Sponsor requires that a Cash Order be effected at actual execution prices (an "Actual Execution Cash Order"),⁶⁹ each Authorized Participant that submits a Cash Order to create or redeem Baskets (a "Variable Fee Cash Order")⁷⁰ will pay a fee (the "Variable Fee") based on the Total Basket NAV, and any price differential

⁶⁹ With respect to a creation or redemption pursuant to an Actual Execution Cash Order, as between the Trust and an Authorized Participant, the Authorized Participant is responsible for the dollar cost of the difference between the Ether price utilized in calculating Total Basket NAV on the trade date and the price at which the Trust acquires or disposes of the Ether on the settlement date. If the price realized in acquiring or disposing of the corresponding Total Basket Amount is higher than the Total Basket NAV, the Authorized Participant will bear the dollar cost of such difference, in the case of a creation, by delivering cash in the amount of such shortfall (the "Additional Creation Cash") to the Cash Account or, in the case of a redemption, with the amount of cash to be delivered to the Authorized Participant being reduced by the amount of such difference (the "Redemption Cash Shortfall"). If the price realized in acquiring the corresponding Total Basket Amount is lower than the Total Basket NAV, the Authorized Participant will benefit from such difference, with the Trust promptly returning cash in the amount of such excess (the "Excess Creation Cash") to the Authorized Participant.

⁷⁰ Unless the Sponsor determines otherwise in its sole discretion based on market conditions and other factors existing at the time of such Cash Order, all creations and redemptions pursuant to Cash Orders are expected to be executed as Variable Fee Cash Orders, and any price differential of Ether between the trade date and the settlement date will be borne solely by the Liquidity Provider until such Ether have been received by the Trust.

of Ether between the trade date and the settlement date will be borne solely by the Liquidity Provider until such Ether have been received or liquidated by the Trust. The Variable Fee is intended to cover all of a Liquidity Provider's expenses in connection with the creation or redemption order, including any Ether trading platform fees that the Liquidity Provider incurs in connection with buying or selling Ether. The amount may be changed by the Sponsor in its sole discretion at any time, and Liquidity Providers will communicate to the Sponsor in advance the Variable Fee they would be willing to accept in connection with a Variable Fee Cash Order, based on market conditions and other factors existing at the time of such Variable Fee Cash Order.

Alternatively, the Sponsor may require that a Cash Order be effected as an Actual Execution Cash Order, in its sole discretion based on market conditions and other factors existing at the time of such Cash Order, and under such circumstances, any price differential of Ether between the trade date and the settlement date will be borne solely by the Authorized Participant until such Ether have been received or liquidated by the Trust.

In the case of creations, to transfer the Total Basket Amount to the Trust's Digital Asset Account, the Liquidity Provider will transfer Ether to one of the public key addresses associated with the Digital Asset Account and as provided by the Sponsor. In the case of redemptions, the same procedure is conducted, but in reverse, using the public key addresses associated with the wallet of the Liquidity Provider and as provided by such party. All such transactions will be conducted on the Blockchain and parties acknowledge and agree that such transfers may be irreversible if done incorrectly.

Authorized Participants do not pay a transaction fee to the Trust in connection with the creation or redemption of Baskets, but there may be transaction fees associated with the validation of the transfer of Ether by the Ethereum Network, which will be paid by the Custodian in the case of redemptions and the Authorized Participant or the Liquidity Provider in the case of creations. Service providers

may charge Authorized Participants administrative fees for order placement and other services related to creation of Baskets. As discussed above, Authorized Participants will also pay the Variable Fee in connection with Variable Fee Cash Orders. Under certain circumstances Authorized Participants may also be required to deposit additional cash in the Cash Account, or be entitled to receive excess cash from the Cash Account, in connection with creations and redemptions pursuant to Actual Execution Cash Orders. Authorized Participants will receive no fees, commissions or other form of compensation or inducement of any kind from either the Sponsor or the Trust and no such person has any obligation or responsibility to the Sponsor or the Trust to effect any sale or resale of Shares.

The following is a summary of the procedures for the creation and redemption of Baskets.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Transfer Agent to create one or more Baskets.

Cash Orders for creation must be placed with the Transfer Agent no later than 1:59:59 p.m., New York time.

The Sponsor may in its sole discretion limit the number of Shares created pursuant to Cash Orders on any specified day without notice to the Authorized Participants and may direct the Marketing Agent to reject any Cash Orders in excess of such capped amount. In exercising its discretion to limit the number of Shares created pursuant to Cash Orders, the Sponsor expects to take into consideration a number of factors, including the availability of Liquidity Providers to facilitate Cash Orders and the cost of processing Cash Orders.

Creations under Cash Orders will take place as follows, where "T" is the trade date and each day in the sequence must be a business day. Before a creation order is placed, the Sponsor determines if such creation order will be a Variable Fee Cash Order or an Actual Execution Cash Order, which determination is communicated to the Authorized Participant.

Trade date (T)	Settlement date (T+1, or T+2, as established at the time of order placement)
• The Authorized Participant places a creation order with the Transfer Agent. • The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Transfer Agent. • The Sponsor notifies the Liquidity Provider of the creation order • The Sponsor determines the Total Basket NAV and any Variable Fee and Additional Creation Cash as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers to the Cash Account: * (x) in the case of a Variable Fee Cash Order, the Total Basket NAV, plus any Variable Fee; or (y) in the case of an Actual Execution Cash Order, the Total Basket NAV, plus any Additional Creation Cash, less any Excess Creation Cash, if applicable (such amount, as applicable, the "Required Creation Cash"). • The Liquidity Provider transfers the Total Basket Amount to the Trust's Digital Asset Account. • Once the Trust is in simultaneous possession of (x) the Total Basket Amount and (y) the Required Creation Cash, the Trust issues the aggregate number of Shares corresponding to the Baskets ordered by the Authorized Participant, which the Transfer Agent holds for the benefit of the Authorized Participant. • Cash equal to the Required Creation Cash is delivered to the Liquidity Provider from the Cash Account. • The Transfer Agent delivers Shares to the Authorized Participant by crediting the number of Baskets created to the Authorized Participant's DTC account.

*The "Cash Account" means the account maintained by the Transfer Agent for purposes of receiving cash from, and distributing cash to, Authorized Participants in connection with creations and redemptions pursuant to Cash Orders. For the avoidance of doubt, the Trust shall have no interest (beneficial, equitable or otherwise) in the Cash Account or any cash held therein.

Redemption Procedures

The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any business day, an Authorized Participant may place a redemption order specifying the number of Baskets to be redeemed.

The redemption of Shares pursuant to Cash Orders will only take place if approved by the Sponsor in writing, in

its sole discretion and on a case-by-case basis. In exercising its discretion to approve the redemption of Shares pursuant to Cash Orders, the Sponsor expects to take into consideration a number of factors, including the availability of Liquidity Providers to facilitate Cash Orders and the cost of processing Cash Orders.

Cash Orders for redemption must be placed no later than 1:59:59 p.m., New York time on each business day. The Authorized Participants may only

redeem Baskets and cannot redeem any Shares in an amount less than a Basket.

Redemptions under Cash Orders will take place as follows, where "T" is the trade date and each day in the sequence must be a business day. Before a redemption order is placed, the Sponsor determines if such redemption order will be a Variable Fee Cash Order or an Actual Execution Cash Order, which determination is communicated to the Authorized Participant.

Trade date (T)	Settlement date (T+1 (or T+2 on case-by-case basis, as approved by sponsor))
• The Authorized Participant places a redemption order with the Transfer Agent. • The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Transfer Agent. • The Sponsor notifies the Liquidity Provider of the redemption order .. • The Sponsor determines the Total Basket NAV and, in the case of a Variable Fee Cash Order, any Variable Fee, as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers Baskets to be redeemed from its DTC account to the Transfer Agent. • The Liquidity Provider delivers to the Cash Account: (x) in the case of a Variable Fee Cash Order, the Total Basket NAV less any Variable Fee; or (y) in the case of an Actual Execution Cash Order, the actual proceeds to the Trust from the liquidation of the Total Basket Amount (such amount, as applicable, the "Required Redemption Cash"). • Once the Trust is in simultaneous possession of (x) the Total Basket Amount and (y) the Required Redemption Cash, the Transfer Agent cancels the Shares comprising the number of Baskets redeemed by the Authorized Participant. • The Custodian sends the Liquidity Provider the Total Basket Amount, and cash equal to the Required Redemption Cash is delivered to the Authorized Participant from the Cash Account.

Suspension or Rejection of Orders and Total Basket Amount

The creation or redemption of Shares may be suspended generally, or refused

with respect to particular requested creations or redemptions, during any period when the transfer books of the Transfer Agent are closed or if circumstances outside the control of the

Sponsor or its delegates make it for all practicable purposes not feasible to process creation orders or redemption

orders or for any other reason at any time or from time to time.⁷¹ The Transfer Agent may reject an order or, after accepting an order, may cancel such order if: (i) such order is not presented in proper form as described in the Participant Agreement, (ii) the transfer of the Total Basket Amount comes from an account other than a Ether wallet address that is known to the Custodian as belonging to a Liquidity Provider or (iii) the fulfillment of the order, in the opinion of counsel, might be unlawful, among other reasons. None of the Sponsor or its delegates will be liable for the suspension, rejection or acceptance of any creation order or redemption order.

Availability of Information

The Trust's website (<https://gray.scale.com/crypto-products/grayscale-ethereum-trust/>) will include quantitative information on a per Share basis updated on a daily basis, including, (i) the current NAV per Share daily and the prior business day's NAV per Share and the reported closing price of the Shares; (ii) the mid-point of the bid-ask price⁷² as of the time the NAV per Share is calculated ("Bid-Ask Price") and a calculation of the premium or discount of such price against such NAV per Share; and (iii) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid-Ask Price against the NAV per Share, within appropriate ranges, for each of the four previous calendar quarters (or for as long as the Trust has been trading as an ETP if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares.

One or more major market data vendors, will provide an intra-day indicative value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third party financial data provider during the Exchange's Core Trading Session (9:30

a.m. to 4:00 p.m., E.T.). The IIV will be calculated using the same methodology as the NAV per Share of the Trust (as described above), specifically by using the prior day's closing NAV per Share as a base and updating that value during the NYSE Arca Core Trading Session to reflect changes in the value of the Index during the trading day.

The IIV disseminated during the NYSE Arca Core Trading Session should not be viewed as an actual real-time update of the NAV per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The NAV for the Trust will be calculated by the Sponsor once a day and will be disseminated daily to all market participants at the same time. To the extent that the Sponsor has utilized the cascading set of rules described in "Index Price" above, the Trust's website will note the valuation methodology used and the price per Ether resulting from such calculation. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA").

Quotation and last sale information for Ether will be widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. In addition, real-time price (and volume) data for Ether is available by subscription from Reuters and Bloomberg. The spot price of Ether is available on a 24-hour basis from major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in Ether will be available from major market data vendors and from the trading platforms on which Ether are traded. The normal trading hours for Digital Asset Trading Platforms are 24-hours per day, 365-days per year.

On each business day, the Sponsor will publish the Index Price, the Trust's NAV, and the NAV per Share on the Trust's website as soon as practicable after its determination. If the NAV and NAV per Share have been calculated using a price per Ether other than the Index Price for such Evaluation Time, the publication on the Trust's website will note the valuation methodology used and the price per Ether resulting from such calculation.

The Trust will provide website disclosure of its NAV daily. The website disclosure of the Trust's NAV will occur

at the same time as the disclosure by the Sponsor of the NAV to Authorized Participants so that all market participants are provided such portfolio information at the same time. Therefore, the same portfolio information will be provided on the public website as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current NAV of the Trust through the Trust's website, as well as from one or more major market data vendors.

The value of the Index, as well as additional information regarding the Index, will be available on a continuous basis at <https://www.coindesk.com/indices>.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., E.T. in accordance with NYSE Arca Rule 7.34-E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00, for which the MPV for order entry is \$0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.201-E. The trading of the Shares will be subject to NYSE Arca Rule 8.201-E(g), which sets forth certain restrictions on Equity Trading Permit Holders ("ETP Holders") acting as registered Market Makers in Commodity-Based Trust Shares to facilitate surveillance. The Exchange represents that, for initial and continued listing, the Trust will be in compliance with Rule 10A-3⁷³ under the Act, as provided by NYSE Arca Rule 5.3-E. A minimum of 100,000 Shares of the Trust will be outstanding at the

⁷¹ Extenuating circumstances outside of the control of the Sponsor and its delegates or that could cause the transfer books of the Transfer Agent to be closed are outlined in the Participant Agreement and include, for example, public service or utility problems, power outages resulting in telephone, telecopy and computer failures, acts of God such as fires, floods or extreme weather conditions, market conditions or activities causing trading halts, systems failures involving computer or other information systems, including any failures or outages of the Ethereum Network, affecting the Authorized Participant, the Sponsor, the Trust, the Transfer Agent, the Marketing Agent and the Custodian and similar extraordinary events.

⁷² The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

⁷³ 17 CFR 240.10A-3.

commencement of trading on the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.⁷⁴ Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.⁷⁵ The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will

communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and Ether derivatives from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and Ether derivatives from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (“CSSA”).⁷⁶ The Exchange is also able to obtain information regarding trading in the Shares and any underlying Ether, Ether futures contracts, options on Ether futures, or any other Ether derivatives in connection with ETP Holders’ proprietary trades, or customer trades effected through ETP Holders on any relevant market. Under NYSE Arca Rule 8.201–E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its accounts for trading in any underlying commodity, related futures or options on futures, or any other related derivatives.

Commentary .04 of NYSE Arca Rule 11.3–E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares). As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts and that subsidiary or affiliate is a member of another regulatory organization, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through a surveillance sharing agreement with that regulatory organization.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the index, portfolio, or reference assets of the Trust, (b) limitations on index or portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an “Information Bulletin” of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the procedures for creations of Shares in Baskets; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) information regarding how the value of the Index and NAV are disseminated; (4) the possibility that trading spreads and the resulting premium or discount on the Shares may widen during the Opening and Late Trading Sessions, when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as described in the Annual Report. The Information Bulletin will disclose that information about the Shares of the Trust is publicly available on the Trust’s website.

The Information Bulletin will also discuss any relief, if granted, by the

⁷⁴ See NYSE Arca Rule 7.12–E.

⁷⁵ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

⁷⁶ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)⁷⁷ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets. In addition, the Exchange may obtain information regarding trading in the Shares from markets that are members of ISG or with which the Exchange has in place a CSSA. Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying Ether or any Ether derivative through ETP Holders acting as registered Market Makers, in connection with such ETP Holders' proprietary trades which they effect on any relevant market.

The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices because, although the Digital Asset Trading Platform Market is not inherently resistant to fraud and manipulation, the Index serves as a means sufficient to mitigate the impact of instances of fraud and manipulation on a reference price for Ether. Specifically, the Index provides a better benchmark for the price of Ether than the Digital Asset Trading Platform Market price because it (1) tracks the Digital Asset Trading Platform Market price through trading activity at U.S.-Compliant Trading Platforms; (2)

mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments; (3) is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and (4) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate. The Trust has used the Index to price the Shares for more than six years, and the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the Ether reference rate, (ii) provide a real-time, volume-weighted fair value of Ether and (iii) appropriately handle and adjust for non-market related events, such that efforts to manipulate the price of Ether would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index. In addition, certain of the Index's Constituent Trading Platforms also have or have begun to implement market surveillance infrastructure to further detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation. The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices based on the existence of the CME Ether futures market as a large, surveilled and regulated market that is closely connected with the spot market for Ether and through which the Exchange could obtain information to assist in detecting and deterring potential fraud or manipulation.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of Ether price and market information available on public websites and through professional and subscription services. Investors may obtain, on a 24-hour basis, Ether pricing information based on the spot price for Ether from various financial information service providers. The closing price and settlement prices of Ether are readily available from the Digital Asset Trading Platforms and other publicly available websites. In addition, such prices are published in public sources, or on-line information services such as Bloomberg and Reuters. The NAV per Share will be calculated daily and made available to all market participants at the same time. The Trust will provide website disclosure of its NAV daily. One or

more major market data vendors will disseminate for the Trust on a daily basis information with respect to the most recent NAV per Share and Shares outstanding. In addition, if the Exchange becomes aware that the NAV per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session (normally 9:30 a.m., E.T., to 4:00 p.m., E.T.) by one or more major market data vendors. The Exchange represents that the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a CSSA. In addition, as noted above, investors will have ready access to information regarding the Trust's NAV, IIV, and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product, and the first such product based on Ether, which will enhance competition among market participants, to the benefit of investors and the marketplace.

⁷⁷ 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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-NYSEARCA-2023-70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-NYSEARCA-2023-70. 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-NYSEARCA-2023-70 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁸

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024-11709 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100214; File No. SR-CboeBZX-2023-069]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To List and Trade Shares of the VanEck Ethereum Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

May 22, 2024.

On September 6, 2023, Cboe BZX Exchange, Inc. ("BZX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares ("Shares") of the VanEck Ethereum Trust (f/k/a VanEck Ethereum ETF) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on September 26, 2023.³ On September 27, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 18, 2023, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On February 16, 2024, the Exchange filed Amendment No. 1, which replaced and superseded

the proposed rule change in its entirety. On March 20, 2024, the Commission provided notice of Amendment No. 1 to the proposed rule change and designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.⁸ On May 21, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 2 amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. ("BZX" or the "Exchange") is filing with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change to list and trade shares of the VanEck Ethereum Trust (the "Trust"),⁹ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 to SR-CboeBZX-2023-069 amends and

⁷⁸ 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. 98457 (Sept. 20, 2023), 88 FR 66076. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-069/sr-cboebzx2023069.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 98566, 88 FR 68236 (Oct. 3, 2023).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99195, 88 FR 88683 (Dec. 22, 2023).

⁸ See Securities Exchange Act Release No. 99782, 89 FR 21032 (Mar. 26, 2024).

⁹ The Trust was formed as a Delaware statutory trust on June 22, 2021 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

replaces in its entirety the proposal as originally submitted on September 6, 2023 and as amended by Amendment No. 1 on February 16, 2024. The Exchange submits this Amendment No. 2 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),¹⁰ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.¹¹ VanEck Digital Assets, LLC is the sponsor of the Trust (“Sponsor”). The Shares will be registered with the Commission by means of the Trust’s registration statement on Form S–1 (the “Registration Statement”).¹²

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹³ With this in mind, the

Chicago Mercantile Exchange (“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹⁴ By way of background, in 2022 the Commission disapproved proposals¹⁵ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁶ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁷ In considering the

remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record . . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁸

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size and that this proposal should be approved.

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of logic, called a protocol, to create a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. It is widely understood that no single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on

¹⁰ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

¹¹ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, “Continued Listing Representations”) shall constitute continued listing requirements for the Shares listed on the Exchange.

¹² See Amendment No. 1 to Registration Statement on Form S–1, dated February 16, 2024, submitted to the Commission by the Sponsor on behalf of the Trust (333–255888). The descriptions of the Trust, the Shares, and the Benchmark contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹³ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the “Winklevoss Proposal”). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission

specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁴ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹⁵ See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR–CboeBZX–2022–035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹⁶ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (the “Grayscale Order”).

¹⁷ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

¹⁸ See the Spot Bitcoin ETP Approval Order at 3011–3012.

digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Canada, Switzerland, and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe and Canada have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹⁹

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic

movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,²⁰ Celsius Network LLC,²¹ BlockFi Inc.²² and Voyager Digital Holdings, Inc.²³ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether itself and could cost U.S. investors significant amounts of money on an annual basis compared to Spot Ether ETPs. Such rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether

Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as warranted based on the Commission’s concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures contracts),²⁴ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with the Custodian (as defined below) to provide, as further outlined below. In the custody statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian’s holding of the Trust’s ether. After diligent investigation, the Sponsor believes that the Custodian’s policies, procedures, and controls for safekeeping,

¹⁹ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

²⁰ See FTX Trading Ltd., et al., Case No. 22–11068.

²¹ See Celsius Network LLC, et al., Case No. 22–10964.

²² See BlockFi Inc., Case No. 22–19361.

²³ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

²⁴ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 (“The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled”).

exclusively possessing, and controlling the Trust's ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services ("NYDFS"), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors and, as

such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Ether Futures ETFs as compared to Spot Ether ETPs, losses which could be prevented by the Commission approving Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether

exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures ²⁵

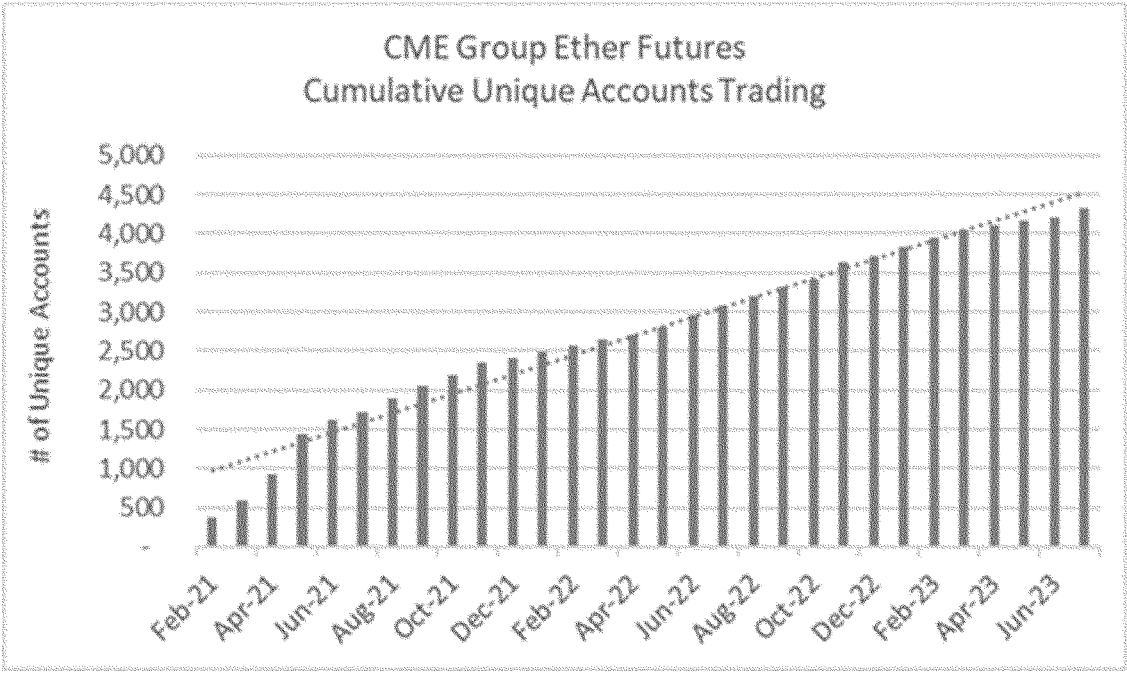
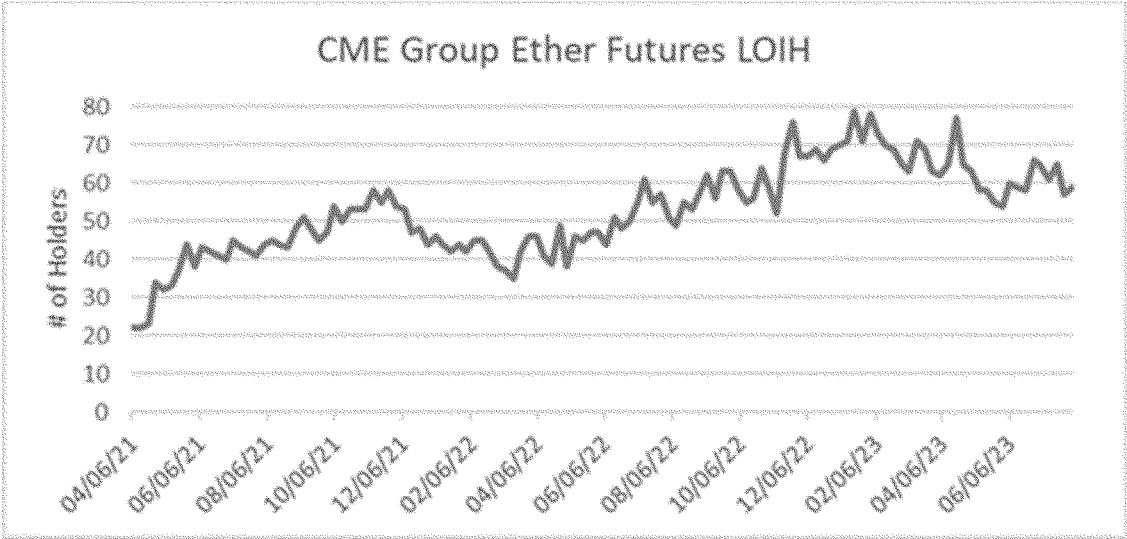
CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²⁶ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME Ether Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.²⁷ The Sponsor's research indicates daily correlation between the spot ETH and the CME Ether Futures is 0.998 from the period of 9/1/22 through 9/1/23.

²⁵ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²⁶ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁷ Source: CME, 7/31/23.

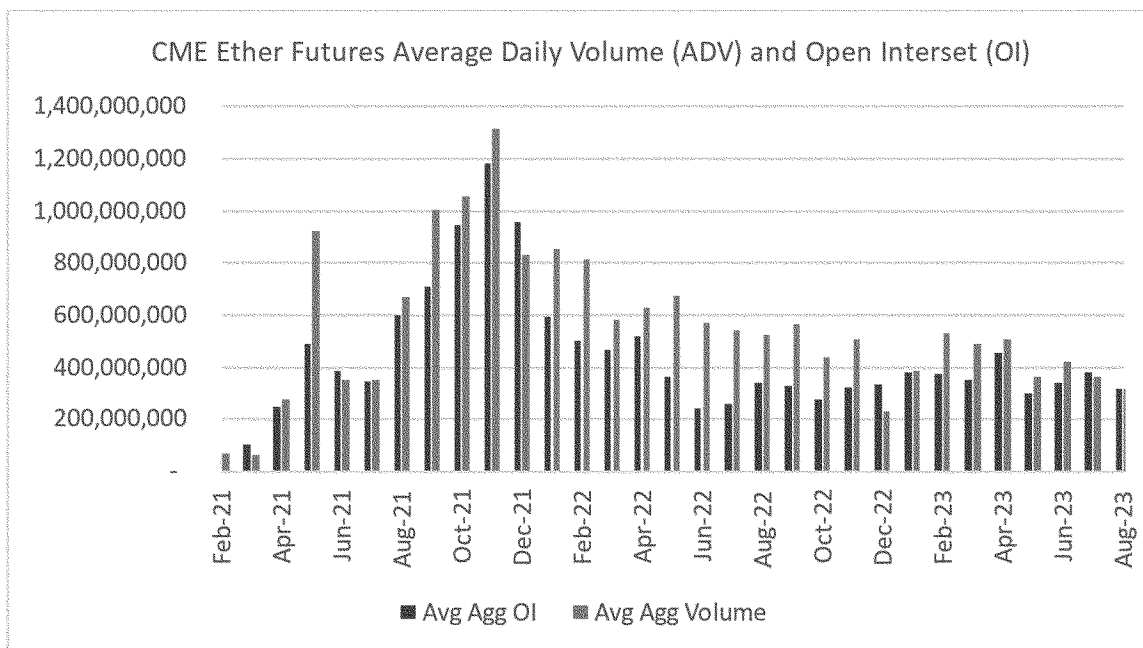
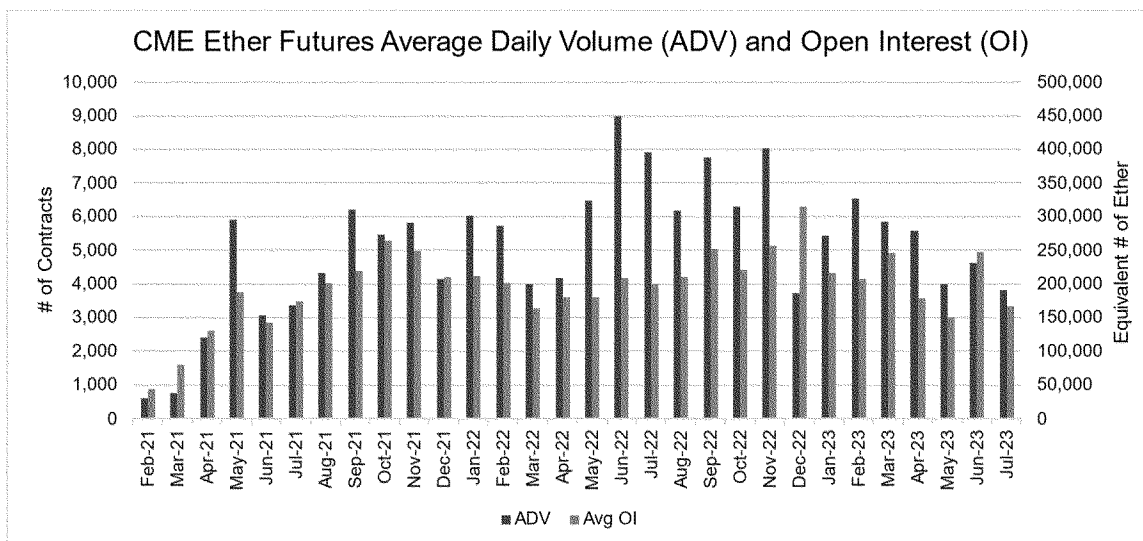
The number of large open interest holders²⁸ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened ether price volatility.



²⁸ A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts,

which is the equivalent of 1,250 ether. At a price of approximately \$1,867 per ether on 7/31/2023,

more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures.



Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,²⁹ including Commodity-Based Trust Shares,³⁰ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are

designed to prevent fraudulent and manipulative acts and practices;³¹ and

³¹ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other platforms, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently

presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

²⁹ See Exchange Rule 14.11(f).

³⁰ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place³² with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).³³ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the

predominant influence on prices in that market.³⁴

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.³⁵

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁶

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission

believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁷ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³⁸ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The

³² As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the “Wilshire Phoenix Disapproval”).

³³ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³⁴ See Wilshire Phoenix Disapproval.

³⁵ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

³⁶ See the Spot Bitcoin ETP Approval Order at 3011–3012.

³⁷ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

³⁸ Source: TokenTerminal.

Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

VanEck Ethereum ETF

Delaware Trust Company is the trustee ("Trustee"). The State Street Bank and Trust Company will be the administrator ("Administrator") and transfer agent ("Transfer Agent") and will be responsible for the custody of the Trust's cash and cash equivalents³⁹ (the "Cash Custodian"). Van Eck Securities Corporation will be the marketing agent ("Marketing Agent") in connection with the creation and redemption of "Creation Baskets", as defined below, of Shares. Gemini Trust Company, LLC, a third-party custodian (the "Custodian"), will be responsible for custody of the Trust's ether.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust's net assets. The Trust's assets will only consist of ether, cash and cash equivalents.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as

amended,⁴⁰ nor a commodity pool for purposes of the Commodity Exchange Act ("CEA"), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right ("IR") or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 25,000 Shares (a "Creation Basket") at the Trust's net asset value ("NAV"). For creations, authorized participants will deliver cash to the Trust's account with the Cash Custodian in exchange for Shares. Upon receipt of an approved creation order, the Sponsor, on behalf of the Trust, will submit an order to buy the amount of ether represented by a Creation Basket. Based off ether executions, the Cash Custodian will request the required cash from the authorized participant; the Transfer Agent will only issue Shares when the authorized participant has made delivery of the cash. Following receipt by the Cash Custodian of the cash from an authorized participant, the Sponsor, on behalf of the Trust, will approve an order with one or more previously onboarded trading partners to purchase the amount of ether represented by the Creation Basket. This purchase of ether will normally be cleared through an affiliate of the Custodian (although the purchase may also occur directly with the trading partner) and the ether will settle directly into the Trust's account at the Custodian.⁴¹ Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their

broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Trust is for the Shares to reflect the performance of ether less the expenses of the Trust's operations. In seeking to achieve its investment objective, the Trust will hold ether and will value its Shares daily based on the reported Benchmark (as discussed below) and process all creations and redemptions in cash transactions with authorized participants. The Trust is not actively managed.

The Benchmark

As described in the Registration Statement, the Trust will use the MarketVector™ Ethereum Benchmark Rate (the "Benchmark") to calculate the Trust's NAV. The Benchmark is designed to be a robust price for ETH in USD and there is no component other than ETH in the Benchmark. The underlying ether platforms (the "constituent platforms") are sourced from the industry leading CryptoCompare Exchange Benchmark review report. The CryptoCompare Exchange Benchmark review report was established in 2019 as a tool designed to bring clarity to the digital trading platform sector by providing a framework for assessing risk and in turn bringing transparency and accountability to a complex and rapidly evolving market.⁴² The current constituent platforms of the Benchmark is Bitstamp, Coinbase, Gemini, itBit, and Kraken. CryptoCompare Data Limited is the index sponsor and index administrator for the Benchmark. CryptoCompare Data Limited is the

⁴² The CryptoCompare Exchange Benchmark review report methodology utilizes a combination of qualitative and quantitative metrics to analyze a comprehensive data set across eight categories of evaluation: legal/regulation, KYC/transaction risk, data provision, security, team/exchange, asset quality/diversity, market quality and negative events. The CryptoCompare Exchange Benchmark review report assigns a grade to each platform which helps identify what it believes to be the lowest risk platforms in the industry. Based on the CryptoCompare Exchange Benchmark review report, MarketVector Indexes initially selects the top five platforms by rank for inclusion in the MarketVector™ Ethereum Benchmark Rate. If an eligible platform is downgraded by two or more notches in a semi-annual review and is no longer in the top five by rank, it is replaced by the highest ranked non-component platform. Adjustments to platform coverage are announced four business days prior to the first business day of each of June and December 23:00 CET. The MarketVector™ Ethereum Benchmark Rate is rebalanced at 16:00:00 GMT/BST on the last business day of each of May and November.

⁴⁰ 15 U.S.C. 80a-1.

⁴¹ For redemptions, the process will occur in the reverse order. Upon receipt of an approved redemption order, the Sponsor, on behalf of the Trust, will submit an order to sell the amount of ether represented by a Creation Basket and the cash proceeds will be remitted to the authorized participant when the 25,000 Shares are received by the Transfer Agent.

³⁹ Cash equivalents are short-term instruments with maturities of less than 3 months.

calculation agent for the Benchmark. The Benchmark is calculated daily between 00:00 and 24:00 (CET) and the Benchmark values are disseminated to data vendors every fifteen seconds. The Benchmark is disseminated in USD and the closing value is calculated at 16:00:00 ET with fixed 16:00 ether platform rates.

In calculating the closing value of the Benchmark, the methodology captures trade prices and sizes from ether platforms and examines twenty three-minute periods leading up to 4:00 p.m. ET. It then calculates an equal-weighted average of the volume-weighted median price of these twenty three-minute periods, removing the highest and lowest contributed prices. Using twenty consecutive three-minute segments over a sixty-minute period means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or would need to replicate efforts multiple times across ether platforms, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot ETH volume in a three-minute window to have any influence on the NAV. As discussed in the Registration Statement, removing the highest and lowest prices further protects against attempts to manipulate the NAV, requiring bad actors to act on multiple ether platforms at once to have any ability to influence the price.

Net Asset Value

NAV means the total assets of the Trust (which includes all ether, cash, and cash equivalents) less total liabilities of the Trust. The Administrator determines the NAV of the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. ET based on the closing value of the Benchmark. The NAV of the Trust is the aggregate value of the Trust's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the NAV, the Administrator values the ether held by the Trust based

on the closing value of the Benchmark as of 4:00 p.m. ET. The Administrator also determines the NAV per Share.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. The Sponsor will monitor for significant events related to crypto assets that may impact the value of ether and will determine, in good faith, and in accordance with its valuation policies and procedures, whether to fair value the Trust's ether on a given day based on whether certain pre-determined criteria have been met. For example, if the closing value of the Benchmark deviates by more than a pre-determined amount from an alternate benchmark available to the Sponsor, the Sponsor may determine to utilize an alternate benchmark, such as the MarketVector™ Ethereum Index or the S&P Ethereum Index. The Sponsor may also fair value the Trust's ether using observed market transactions from various trading platforms, including some or all of the trading platforms included in the Benchmark.⁴³

Availability of Information

In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price;⁴⁴ (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.vaneck.com,

⁴³ Any alternative method to determining NAV will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

⁴⁴ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

or any successor thereto. The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA"). The Trust will also disseminate its holdings on a daily basis on its website.

The Intraday Indicative Value ("IIV") will be updated during Regular Trading Hours to reflect changes in the value of the Trust's ether holdings during the trading day. The IIV may differ from the NAV because NAV is calculated, using the closing value of the Benchmark, once a day at 4:00 p.m. Eastern time whereas the IIV draws prices from the last trade on each constituent platform⁴⁵ to produce a relevant, real-time price. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours through the facilities of the CTA and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Benchmark is calculated every 15 seconds and information about the Benchmark and Benchmark value, including index data and key elements of how the Benchmark is calculated, will be publicly available at <https://www.marketvector.com/>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is also available from ether trading platforms. The normal trading hours for

⁴⁵ The constituent platforms for purposes of calculating IIV are Gemini, Bitstamp, and Bitfinex.

ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The Custodian

The Custodian's services (i) allow ETH to be deposited from a public blockchain address to the Trust's ETH account and (ii) allow ETH to be withdrawn from the ETH account to a public blockchain address as instructed by the Trust. The custody agreement requires the Custodian to hold the Trust's ETH in cold storage, unless required to facilitate withdrawals as a temporary measure. The Custodian will use segregated cold storage ETH addresses for the Trust which are separate from the ETH addresses that the Custodian uses for its other customers and which are directly verifiable via the ETH blockchain. The Custodian will safeguard the private keys to the ETH associated with the Trust's ETH account. The Custodian will at all times record and identify in its books and records that such ETH constitutes the property of the Trust. The Custodian will not withdraw the Trust's ETH from the Trust's account with the Custodian, or loan, hypothecate, pledge or otherwise encumber the Trust's ETH, without the Trust's instruction. If the custody agreement terminates, the Sponsor may appoint another custodian and the Trust may enter into a custodian agreement with such custodian.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 25,000 Shares that are based on the amount of ether held by the Trust on a per unit (*i.e.*, 25,000 Share) basis. According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by 4:00 p.m. ET, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of

Shares included in the Creation Baskets being created determined as of 4:00 p.m. ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket.

The authorized participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, authorized participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process.

The Trust will create Shares by receiving ether from a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to facilitate the delivery of the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ether to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ether to the Trust. When fulfilling a redemption request, the Trust will deliver ether to a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting such third party to receive the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ether from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ether from the Trust.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The Sponsor will maintain ownership and control of ether in a manner consistent with good delivery requirements for spot commodity transactions.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the

initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Trust must be in compliance with Rule 10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the NAV will be calculated daily and that the NAV and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁶ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as

⁴⁶ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ether, CME Ether Futures, options on CME Ether Futures, or any other ether derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the

Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Benchmark is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Benchmark occurs. If the interruption to the dissemination of the IIV or the value of the Benchmark persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for

derivative products, including Commodity-Based Trust Shares. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, and any other ether derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, and any other ether derivative from such markets and other entities.⁴⁷ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, and any other ether derivative via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the

⁴⁷ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

risks involved in trading the Shares outside of Regular Trading Hours⁴⁸ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures and options on CME Ether Futures.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁹ in general and Section 6(b)(5) of the Act⁵⁰ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁵¹ including Commodity-Based Trust Shares,⁵² to be listed on U.S. national securities. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent

fraudulent and manipulative acts and practices;⁵³ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁵⁴ with a regulated

⁵³ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁵⁴ As previously articulated by the Commission, "The standard requires such surveillance-sharing agreements since 'they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'" The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities

market of significant size. Both the Exchange and CME are members of ISG.⁵⁵ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵⁶

The Commission has also recognized that the "regulated market of significant size" standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵⁷

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the

laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party." The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁵⁵ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵⁶ See Wilshire Phoenix Disapproval.

⁵⁷ See Winklevoss Order at 37580. The Commission has also specifically noted that it "is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met." *Id.* at 37582.

⁴⁸ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

⁴⁹ 15 U.S.C. 78f.

⁵⁰ 15 U.S.C. 78f(b)(5).

⁵¹ See Exchange Rule 14.11(f).

⁵² Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME ... can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵⁸

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals" makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵⁹ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁶⁰ The Sponsor expects that the Trust would represent a very small

percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust's assets and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

In addition to the price transparency of the Benchmark, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned

⁵⁸ See the Spot Bitcoin ETP Approval Order at 3011–3012.

⁵⁹ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market ... But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

⁶⁰ Source: TokenTerminal.

information will be published as of the close of business available on the Sponsor's website at www.vaneck.com, or any successor thereto. The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The Trust will also disseminate its holdings on a daily basis on its website.

The IIV will be updated during Regular Trading Hours to reflect changes in the value of the Trust's ether holdings during the trading day. The IIV may differ from the NAV because NAV is calculated, using the closing value of the Benchmark, once a day at 4:00 p.m. Eastern time whereas the IIV draws prices from the last trade on each constituent platform to produce a relevant, real-time price. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Benchmark is calculated every 15 seconds and information about the Benchmark and Benchmark value, including index data and key elements of how the Benchmark is calculated, will be publicly available at <https://www.marketvector.com/>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is also available from ether trading platforms. The normal trading hours for ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be

continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. Premium and discount volatility, high fees, rolling costs, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis that could potentially be eliminated through access to a Spot Ether ETP. As such, the Exchange believes that this proposal acts to limit the risk to U.S. investors that are increasingly seeking exposure to ether by providing direct, 1-for-1 exposure to ether in a regulated, transparent, exchange-traded vehicle, specifically by: (i) reducing premium volatility; (ii) reducing management fees through meaningful competition; (iii) providing an alternative to Ether Futures ETFs which will eliminate roll cost; (iv) reducing risks associated with investing in operating companies that are imperfect proxies for ether exposure; and (v) providing an alternative to custodial spot ether. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. As discussed throughout, this growth investor protection concerns need to be reevaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establishes the CME Ether Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Ether

Futures market is a significant market as it relates to the CME Ether Futures market, but not a significant market as it relates to the ether spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ChoeBZX-2023-069 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-ChoeBZX-2023-069. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-069 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶¹

J. Matthew DeLesDernier,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100210; File No. SR-GEMX-2024-11]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Cabinet Proximity Option Fee To Establish a Reservation Fee for Cabinets With Power Densities Greater Than 10 kW

May 22, 2024.

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 May 9, 2024, 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 Cabinet Proximity Option Fee at General 8, Section 1, as described further below.

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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change³ is to amend the Exchange's Cabinet Proximity Option Fee at General 8, Section 1(d) by establishing a reservation fee for cabinets with power densities greater than 10 kilowatts ("kW").⁴

The Exchange currently offers a Cabinet Proximity Option program where, for a monthly fee, customers can obtain an option for future use on available, unused cabinet space in proximity to their existing equipment. Cabinets reserved under the Cabinet Proximity Option program are unused cabinets that customers reserve for future use and can be converted to a powered cabinet at the customer's request. Under the program, customers can reserve up to maximum of 20 cabinets that the Exchange endeavors to

provide as close as reasonably possible to the customer's existing cabinet space, taking into consideration power availability within segments of the data center and the overall efficiency of use of data center resources as determined by the Exchange. Should reserved data center space be needed for use, the reserving customer will have three business days to formally contract with the Exchange for full payment for the reserved cabinet space or it will be reassigned. In making determinations to require exercise or relinquishment of reserved space as among numerous customers, the Exchange will take into consideration several factors, including: proximity between available reserved cabinet space and the existing space of a customer seeking additional space for actual cabinet usage; a customer's ratio of cabinets in use to those reserved; the length of time that a particular reservation(s) has been in place; and any other factor that the Exchange deems relevant to ensure overall efficiency in use of the data center space.⁵

The applicable monthly fees for the Cabinet Proximity Option program are in General 8, Section 1(d). The Cabinet Proximity Option fee is \$1,055/month per medium or low density cabinets and \$1,583/month per medium/high or high density cabinets.⁶ The Exchange proposes to establish a Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the addition to the existing Cabinet Proximity Option fees.

Currently, the Exchange offers Super High Density Cabinets with power densities greater than 10 kW and less than or equal to 17.3 kW.⁷ In addition, the Exchange intends to expand its data center and offer cabinets with increased power densities in the future, including power densities greater than 17.3 kW.⁸

⁵ See Securities Exchange Act Release No. 34-62397 (June 28, 2010), 75 FR 38860 (July 6, 2010) (SR-NASDAQ-2010-019). In 2017, the Exchange synchronized its options for connecting to the Exchange with that of its sister exchanges and adopted uniform colocation services, including the Cabinet Proximity Option program. See Securities Exchange Act Release No. 34-81902 (October 19, 2017), 82 FR 49453 (October 25, 2017) (SR-GEMX-2017-48).

⁶ Low density cabinets are cabinets with power densities less than or equal to 2.88 kW. Medium density cabinets are cabinets with power densities greater than 2.88 kW and less than or equal to 5 kW. Medium/High density cabinets are cabinets with power densities greater than 5 kW and less than or equal to 7 kW. High density cabinets are cabinets with power densities greater than 7 kW and less than 10 kW. See General 8, Section 1(a).

⁷ See General 8, Section 1(a).

⁸ The Exchange will submit proposed rule change(s) to the Commission regarding any

⁶¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially filed the proposed pricing change on March 1, 2024 (SR-GEMX-2024-06). On March 13, 2024, the Exchange withdrew that filing and submitted SR-GEMX-2024-08. On May 9, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ On February 26, 2024, the Exchange filed a proposal to offer the Exchange's Cabinet Proximity Option program for cabinets with power densities greater than 10 kW. See Securities Exchange Act Release No. 34-99646 (February 29, 2024), 89 FR 16064 (March 6, 2024) (SR-GEMX-2024-04).

Customers will not be liable to pay fees under the Cabinet Proximity Option program until such time as cabinets can be converted to powered cabinets. To be clear, the Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW would apply to any such reservations in the existing data center. Although the Exchange has an expansion of the data center underway, the fees for the Cabinet Proximity Option program would not apply to the expanded data center until the expansion is operational and cabinets are available and able to be converted to powered cabinets.⁹

The proposed Cabinet Proximity Option fee of \$3,000 would only be charged to those customers that voluntarily choose to reserve cabinets with power densities greater than 10 kW. Such option is available to all customers. Similar to other fees related to cabinet and power usage, the Cabinet Proximity Option fee is incremental, with higher fees being imposed based on higher levels of cabinet and power allocation. The proposed Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW is comparable to pricing for “PNU cabinets”¹⁰ available to customers of co-location facilities of the New York Stock Exchange LLC (“NYSE”), which charges a monthly fee of \$360 per kW for PNU cabinets.¹¹

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹³ in particular, in that it provides for the equitable allocation of

proposal to expand its services, including a proposal to offer cabinets with new power densities.

⁹ Although the timing is subject to change, the Exchange anticipates that the data center expansion will be complete by September 2024.

¹⁰ Similar to the Exchange’s Cabinet Proximity Option program, the New York Stock Exchange offers “PNU cabinets,” which are reserved cabinets that are not active and can be converted to powered, dedicated cabinets when the user requests. Due to heightened demand for power and cabinets, NYSE established certain procedures related to PNU cabinet conversion and restrictions on new PNU cabinet offerings. NYSE adopted a policy that, if unallocated cabinet inventory is at or below 40 cabinets, new PNU cabinets are not offered. However, when the unallocated cabinet inventory is more than 40 cabinets, NYSE may continue to offer PNU cabinets. See Securities Exchange Act Release No. 34–90732 (December 18, 2020), 85 FR 84443 (December 28, 2020). See also Securities Exchange Act Release No. 34–91515 (April 8, 2021), 86 FR 19674 (April 14, 2021).

¹¹ See NYSE Connectivity Fee Schedule, available at https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

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.

First, the proposal is reasonable because the proposed fee is comparable to NYSE’s monthly fee of \$360 per kW for PNU cabinets.¹⁴ As noted above, NYSE offers “PNU cabinets,” which are reserved cabinets that are not active and can be converted to powered, dedicated cabinets when the user requests.¹⁵ The Exchange’s proposal would establish a flat \$3,000 Cabinet Proximity Option fee for cabinets with power densities greater than 10 kW. Under NYSE’s fee schedule, a reservation for a cabinet with power density equal to 10 kW would be \$3,600 (e.g., 10 kW × \$360). Because NYSE’s PNU cabinet fees are charged on a per kW basis, PNU cabinet fees for cabinets with power densities greater than 10 kW would be more than \$3,600 and increase as the power density of the cabinet increases. Therefore, the Exchange’s proposal reflects a discounted price to reserve such cabinets as compared to NYSE’s fees for comparable PNU cabinets.

Furthermore, the Exchange offers the Cabinet Proximity Option program as a convenience to customers, providing an option to reserve unused cabinet space in proximity to their existing equipment. No firms are required to reserve cabinets via the Cabinet Proximity Option program. Clients may simply order cabinets without utilizing reservations. The proposed Cabinet Proximity Option fee of \$3,000 would only be charged to those customers that voluntarily choose to reserve cabinets with power densities greater than 10 kW and such option is available to all customers.

The Exchange believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange,¹⁶ connectivity

¹⁴ See NYSE Connectivity Fee Schedule, available at https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.

¹⁵ *Supra* note 10.

¹⁶ There are currently 17 exchanges offering options trading services. No single options exchange trades more than 14% of the options market by volume and only one of the 17 options exchanges has a market share over 10 percent. See Nasdaq, Options Market Statistics (Last updated January 11, 2024), available at https://www.nasdaq.com/Trader.aspx?id=Options_VolumeSummary. This broad dispersion of market share demonstrates that market participants can and do exercise choice in trading venues. Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional

to the Exchange via a third-party reseller of connectivity, and/or trading of options products within markets which do not require connectivity to the Exchange, such as the Over-the-Counter (OTC) markets. Market participants that wish to connect to the Exchange will continue to choose the method of connectivity based on their specific needs. Market participants that wish to connect to the Exchange but want to avoid or mitigate the effect of this proposed fee can choose to connect to the Exchange through a vendor (or order cabinets without reservations, as noted above).

In offering the Cabinet Proximity Option the Exchange incurs certain costs, including costs related to the data center, including maintaining an adequate level of power so that reserved cabinets can be available and powered on promptly at the request of customers.

If the Exchange is incorrect in its determination that the proposed fee reflects the value of the Cabinet Proximity Option for cabinets with power densities greater than 10 kW, customers will not reserve such cabinets.

In summary, the proposal represents an equitable allocation of reasonable dues, fees and other charges because the proposed fee is less than NYSE’s fee for a comparable service, customers have choices in how they connect to the Exchange, and reservations under the Cabinet Proximity Option program are optional and provided as a convenience to customers.

The Exchange believes that the proposed fee change is not unfairly discriminatory because the Cabinet Proximity Option fee is assessed uniformly across all market participants that voluntarily select the option, which is available to all customers. All customers have the choice of whether and how to connect to the Exchange and may order cabinets without utilizing reservations.

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.

Nothing in the proposal burdens inter-market competition because approval of the proposal does not impose any burden on the ability of other exchanges to compete. The Exchange operates in a highly competitive market in which market

substitute platforms to further compete with the Exchange and the products it offers.

participants can determine whether or not to connect to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative exchanges that they may participate on and direct their order flow, as well as off-exchange venues, where competitive products are available for trading.

Nothing in the proposal burdens intra-market competition because the Cabinet Proximity Option program is available to any customer under the same fees as any other customer, and any customer that wishes to reserve a cabinet pursuant to the Cabinet Proximity Option program 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-2024-11 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-2024-11. 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-GEMX-2024-11 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-11702 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100215; File No. SR-CboeBZX-2023-095]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To List and Trade Shares of the Fidelity Ethereum Fund Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

May 22, 2024.

On November 17, 2023, Cboe BZX Exchange, Inc. ("BZX" or "Exchange") filed with the Securities and Exchange

Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares ("Shares") of the Fidelity Ethereum Fund under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on December 6, 2023.³ On January 18, 2024, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On March 4, 2024, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On March 15, 2024, the Exchange filed Amendment No. 1, which replaced and superseded the proposed rule change in its entirety. On April 2, 2024, the Commission published notice of Amendment No. 1 to the proposed rule change.⁸ On May 21, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 2 amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. ("BZX" or the "Exchange") is filing with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change to list and trade shares of the Fidelity Ethereum Fund (the "Trust"),⁹ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99045 (Nov. 30, 2023), 88 FR 84840. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-095/sr-cboebzx2023095.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99390, 89 FR 4639 (Jan. 24, 2024).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99667, 89 FR 16804 (Mar. 8, 2024).

⁸ See Securities Exchange Act Release No. 99888, 89 FR 24519 (Apr. 8, 2024).

⁹ The Trust was formed as a Delaware statutory trust on October 31, 2023, and is operated as a

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁸ 17 CFR 200.30-3(a)(12).

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 to SR–CboeBZX–2023–095 amends and replaces in its entirety the proposal as originally submitted on November 17, 2023, and as amended by Amendment No. 1 on March 18, 2024. The Exchange submits this Amendment No. 2 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),¹⁰ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.¹¹ FD Funds Management LLC is the sponsor of the Trust (“Sponsor”). The Shares will be registered with the Commission by means of the Trust's registration statement on Form S–1 (the “Registration Statement”).¹²

grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

¹⁰ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

¹¹ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, “Continued Listing Representations”) shall constitute continued listing requirements for the Shares listed on the Exchange.

¹² On May 21, 2024, the Trust filed with the Commission amendment no. 1 to the Registration Statement on Form S–1, submitted to the Commission by the Sponsor on behalf of the Trust

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹³ With this in mind, the Chicago Mercantile Exchange (“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹⁴ By way of background, in

(333–278249). The descriptions of the Trust, the Shares, and the Index (as defined below) contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹³ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the “Winklevoss Proposal”). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁴ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange,

2022 the Commission disapproved proposals¹⁵ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁶ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁷ In considering the remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record, . . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁸

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a

Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹⁵ See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR–CboeBZX–2022–035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹⁶ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (the “Grayscale Order”).

¹⁷ See *Grayscale Investments, LLC v. SEC*, 82 F.4th 1239 (D.C. Cir. 2023).

¹⁸ See the Spot Bitcoin ETP Approval Order at 3011–3012.

regulated market of significant size and that this proposal should be approved.

Background

Ethereum is a network of computers all over the world that follow a set of rules called the Ethereum protocol. The Ethereum protocol creates a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of their counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained application formation and free exchange. It is widely understood that no single person or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, including the native asset to the Ethereum network, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including data storage, trading, and launching applications. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand

blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs and 32 ETH serves as the minimum capital required to run validator software and participate in consensus to add new blocks to the blockchain.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures¹⁹

CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²⁰ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME Ether Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.²¹

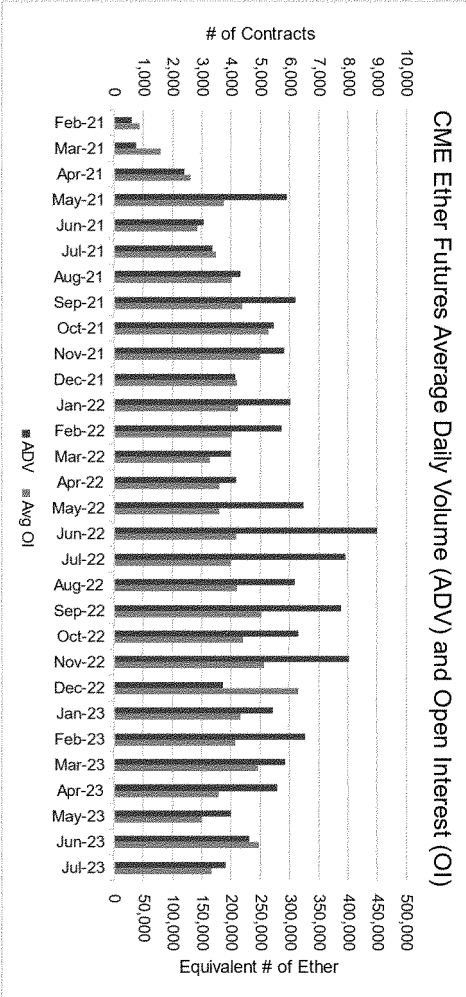
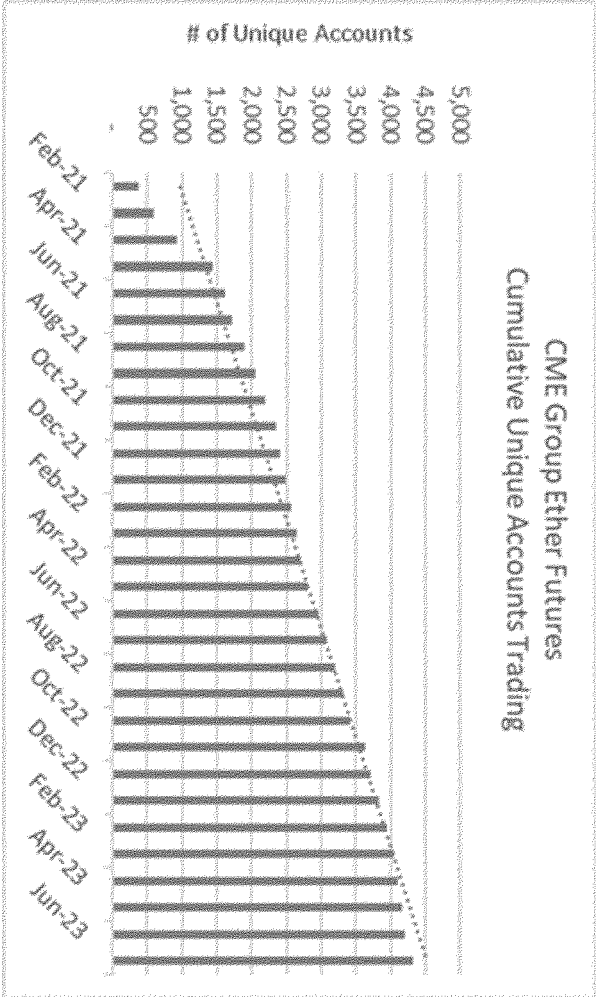
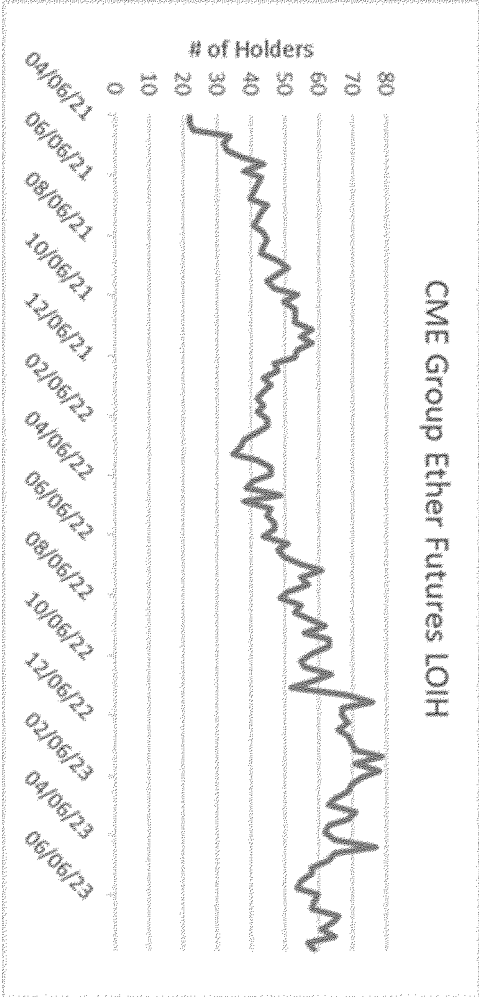
The number of large open interest holders²² and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.

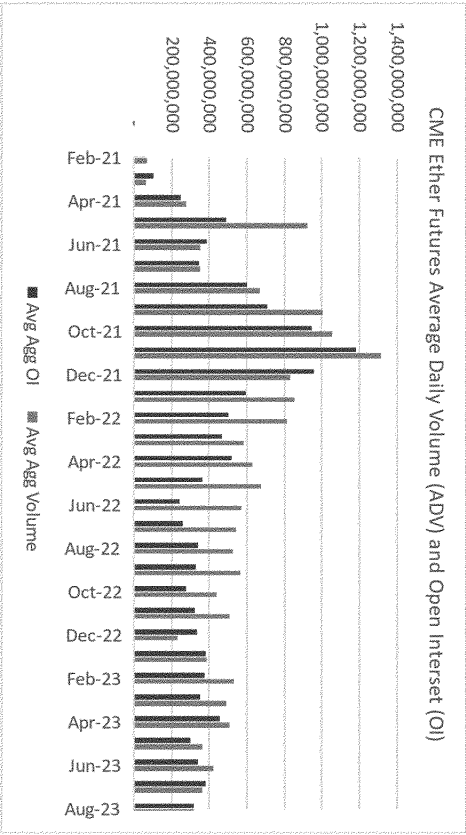
¹⁹ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²⁰ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²¹ Source: CME, 7/31/23.

²² A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures.

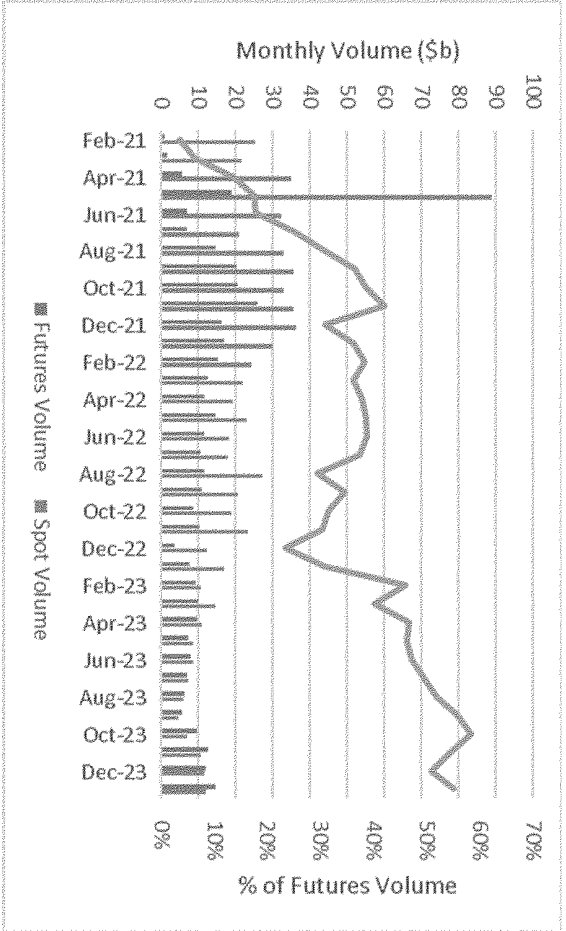




The market for CFTC-regulated trading of ether derivatives has developed substantially recently. From February 2021 to January 2024, CFTC regulated ether futures notional trading volume on Chicago Mercantile

Exchange increased from 0.94 to 14.68 USD billion on a monthly basis. At the same time, total ether spot volume decreased from 25.31 USD billion to 11.98 USD billion on a monthly basis using the CME CF Ether-Dollar

Reference Rate related spot platforms.²³ As a result, CME Ether Futures represented an increasing amount of ETH/USD spot and futures volumes, up to 55% as of the end of January 2024.



Furthermore, while CME Ether Futures represent less than 3% of global ETH futures volumes²⁴ these same futures contracts represent greater than 10% of global ETH spot volumes,²⁵ and

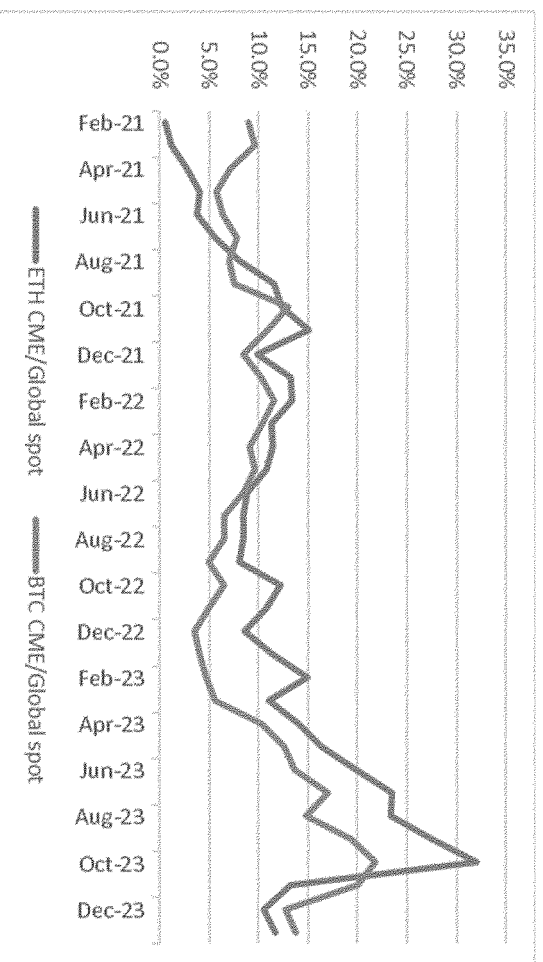
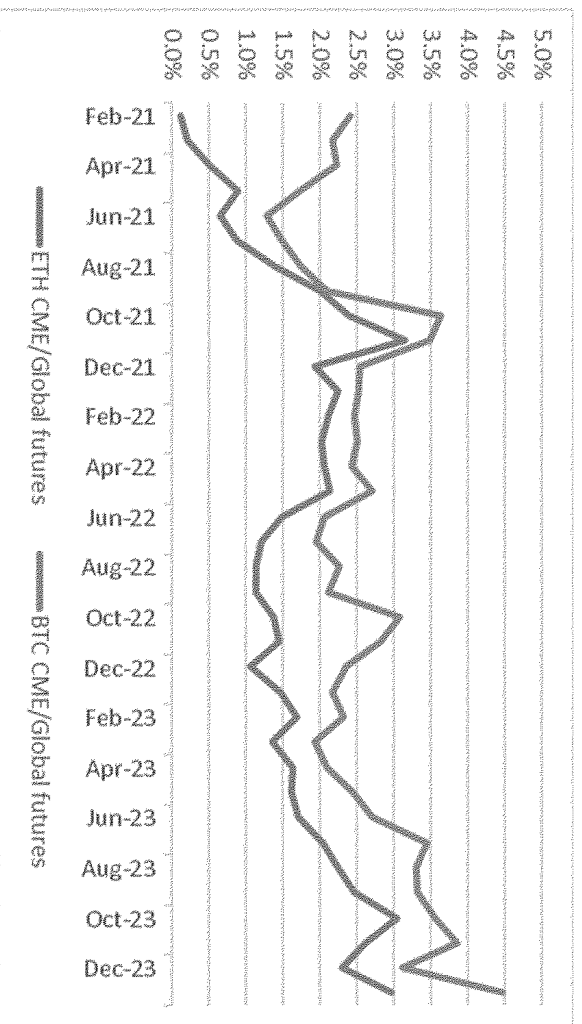
has been as high as 30% of global ETH spot volumes in October 2023. Since the start of 2023, both BTC and CME Ether Futures volumes have trended higher in their overall volume share of global

futures activity and CME Ether Futures have often represented a larger percentage of global spot volumes compared to the BTC CME futures.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto trading platforms, including Bitstamp, Coinbase, Gemini, iBit, Kraken, and LMAX Digital.

²⁴ List of platforms used to determine stated volume can be found here: https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_future_usd_1d.

²⁵ List of platforms used to determine the stated volumes can be found here: https://coverage.coinmetrics.io/exchange-metrics-v2/volume_reported_spot_usd_1d.



Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts²⁶ including Commodity-Based Trust Shares,²⁷ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and

manipulative acts and practices;²⁸ and

²⁶ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH trading platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other trading platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective.

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns the Commission are sufficiently mitigated to

Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH trading platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

²⁶ See Exchange Rule 14.11(f).

²⁷ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place²⁹ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).³⁰ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to

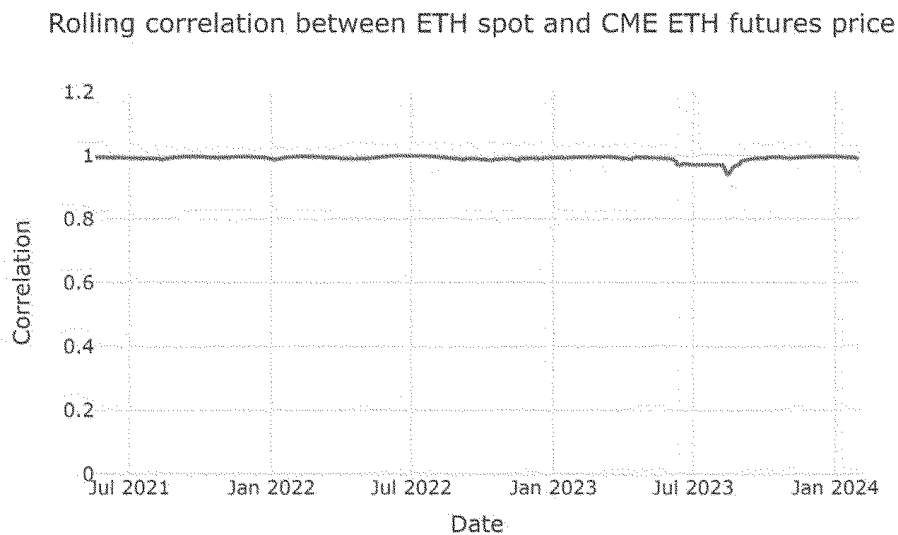
which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³¹

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.³²

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on the surveilled market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct.

The Sponsor examined the correlation between the ETH spot price and the CME Ether Futures price. In this study, the price of the CME Ether Futures front month contract, *i.e.*, the contract with the nearest expiration date, is compared to the ETH spot price. The rolling correlation between the assets with 90 days windows shows that the futures and spot prices are highly correlated and ranged between 0.94 and 0.998. In addition, the daily returns for ETH spot and CME Ether Futures are highly correlated. The following charts evidence these relationships.



²⁹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-

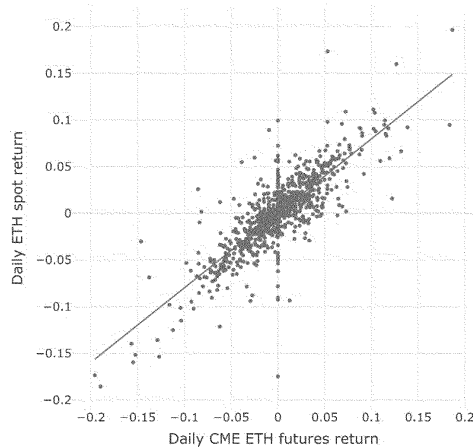
sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

³⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³¹ See Wilshire Phoenix Disapproval.

³² See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

ETH spot and CME ETH futures daily returns



Furthermore, the Sponsor examined intra-day correlations for both price and returns using historical pricing data every hour. This study further evidences

the high correlation between the ETH/USD spot price and CME Ether Futures across six the CME CF Ether-Dollar Reference Rate related spot platforms³³

with hourly return correlations above 0.98.

ETH	Intraday price	Hourly returns	BTC	Intraday price	Hourly returns
	<i>Sample</i>	<i>Sample</i>		<i>Sample</i>	<i>Sample</i>
Spot platform			Spot platform		
Platform 1	0.985	0.985	Platform 1	0.999	0.989
Platform 2	0.985	0.985	Platform 2	0.999	0.988
Platform 3	0.982	0.982	Platform 3	0.999	0.986
Platform 4	0.981	0.981	Platform 4	0.999	0.986
Platform 5	0.985	0.985	Platform 5	0.999	0.986
Platform 6	0.985	0.985	Platform 6	0.999	0.987

The Sponsor also examined the distribution of hourly returns of spot ETH/USD to CME Ether Futures. One approach to detect potential price manipulation involves analyzing price movements on unregulated platforms compared to the surveilled market. This comparison focuses on identifying abnormal activity such as sudden price

spikes or repetitive trades on unregulated platforms. A preliminary analysis of CME data compared to spot platforms revealed little to no extreme deviation in hourly returns. The following table shows at least 97.9% cases the hourly returns of the spot platforms from the regulated exchange are within 50 basis points. This suggests

a high degree of similarity in price movements between the regulated exchange and the spot platforms for most hours. Further analysis using Bitcoin data reveals a similar pattern to the ether spot platforms. The Sponsor concludes that the manipulation in the ETP would require the manipulators to participate in the surveilled market.

Spot platform	Hourly return within CME's for ETH			Hourly return within CME's for BTC		
	<200 bps (%)	<100 bps (%)	<50 bps (%)	<200 bps (%)	<100 bps (%)	<50 bps (%)
Platform 1	99.98	99.92	98.63	99.96	99.94	99.46
Platform 2	100.00	99.83	98.51	99.96	99.92	99.38
Platform 3	99.96	99.69	97.89	99.96	99.85	98.99
Platform 4	99.98	99.81	98.32	99.98	99.88	99.27
Platform 5	99.92	99.71	98.32	99.94	99.85	99.25
Platform 6	99.98	99.86	98.51	99.98	99.92	99.28

³³ The six platforms are Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order³⁴ also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME ... can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁵

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals" makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁶ The Sponsor

notes that ETH total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³⁷ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through over-the-counter ether funds ("OTC ETH Funds") has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by

these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Fidelity Ethereum Fund

The Registration Statement includes the following description of the Trust and its operations. The Trust will issue Shares that represent fractional undivided beneficial interests in and ownership of the Trust. The Trust is a Delaware statutory trust that operates pursuant to the Declaration of Trust and Trust Agreement (the "Trust Agreement"), between Sponsor and Delaware Trust Company, the Delaware trustee of the Trust (the "Trustee"). Sponsor manages the Trust and is responsible for the ongoing registration of the Shares. The Trust will engage Fidelity Service Company, Inc. ("FSC"), a Sponsor affiliate, to be the administrator ("Administrator"). State Street and Trust Company the (the "Transfer Agent" and "Cash Custodian") will facilitate the issuance and redemption of Shares of the Trust and respond to correspondence by Trust shareholders and others relating to its duties, maintain shareholder accounts, and make periodic reports to the Trust. Another affiliate of Sponsor, Fidelity Distributors Company LLC, will be the distributor ("Distributor") in connection with the creation and redemption of "Creation Baskets" of Shares. The Sponsor will provide assistance in the marketing of the Shares. Fidelity Digital Asset Services, LLC ("FDAS"), another Sponsor affiliate, will serve as the Custodian.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust. The Trust's assets will only consist of ether, cash, and cash equivalents.³⁸ Except for cash temporarily held to pay Trust expenses, facilitate redemption transactions, or received in creation transactions, the Trust will only invest in ETH.

³⁸ Cash equivalents are short-term instruments with maturities of less than 3 months.

³⁴ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the "Spot Bitcoin ETP Approval Order").

³⁵ See the Spot Bitcoin ETP Approval Order at 3011–3012.

³⁶ This logic is reflected by U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale

Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

³⁷ Source: TokenTerminal.

According to the Registration Statement, the Trust is neither an investment company registered under the 1940 Act,³⁹ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust’s ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right (“IR”) or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is to seek to track the performance of ETH, as measured by the performance of the Fidelity Ethereum Reference Rate (the “Index”), less the Trust’s expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold ETH, cash, and cash equivalents and will value its Shares daily as of 4:00 p.m. Eastern time using the Index price to value the ether and process all creations and redemptions in transactions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

The Index is designed to reflect the performance of ETH in U.S. dollars. The current digital trading platform composition of the Index is Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital. The Index methodology was developed by Fidelity Product Services, LLC (the “Index Provider”) and is administered by the Fidelity Index Committee. Coin Metrics, Inc. is the third-party calculation agent for the Index.⁴⁰

The Index is constructed using ETH price feeds from eligible ETH spot markets and a volume-weighted median price (“VWMP”) methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments to develop an ETH price composite. The Index market

value is the volume-weighted median price of ETH in U.S. dollars over the previous sixty minutes, which is calculated by (1) ordering all individual transactions on eligible spot markets over the previous sixty minutes by price, and then (2) selecting the price associated with the 50th percentile of total volume. Using rolling sixty-minute segments means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or such malicious actors would need to replicate efforts multiple times across eligible ETH spot markets, potentially triggering review. This extended period also supports authorized participant activity by capturing volume over a longer time period, rather than forcing authorized participants to mark an individual close or auction. The use of a median price reduces the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation. The use of a volume-weighted median (as opposed to a traditional median) serves as an additional protection against attempts to manipulate the NAV by executing a large number of low-dollar trades, because any manipulation attempt would have to involve a majority of global spot ETH volume in a sixty-minute window to have any influence on the NAV.

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at i.fidelity.com/indices.

Net Asset Value

As described in the Registration Statement, for purposes of calculating the Trust’s NAV per Share, the Trust’s holdings of ETH will be valued using the Index value as of 4:00 p.m. Eastern time. NAV means the total assets of the Trust which will include only ETH, cash, and cash equivalents, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator calculates the NAV of the Trust once each Exchange trading day. The NAV for a normal trading day will be released after 4:00 p.m. Eastern time. Trading during the core trading session on the Exchange typically closes at 4:00 p.m. Eastern time. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. Eastern time and almost always by 8:00 p.m. Eastern time). The pause between 4:00 p.m. Eastern time and 5:30 p.m. Eastern time (or later) provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. If the Sponsor determines in good faith that the Index does not reflect an accurate ETH price, then the Trust will cause to be employed an alternative method to determine the fair value of the Trust’s assets as reviewed and approved by the Sponsor’s valuation committee.⁴¹

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust’s ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day’s NAV per Share and the reported BZX Official Closing Price;⁴² (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business and available on the Sponsor’s website at www.fidelity.com, or any successor thereto.

The Trust will provide an Intraday Indicative Value (“IIV”) per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange’s Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Trading Hours through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg

⁴¹ Such alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

⁴² As defined in Rule 11.23(a)(3), the term “BZX Official Closing Price” shall mean the price disseminated to the consolidated tape as the market center closing trade.

³⁹ 15 U.S.C. 80a-1.

⁴⁰ The Sponsor’s affiliates have an ownership interest in Coin Metrics, Inc.

and Reuters. The IIV calculation agent will use the Trust's ETH holdings and cash and cash equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1⁴³ as the pricing source for the spot ETH, which will be used to update the IIV. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

The value of the Index will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at *i.fidelity.com/indices*.

Quotation and last sale information for ETH is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the trading platforms on which ETH are traded. Depth of book information is also available from ETH trading platforms. The normal trading hours for ETH trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

⁴³ Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See *blockstream.com/cryptofeed*.

The ETH Custodian

The Sponsor has selected FDAS to be the Trust's Custodian. FDAS is a New York state limited liability trust⁴⁴ that serves as ETH custodian to institutional and individual investors. The Custodian maintains a substantial portion of the private keys associated with the Trust's ETH in "cold storage" or similarly secure technology. Cold storage is a safeguarding method with multiple layers of protections and protocols, by which the private key(s) corresponding to the Trust's ETH is (are) generated and stored in an offline manner. Private keys are generated in offline computers that are not connected to the internet so that they are resistant to being hacked. Cold storage of private keys may involve keeping such keys on a non-networked computer or electronic device or storing the public key and private keys on a storage device or printed medium and deleting the keys from all computers.

The Custodian may receive deposits of ETH but may not send ETH without use of the corresponding private keys. In order to send ETH when the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into a software program to sign the transaction, or the unsigned transaction must be sent to the "cold" server in which the private keys are held for signature by the private keys. At that point, the Custodian can transfer the ETH. The Trust's Transfer Agent will facilitate the settlement of Shares in response to the placement of creation orders and redemption orders from authorized participants. The Trust will only hold ETH, cash and cash equivalents. The Trust will enter into a cash custody agreement with the Cash Custodian as custodian of the Trust's cash and cash equivalents.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 25,000 Shares (a "Creation Basket") that are based on the amount of ETH held by the Trust on a per unit (*i.e.*, 25,000 Share) basis. According to the Registration Statement, on any

⁴⁴ New York state trust companies are subject to rigorous oversight similar to other types of entities, such as nationally chartered banking entities, that hold customer assets. Like national banks, they must obtain specific approval of their primary regulator for the exercise of their fiduciary powers. Moreover, limited purpose trust companies engaged in the custody of digital assets are subject to even more stringent requirements than national banks which, following initial approval of trust powers, generally can exercise those powers broadly without further approval of the OCC. In contrast, NYDFS requires in their approval orders that limited purpose trust companies obtain separate approval for all material changes in business.

business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by close of Regular Trading Hours on the Exchange or an earlier time as determined and communicated by the Sponsor and its agent. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation Baskets being created determined as of 4:00 p.m. ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ETH held by the Trust as of the opening of business on that business day, adjusted for the amount of ETH constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the aggregation of Shares associated with a Creation Basket. The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The authorized participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, authorized participants will not directly or indirectly purchase, hold, deliver, or receive ETH as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ETH as part of the creation or redemption process.

The Trust will create Shares by receiving ETH from a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to deliver the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ETH to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ETH to the Trust. The Trust will redeem Shares by delivering ETH to a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to receive the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ETH from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ETH from the Trust.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The Sponsor will maintain ownership and control of ETH in a manner consistent with good delivery requirements for spot commodity transactions.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Trust must be in compliance with Rule 10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the NAV will be calculated daily and that the NAV and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁵ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to

the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ETH, CME Ether Futures contracts, options on CME Ether Futures, or any other ETH derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange

may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ETH underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The

⁴⁵ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other ether derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other ether derivative from such markets and other entities.⁴⁶ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other ether derivative via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

The Information Circular

Prior to the commencement of trading, the Exchange will inform its

members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴⁷ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ETH, that the Commission has no jurisdiction over the trading of ETH as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures contracts and options on CME Ether Futures contracts.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁸ in general and Section 6(b)(5) of the Act⁴⁹ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts, including Commodity-Based Trust Shares, to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁵⁰ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and, as described and discussed above, the Sponsor's analysis demonstrates that the Exchange has satisfied the requirements under the Act that the CME Ether Futures Market (i) is a regulated market, (ii) has a comprehensive surveillance-sharing agreement with the Exchange; and (iii) satisfies the Commission's "significant market" definition.⁵¹ In addition, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

⁵⁰ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH trading platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other trading platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH trading platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁴⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁷ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

⁴⁸ 15 U.S.C. 78f.

⁴⁹ 15 U.S.C. 78f(b)(5).

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁵¹ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁵² As such, the only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵³

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵⁴

⁵¹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See *Wilshire Phoenix Disapproval*.

⁵² For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵³ See *Wilshire Phoenix Disapproval*.

⁵⁴ See *Winklevoss Order* at 37580. The Commission has also specifically noted that it “is

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵⁵

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether

not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

⁵⁵ See the Spot Bitcoin ETP Approval Order at 3011–3012.

Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵⁶ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵⁷ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and

⁵⁶ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18court in the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

⁵⁷ Source: TokenTerminal.

manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares—Rule 14.11(e)(4)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency

in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business and available on the Sponsor's website at www.fidelity.com, or any successor thereto.

The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. Eastern time). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters. The IIV calculation agent will use the Trust's ETH holdings and cash and cash equivalents expected to comprise that day's NAV calculation to calculate the IIV. The calculation agent currently uses the Blockstream Crypto Data Feed Streaming Level 1⁵⁸ as the pricing source for the spot ETH, which will be used to update the IIV. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day.

The price of ETH will be made available by one or more major market

data vendors, updated at least every 15 seconds during Regular Trading Hours.

The value of the Index will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated every day and is constructed using ETH price feeds from eligible ETH spot markets and a VWMP methodology, calculated every 15 seconds based on VWMP spot market data over rolling sixty-minute increments. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at i.fidelity.com/indices.

Quotation and last sale information for ETH is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the trading platforms on which ETH are traded. Depth of book information is also available from ETH trading platforms. The normal trading hours for ETH trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal. For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

⁵⁸ Blockstream provides cryptocurrency data feeds delivering real-time and historical trade data from the world's leading cryptocurrency venues. See <https://blockstream.com/cryptofeed/>.

necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-095 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeBZX-2023-095. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the

Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-095 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁹

J. Matthew DeLesDernier,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100211; File No. SR-BX-2024-016]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt an OTTO Protocol

May 22, 2024.

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 May 8, 2024, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new protocol, "Ouch to Trade Options" or "OTTO" and establish pricing for this new protocol.

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.

⁵⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

BX proposes to offer a new order entry protocol called OTTO. Today, BX Participants may enter orders into the Exchange through the "Financial Information eXchange" or "FIX."³ The proposed new OTTO protocol is identical to the OTTO protocol offered today on 3 Nasdaq affiliated exchanges, Nasdaq ISE, LLC ("ISE"), Nasdaq GEMX, LLC ("GEMX") and Nasdaq MRX, LLC ("MRX").

The OTTO protocol is a proprietary protocol of Nasdaq, Inc. The Exchange continues to innovate and modernize technology so that it may continue to compete among options markets. The ability to continue to innovate with technology and offer new products to market participants allows BX to remain competitive in the options space which currently has seventeen options markets and potential new entrants.

OTTO Protocol

As proposed, OTTO would allow Participants and their Sponsored Customers⁴ to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. OTTO features would

³ FIX is an interface that allows Participants and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders and responses to and from the Exchange. Features include the following: (1) execution messages; (2) order messages; and (3) risk protection triggers and cancel notifications. In addition, a BX Participant may elect to utilize FIX to send a message and PRISM Order, as defined within Options 3, Section 13, to all BX Participants that opt in to receive Requests for PRISM requesting that it submit the sender's PRISM Order with responder's Initiating Order, as defined within Options 3, Section 13, into the Price Improvement Auction ("PRISM") mechanism, pursuant to Options 3, Section 13 ("Request for PRISM"). See Options 3, Section 7(e)(1)(A).

⁴ General 2, Section 22 describes Sponsored Access arrangements.

include the following: (1) options symbol directory messages (*e.g.*, underlying and complex instruments); (2) System⁵ event messages (*e.g.*, start of trading hours messages and start of opening); (3) trading action messages (*e.g.*, halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. The Exchange notes that unlike FIX, which offers routing capability, OTTO does not permit routing. The Exchange proposes to include this description of OTTO in new Options 3, Section 7(e)(1)(B) and re-letter current “B” as “C”.

Only one order protocol is required for a BX Participant to submit orders into BX. Only BX Participants may utilize ports on BX. Any market participant that sends orders to a BX Participant would not need to utilize a port. The BX Participant may send all orders, proprietary and agency, through one port to BX. Participants may elect to obtain multiple ports to organize their business,⁶ however only one port is necessary for a Participant to enter orders on BX.

Participants may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. Participants may prefer one protocol as compared to another protocol, for example, the ability to route may cause a Participant to utilize FIX and a Participant that desires to execute an order locally may prefer

⁵ The term “System” or “Trading System” means the automated system for order execution and trade reporting owned and operated by BX as the BX Options market. The BX Options market comprises: (A) an order execution service that enables Participants to automatically execute transactions in option series; and provides Participants with sufficient monitoring and updating capability to participate in an automated execution environment; (B) a trade reporting service that submits “locked-in” trades for clearing to a registered clearing agency for clearance and settlement; transmits last-sale reports of transactions automatically to the Options Price Reporting Authority for dissemination to the public and industry; and provides participants with monitoring and risk management capabilities to facilitate participation in a “locked-in” trading environment; and (C) the data feeds described in Options 3, Section 23. See BX Options 1, Section 1(a)(59).

⁶ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons, segregating order flow among different trading desks, or other determinations that are specific to that Participant. A market participant may utilize multiple ports in some cases to send multiple orders through different ports to avoid any latency or queuing of orders. The Exchange notes that to the extent that different OTTO Ports are used to send multiple orders as compared to sending multiple orders through one OTTO Port the difference from a latency standpoint would be in nanoseconds.

OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Participants depending on their trading behavior. Nasdaq believes that the addition of OTTO will provide BX Participants with additional choice when submitting orders to BX.

While the Exchange has no way of predicting with certainty the amount or type of OTTO Ports market participants will in fact purchase, the Exchange anticipates that some Participants will subscribe to multiple OTTO Ports in combination with FIX Ports. The Exchange notes that Options Participants may use varying number of OTTO ports based on their business needs.

Other Amendments

In connection with offering OTTO, the Exchange proposes to amend other rules within Options 3. Each amendment is described below.

Options 3, Section 7

BX proposes to amend Options 3, Section 7, Types of Orders and Quote Protocols. Specifically, BX proposes to amend Options 3, Section 7 (b)(2) that describes the Immediate-or-Cancel” or “IOC” order. Today, Options 3, Section 7(b)(2)(B) notes that an IOC order may be entered through FIX or SQF, provided that an IOC Order entered by a Market Maker through SQF is not subject to the Order Price Protection, the Market Order Spread Protection, or Size Limitation in Options 3, Section 15(a)(1), (a)(2), and (b)(2), respectively. The Exchange proposes to add “OTTO” to the list of protocols to note that an IOC order may also be entered through OTTO.

BX also proposes to amend the “DAY” order in Options 3, Section 7(b)(3) that currently provides that a Day order may be entered through FIX. With the addition of OTTO, a Day order may also be entered through OTTO.

BX also proposes to amend the “Good Til Cancelled” or “GTC” order which currently does not specify that a GTC order may be entered through FIX. GTC orders would only be able to be entered through FIX and not OTTO. The Exchange proposes to amend Options 3, Section 7(b)(4) to add a sentence to note that GTC orders may be entered through FIX.

Options 3, Section 8

BX proposes to amend Options 3, Section 8, Options Opening Process. BX proposes to amend Options 3, Section 8(l) that describes the Opening Process Cancel Timer. The Opening Process Cancel Timer represents a period of

time since the underlying market has opened. If an option series has not opened before the conclusion of the Opening Process Cancel Timer, a Participant may elect to have orders returned by providing written notification to the Exchange. Today, these orders include all non-Good Til Cancelled Orders received over the FIX protocol. The Exchange proposes to add the OTTO protocol as well to the rule text language in that paragraph.

Options 3, Section 12

The Exchange proposes to amend the Options 3, Section 12, Crossing Orders. Specifically, the Exchange proposes to amend Customer Crossing Orders in Options 3, Section 12(a) that currently provides Public Customer-to-Public Customer Cross Orders are automatically executed upon entry provided that the execution is at or between the best bid and offer on the Exchange and (i) is not at the same price as a Public Customer Order on the Exchange’s limit order book and (ii) will not trade through the NBBO. Public Customer-to-Public Customer Cross Orders must be entered through FIX. The Exchange proposes to remove the sentence that provides that Public Customer-to-Public Customer Cross Orders must be entered through FIX because they will be able to be entered through both FIX and OTTO.

Options 3, Section 17

The Exchange proposes to amend the Kill Switch at Options 3, Section 17. The Kill Switch provides Participants with an optional risk management tool to promptly cancel and restrict orders. With the introduction of OTTO, the Exchange proposes to align its Kill Switch rule text with MRX’s Kill Switch.⁷ The Exchange proposes to note in Options 3, Section 17(a) that BX Participants may initiate a message(s) to the System to promptly cancel and restrict their order activity on the Exchange, as is the case today, as described in section (a)(1). This amendment simply rewords the rule text without a substantive amendment to the rule text.

The Exchange proposes to renumber Options 3, Section 17(a)(i) and (ii) as (a)(1) and (2). Current Options 3, Section 17(a)(i) states, “If orders are cancelled by the BX Participant utilizing the Kill Switch, it will result in the cancellation of all orders requested for the Identifier(s). The BX Participant will be unable to enter additional orders for the affected Identifier(s) until re-entry has been enabled pursuant to section

⁷ See MRX Options 3, Section 17.

(a)(ii).” The Exchange proposes to instead provide, “A BX Participant may submit a request to the System through FIX or OTTO to cancel all existing orders and restrict entry of additional orders for the requested Identifier(s) on a user level on the Exchange.” With the addition of OTTO, the Exchange notes that both FIX and OTTO orders may be cancelled. Further, today, BX Participants utilize an interface to send a message to the Exchange to initiate a Kill Switch.⁸ The Exchange notes that in lieu of the interface, BX Participants will only be able to initiate a cancellation of their orders by sending a mass purge request through FIX or OTTO. This change will align the Kill Switch functionality to that of ISE, GEMX and MRX Options 3, Section 17 and will enable BX Participants to initiate the Kill Switch more seamlessly without the need to utilize a separate interface. When initiating a cancellation of their orders by sending a mass purge request through FIX or OTTO, Participants will be able to submit a Kill Switch request on a user level only. This is a change from the ability to cancel orders on either a user or group level⁹ with the interface. The Exchange proposes to amend Options 3, Section 17(a) to note this change by removing the words “or group” and the following sentence that applies to a group.¹⁰

Finally, the Exchange proposes to amend proposed Options 3, Section 17(a)(2) to align to MRX’s rule text by providing “Once a BX Participant initiates a Kill Switch pursuant to (a)(1) above . . .” in the first sentence. This amendment simply rewords the rule text without a substantive amendment to the rule text.

Options 3, Section 18

The Exchange proposes to amend Options 3, Section 18, Detection of Loss of Communication. The Exchange proposes to add OTTO to Options 3, Section 18 as OTTO would also be subject to this rule. Today, when the SQF Port or the FIX Port detects the loss of communication with a Participant’s Client Application because the

Exchange’s server does not receive a Heartbeat message for a certain time period, the Exchange will automatically logoff the Participant’s affected Client Application and automatically cancel all of the Participant’s open quotes through SQF and open orders through FIX. Quotes and orders are cancelled across all Client Applications that are associated with the same BX Options Market Maker ID and underlying issues.

At this time, the Exchange proposes to permit orders entered through OTTO to be cancelled similar to FIX orders when the Exchange’s server does not receive a Heartbeat message for a certain time period. The Exchange is proposing to amend Options 3, Section 18 to also rearrange the rule text to add the word “Definitions” next to “a” and move the rule text in current “a” to “b” and re-letter the other paragraphs accordingly. Also, the Exchange proposes to define “Session of Connectivity” for purposes of this rule to mean each time the Participant connects to the Exchange’s System. Further, each new connection, intra-day or otherwise, is a new Session of Connectivity. The Exchange proposes to use the new definition throughout Options 3, Section 18.

Similar to FIX, when the OTTO Port detects the loss of communication with a Participant’s Client Application because the Exchange’s server does not receive a Heartbeat message for a certain time period, the Exchange will automatically logoff the Participant’s affected Client Application and automatically cancel all of the Participant’s open orders through OTTO. Orders would be cancelled across all Client Applications that are associated with the same BX Options Market Maker ID and underlying issues. The Exchange proposes to update Options 3, Section 18 to provide in proposed Options 3, Section 18(a)(3) that the OTTO Port is the Exchange’s proprietary System component through which Participants communicate their orders from the Client Application. Further, the Exchange would note in proposed Options 3, Section 18(c) that when the OTTO Port detects the loss of communication with a Participant’s Client Application because the Exchange’s server does not receive a Heartbeat message for a certain time period (“nn” seconds), the Exchange will automatically logoff the Participant’s affected Client Application and if the Participant has elected to have its orders cancelled pursuant to proposed Section 18(f), automatically cancel all orders. Proposed Options 3, Section 18(f) would provide that the default period of “nn” seconds for OTTO Ports would be fifteen (15)

seconds for the disconnect and, if elected, the removal of orders. A Participant may determine another time period of “nn” seconds of no technical connectivity, as required in proposed paragraph (c), to trigger the disconnect and, if so elected, the removal of orders and communicate that time to the Exchange. The period of “nn” seconds may be modified to a number between one hundred (100) milliseconds and 99,999 milliseconds for OTTO Ports prior to each Session of Connectivity to the Exchange. This feature may be disabled for the removal of orders, however the Participant will be disconnected.

Proposed Options 3, Section 18(f)(1) would provide that if the Participant changes the default number of “nn” seconds, that new setting shall be in effect throughout the current Session of Connectivity and will then default back to fifteen seconds. The Participant may change the default setting prior to each Session of Connectivity. Finally, as proposed in Options 3, Section 18(f)(2), if the time period is communicated to the Exchange by calling Exchange operations, the number of “nn” seconds selected by the Participant will persist for each subsequent Session of Connectivity until the Participant either contacts Exchange operations by phone and changes the setting or the Participant selects another time period through the Client Application prior to the next Session of Connectivity. The trigger for OTTO Ports is event and Client Application specific. The automatic cancellation of the BX Options Market Maker’s open orders for OTTO Ports entered into the respective OTTO Ports via a particular Client Application will neither impact nor determine the treatment of orders of the same or other Participants entered into the OTTO Ports via a separate and distinct Client Application. The proposed amendments for OTTO mirror the manner in which FIX Ports are treated when the Exchange’s server does not receive a Heartbeat message for a certain time period for a FIX Port.¹¹

Pricing

BX proposes to amend its Pricing Schedule at Options 7, Section 3, BX Options Market—Ports and other Services, to assess a port fee for the new OTTO protocol.

The Exchange proposes to assess an OTTO Port Fee of \$650 per port, per month, per account number. OTTO would be an additional order entry protocol for BX Participants in addition

⁸ See Securities Exchange Act Release No. 76116 (October 8, 2015), 80 FR 62147 (October 15, 2015) (SR-BX-2015-050) (Order Approving Proposed Rule Change To Adopt a Kill Switch).

⁹ A permissible group could include all badges associated with a Market Maker. Today, a Participant is able to set up these groups in the interface to include all or some of the Identifiers associated with the Participant firm so that a GUI Kill Switch request could apply to this pre-defined group.

¹⁰ The Exchange proposes to remove this sentence, “Permissible groups must reside within a single broker-dealer” as the group option would no longer exist.

¹¹ The Exchange proposes to update internal cross-references to accommodate relocated text.

to FIX, which is currently utilized by BX Participants to enter orders into BX. The Exchange currently assesses a FIX Port Fee of \$650 per port, per month, per account number.¹² Only one FIX order protocol is required for a BX Participant to submit orders into BX and to meet its regulatory requirements.¹³ The Exchange will provide each Participant the first FIX Port at no cost to submit orders into BX. Only one account number is necessary to transact an options business on BX and account numbers are available to Participants at no cost.

Only BX Participants may utilize ports on MRX. [sic] Any market participant that sends orders to a Participant would not need to utilize a port. The BX Participant can send all orders, proprietary and agency, through one port to BX. Participants may elect to obtain multiple account numbers to organize their business, however only one account number and one port for orders is necessary for a BX Participant to trade on BX. All other order entry ports offered by BX are not required for an BX Participant to meet its regulatory obligations. BX Participants utilizing the first FIX Port offered at no cost do not need to purchase an OTTO Port to meet their regulatory obligations.

Further, while only one FIX protocol is necessary to submit orders into BX, Participants may choose to purchase a greater number of order entry ports, depending on their business model.¹⁴ To the extent that Participants chose to utilize more than one FIX Port, the Participant would be assessed \$650 per port, per month, per account number for each subsequent port beyond the first port.

The Exchange also proposes to add OTTO to the list of ports that are capped at \$7,500 on BX. Today, the maximum monthly fees in the aggregate for FIX Port, CTI Port, FIX DROP Port, BX Depth Port and BX TOP Port Fees on BX is \$7,500.¹⁵ These ports are available to all BX Participants. To the extent that a Participant expended more than \$7,500 for FIX or OTTO Ports, BX would not charge a Participant for additional FIX

or OTTO Ports, respectively, beyond the cap.

Only one FIX order protocol is required for an MRX [sic] Member to submit orders into MRX [sic] and to meet its regulatory requirements.¹⁶ The Exchange will provide each Participant the first FIX Port at no cost to submit orders into BX. Only one account number is necessary to transact an options business on BX and account numbers are available to Participants at no cost. Both FIX and OTTO ports are not necessary to conduct business on BX; a Participant may choose among protocols based on their business workflow. The Exchange's proposal to offer the first FIX Port at no cost would allow BX Participants to submit orders and quotes into BX at no cost while meeting their regulatory obligations.

The proposed fee for OTTO is identical to the fee offered for OTTO, an identical protocol, on MRX. Additionally, MRX offers one free FIX Port to its Members and assesses the same FIX Port fee of \$650 per port, per month, per account number as BX assessed today for FIX. MRX also offers a free FIX Disaster Recovery Port. Today, BX does not assess Disaster Recovery Port fees.¹⁷ Finally, today, MRX offers a \$7,500 monthly cap for OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports.¹⁸ BX's proposed monthly cap does not include Disaster Recovery Ports, which are free on BX, but does include BX Depth Ports and BX Top Ports which are assessed fees of \$650 per port, per month.

Implementation

The Exchange will implement this rule change on or before December 20, 2025. The Exchange will announce the operative date to Participants in an Options Trader Alert.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁰ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Additionally, the Exchange believes that

its proposal furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²¹ 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.

OTTO Protocol

The Exchange's proposal to adopt OTTO is consistent with the Act because OTTO would provide BX Participants with an alternative protocol to submit orders to the Exchange. As proposed, BX would offer the first OTTO Port at no cost to submit orders into BX, which would remove impediments to and perfect the mechanism of a free and open market. While BX Participants may elect to obtain multiple ports to organize their business,²² only one order port is necessary for a Participant to enter orders on BX. A BX Participant may send all orders, proprietary and agency, through one port to BX without incurring any cost with this proposal. In the alternative, BX Participants may elect to obtain multiple ports to organize their business.²³

With the addition of OTTO, a BX Participant may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. Each BX Participant would receive one OTTO Port at no cost, thereby promoting just and equitable principles of trade. The Exchange notes that Participants may prefer one order protocol as compared to another order protocol, for example, the ability to route an order may cause a Participant to utilize FIX and a Participant that desires to execute an order locally may utilize OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Participants depending on their trading behavior. With this proposal, BX Participant may organize their business as they chose with the ability to send orders to BX at no cost. The proposed new OTTO protocol is identical to the OTTO protocol offered today on ISE, GEMX, MRX.

²¹ See 15 U.S.C. 78f(b)(4) and (5).

²² For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

²³ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

¹² The term "account number" means a number assigned to a Participant. Participants may have more than one account number. See Options 1, Section 1(a)(2). Account numbers are free on BX.

¹³ BX Participants have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations.

¹⁴ For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

¹⁵ See BX Options 7, Section 3(i).

¹⁶ BX Participants have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations.

¹⁷ See BX Options 7, Section 3.

¹⁸ See MRX Options 7, Section 6.

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

Other Amendments

In connection with offering OTTO, the Exchange proposes to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized. IOC Orders may be entered through FIX, OTTO or SQF. A Day order may be entered through FIX or OTTO. A GTC order may only be entered through FIX. A Public Customer-to-Public Customer Cross Order may be entered through FIX or OTTO. Other processes such the Opening Cancel Timer would impact FIX and OTTO equally.

The Exchange's proposal to amend the Kill Switch at Options 3, Section 17 to align its rule text in proposed Options 3, Section 17(a) and (a)(2) with MRX's Options 3, Section 17 is consistent with the Act because it does not substantively amend the functionality beyond removing the group level cancel capability. The Exchange's proposal to amend proposed Options 3, Section 17(a)(2) to specify that FIX and OTTO orders may be cancelled is consistent with the Act as it will make clear that all orders entered on BX may be purged through the Kill Switch. Finally, allowing BX Participants to send a mass purge request through FIX or OTTO, in lieu of an interface, is consistent with Act and the protection of investors and the general public because it will enable BX Participants to initiate the Kill Switch more seamlessly without the need to utilize a separate interface. Further, utilizing the order protocols directly, in lieu of the interface, will align the Kill Switch functionality to that of ISE, GEMX and MRX. When initiating a cancellation of their orders by sending a mass purge request through FIX or OTTO, Participants will be able to submit a Kill Switch request on a user level only because the purge will be specific to a FIX or OTTO user for these ports.

Finally, the Detection of Loss of Communication would apply equally to FIX and OTTO. The Exchange believes that its proposal is consistent with the Act and protects investors as the Exchange is making clear what types of order types and other mechanisms may utilize OTTO. Today, BX Participants utilize FIX to enter their orders. Despite the fact that OTTO would not be available for the GTC Time-In-Force modifier, the Exchange notes that one OTTO Port is being provided to Participants at no cost. Today, FIX is the only manner in which to enter orders into BX.

Pricing

Proposed Port Fees Are Reasonable, Equitable and Not Unfairly Discriminatory

Only one FIX order protocol is required for a BX Participant to submit orders into BX and to meet its regulatory requirements²⁴ at no cost while meeting its regulatory requirements. The Exchange will provide each Participant the first FIX Port at no cost to submit orders into BX. Only one account number is necessary to transact an options business on BX and account numbers are available to Participants at no cost.

The Exchange proposes to offer each Participant the first FIX Port at no cost to meet their regulatory requirements. As noted above, Participants may freely choose to rely on one or many ports, depending on their business model.

The Exchange's proposal is reasonable, equitable and not unfairly discriminatory as BX is providing BX Participants the first FIX Port to submit orders at no cost. These ports, which are offered at no cost, would allow a BX Participant to meet its regulatory requirements. All other ports offered by BX are not required for an BX Participant to meet its regulatory obligations. Therefore, for the foregoing reasons, it is reasonable to assess no fee for the first FIX Port obtained by a Participant as an BX Participant is able to meet its regulatory requirements with these ports.

Further it is equitable and not unfairly discriminatory to assess no fee for the first FIX Port to Participants as all Participants would be entitled to the first FIX Port at no cost. With this proposal, BX Participants may organize their business in such a way as to submit orders to BX at no cost.

The Exchange's proposal to assess \$650 per port, per month, per account number for an OTTO Port is reasonable because OTTO is not required for a Participant to meet its regulatory requirements. The Exchange is offering the first FIX Port at no cost to submit orders to BX. In addition to the FIX Port, all Participants may elect to purchase OTTO to submit orders to BX. BX Participants utilizing the FIX Port, which is offered at no cost, do not need to utilize OTTO.

Finally, in the event that a BX Participant elects to subscribe to multiple ports, the Exchange offers a monthly cap beyond which a

Participant would be assessed no additional fees for the month and proposes to add OTTO to the monthly cap. Today, OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports are subject to a monthly cap of \$7,500. These caps are reasonable because they allow Participants to limit their fees beyond a certain level if they elect to purchase multiple ports in a given month. The caps are also equitable and not unfairly discriminatory because any Participant will be subject to the cap, provided they exceeded the appropriate dollar amount in a given month. These ports are available to all BX Participants.

The proposed BX OTTO fee is the same as the OTTO Port fee on MRX, for the identical port. Additionally, MRX offers one free FIX Port to its Members and assesses the same FIX Port fee of \$650 per port, per month, per account number as BX assesses today for a FIX Port. MRX offers its Members a free FIX Disaster Recovery Port.²⁵ Today, BX does not assess Disaster Recovery Port fees.²⁶ Finally, today, MRX offers a \$7,500 monthly cap for OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports.²⁷ BX's proposed monthly cap does not include Disaster Recovery Ports, which are free on BX, but does include BX Depth Ports and BX Top Ports which are currently assessed fees of \$650 per port, per month.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The OTTO protocol is a proprietary protocol of Nasdaq, Inc. The Exchange continues to innovate and modernize technology so that it may continue to compete among options markets. The ability to continue to innovate with technology and offer new products to market participants allows BX to remain competitive in the options space which currently has seventeen options markets and potential new entrants. If BX were unable to offer and price new protocols, it would result in an undue burden on competition as BX would not have the ability to innovate and modernize its technology to compete effectively in the options space. BX's ability to offer OTTO will enable it to compete with other options markets that provide its market participants a choice as to the

²⁴ BX Participants have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations. See Rule 611 of Regulation NMS; 17 CFR 242.611 and FINRA Rule 5310.

²⁵ See MRX Options 7, Section 6.

²⁶ See BX Options 7, Section 3.

²⁷ See MRX Options 7, Section 6.

type of order entry protocols that may be utilized. BX's ability to offer and price new and innovative products and continue to modernize its technology, similar to other options markets, supports intermarket competition.

OTTO Protocol

The Exchange's proposal to adopt an OTTO Protocol does not impose an undue burden on intramarket competition. Today, all BX Participants utilize FIX to send orders to BX. The Exchange would offer each BX Participant the first OTTO Port at no cost with this proposal. With the addition of OTTO Ports, a BX Participant may elect to enter their orders through FIX, OTTO, or both protocols, although both protocols are not necessary. The Exchange's proposal to adopt an OTTO Protocol does not impose an undue burden on intermarket competition as other options exchanges offer multiple protocols today such as ISE, GEMX and MRX.

Other Amendments

The Exchange's proposal to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized does not impose an undue burden on intramarket competition as these rules will apply in the same manner to all Participants. The Exchange's proposal to amend other rules within Options 3 to make clear where the FIX and OTTO protocols may be utilized does not impose an undue burden on intermarket competition as other options exchanges may elect to utilize their order entry protocols in different ways.

Pricing

Nothing in the proposal burdens inter-market competition because BX's proposal to offer the first FIX Port for free is similar to MRX's FIX Port offering, and would allow BX Participants to meet their regulatory obligations. BX's offering would permit Participants the ability to submit orders to BX at no cost. OTTO Ports are not required for BX Participants to meet their regulatory obligations.

Nothing in the proposal burdens intra-market competition because the Exchange would uniformly assess the port fees to all Participants, as applicable, and would uniformly apply monthly caps. The proposed fees are identical to fees recently approved on MRX.²⁸ The proposed BX OTTO fee is the same as the OTTO Port fee on MRX,

for the identical port. Additionally, MRX offers one free FIX Port to its Members and assesses the same FIX Port fee of \$650 per port, per month, per account number as BX assessed today for FIX.²⁹ MRX also offers a free FIX Disaster Recovery Port.³⁰ Today, BX does not assess Disaster Recovery Port fees.³¹ Finally, today, MRX offers a \$7,500 monthly cap for OTTO Ports, CTI Ports, FIX Ports, FIX Drop Ports and all Disaster Recovery Ports.³² BX's proposed monthly cap does not include Disaster Recovery Ports, which are free on BX, but does include BX Depth Ports and BX Top Ports which are assessed fees of \$650 per port, per month.

To the extent that the Commission does not permit BX to assess the same identical fees for the same identical products on its market, the Commission is creating a burden on competition by allowing MRX to assess fees and offer a product that would otherwise be unavailable on BX. Additionally, the proposal offers a free FIX Port to BX Participants that already subscribe to FIX, the only order port currently offered on BX. Each SRO should be permitted to mirror fees assessed by another SRO to further competition among the exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act³³ and subparagraph (f)(6) of Rule 19b-4 thereunder.³⁴

At any time within 60 days of the filing of the proposed rule change, the

Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BX-2024-016 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-2024-016. 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

²⁸ See Securities Exchange Commission Release No. 96824 (February 7, 2023), 88 FR 8975 (February 10, 2023) (SR-MRX-2023-05).

²⁹ See MRX Options 7, Section 6.

³⁰ Id.

³¹ See BX Options 7, Section 3.

³² See MRX Options 7, Section 6.

³³ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁴ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–BX–2024–016 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–11703 Filed 5–28–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100218; File No. SR–CboeBZX–2024–018]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Relating To List and Trade Shares of the Franklin Ethereum ETF, a Series of the Franklin Ethereum Trust, Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

May 22, 2024.

On February 22, 2024, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Franklin Ethereum ETF, a series of the Franklin Ethereum Trust, under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on March 13, 2024.³ On April 23, 2024, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On May 21, 2024, the Exchange filed Amendment No. 1 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 1 amended and replaced the proposed rule change in its entirety. The

Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to list and trade shares of the Franklin Ethereum ETF (the “Fund”), a series of the Franklin Ethereum Trust (the “Trust”),⁶ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 to SR–CboeBZX–2024–018 amends and replaces in its entirety the proposal as originally submitted on February 22, 2024. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),⁷ which governs the listing and trading of Commodity-Based Trust

Shares on the Exchange.⁸ Franklin Holdings, LLC is the sponsor of the Fund (“Sponsor”). The Shares will be registered with the Commission by means of the Trust’s registration statement on Form S–1 (the “Registration Statement”).⁹

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹⁰ With this in mind, the

⁸ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, “Continued Listing Representations”) shall constitute continued listing requirements for the Shares listed on the Exchange.

⁹ On February 12, 2024, the Trust filed with the Commission the Registration Statement on Form S–1, submitted to the Commission by the Sponsor on behalf of the Trust (333–277008). The descriptions of the Fund, the Trust, the Shares, and the Index (as defined below) contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹⁰ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the “Winklevoss Proposal”). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance

Continued

³⁵ 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. 99686 (Mar. 7, 2024), 89 FR 18447. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2024-018/sr-cboebzx2024018.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 100015, 89 FR 33431 (Apr. 29, 2024).

⁶ The Trust was formed as a Delaware statutory trust on February 8, 2024. The Fund is operated as a grantor trust for U.S. federal tax purposes. The Trust and the Fund have no fixed termination date.

⁷ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

Chicago Mercantile Exchange (“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these funds are nearly identical to the Fund, but hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹¹ By way of background, in 2022 the Commission disapproved proposals¹² to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹³ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁴ In considering the remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record. . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot

sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹¹ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹² See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR-CboeBZX-2022-035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹³ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR-NYSEArca-2021-90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) (the “Grayscale Order”).

¹⁴ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁵

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size and that this proposal should be approved.

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of logic, called a protocol, to create a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. It is widely understood that no single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an

alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹⁶

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their

¹⁶ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

¹⁵ See the Spot Bitcoin ETP Approval Order at 3011–3012.

digital assets in accounts at FTX,¹⁷ Celsius Network LLC,¹⁸ BlockFi Inc.,¹⁹ and Voyager Digital Holdings, Inc.,²⁰ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Fund, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ether primarily through CME Ether Futures (“Ether Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Ether ETPs. Such rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether Futures ETFs represent a useful trading tool, they are

clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as warranted based on the Commission’s concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures contracts),²¹ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Fund has contracted with the Custodian (as discussed below) to provide, as further outlined below. In the custody statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian’s holding of the Fund’s ether. After diligent investigation, the Sponsor believes that the Custodian’s policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Fund’s ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services (“NYDFS”), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of

providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Ether Futures ETFs as compared to Spot Ether ETPs, losses which could be prevented by the Commission approving Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

¹⁷ See FTX Trading Ltd., et al., Case No. 22–11068.

¹⁸ See Celsius Network LLC, et al., Case No. 22–10964.

¹⁹ See BlockFi Inc., Case No. 22–19361.

²⁰ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

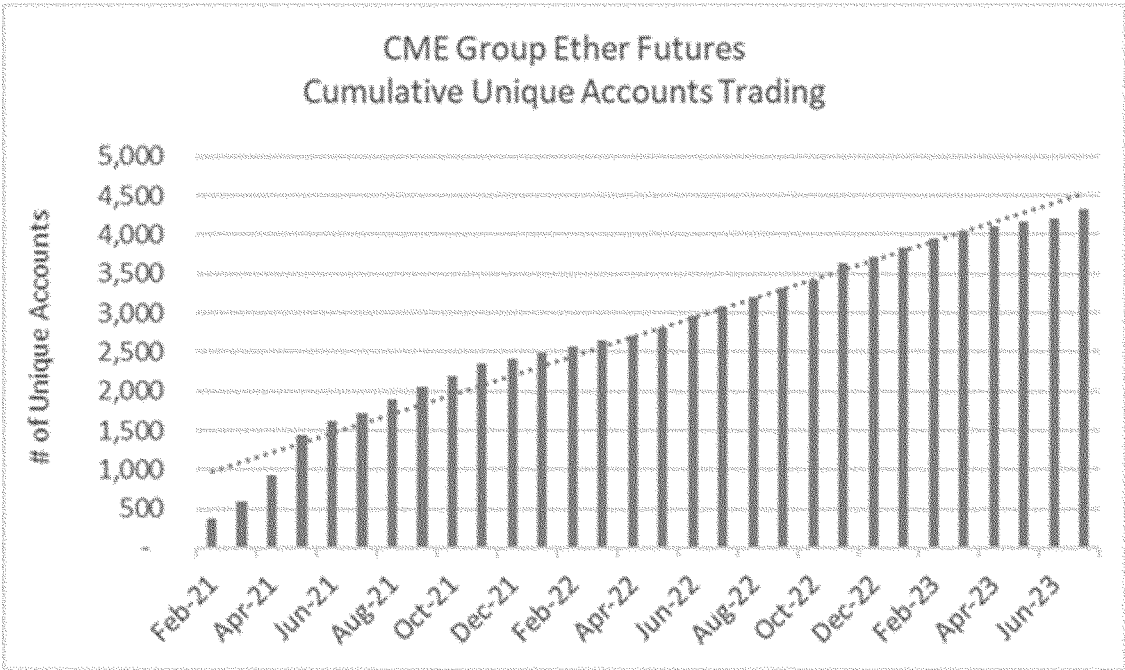
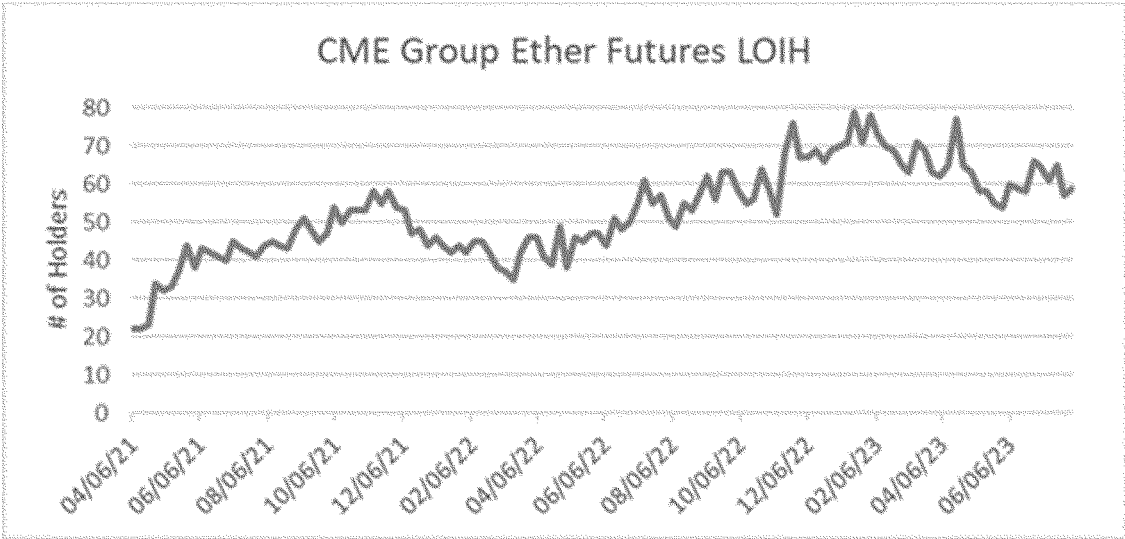
²¹ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 (“The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled”).

CME Ether Futures ²²

CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²³ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures

have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME Ether Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.²⁴ The Sponsor's

research indicates daily correlation between the spot ETH and the CME Ether Futures is 0.998 from the period of 9/1/22 through 9/1/23. The number of large open interest holders²⁵ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened ether price volatility.



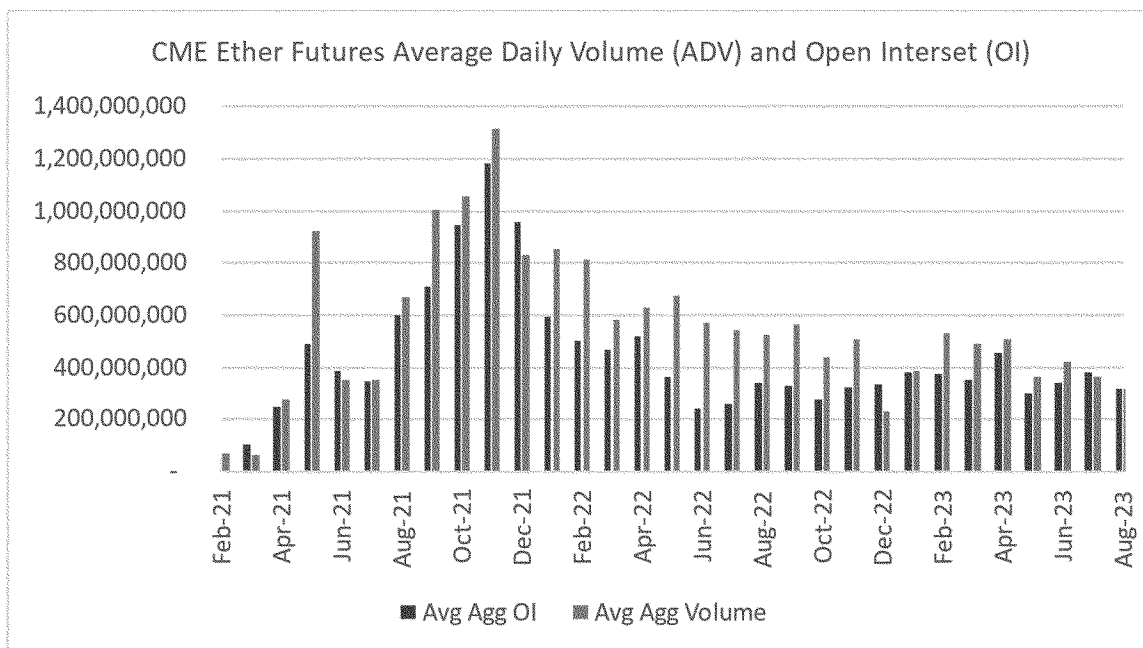
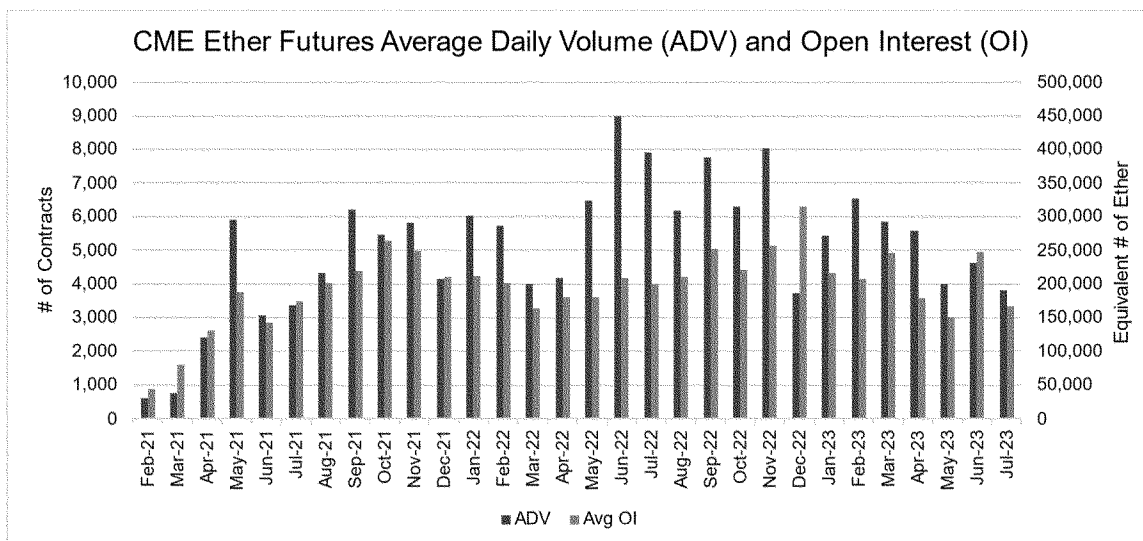
²² Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²³ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several

crypto trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁴ Source: CME, 7/31/23.
²⁵ A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts,

which is the equivalent of 1,250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures.



Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,²⁶ including Commodity-Based Trust Shares,²⁷ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are

designed to prevent fraudulent and manipulative acts and practices;²⁸ and

²⁸ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently

presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH or OTC trading platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

²⁶ See Exchange Rule 14.11(f).

²⁷ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place²⁹ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).³⁰ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the

predominant influence on prices in that market.³¹

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the Act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.³²

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order³³ also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME ... can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁴

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission

believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Fund would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁵ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.³⁶ The Sponsor expects that the Fund would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Fund’s assets and, thus, the Fund would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The

²⁹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the “Wilshire Phoenix Disapproval”).

³⁰ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³¹ See Wilshire Phoenix Disapproval.

³² See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

³³ See the Spot Bitcoin ETP Approval Order.

³⁴ See the Spot Bitcoin ETP Approval Order at 3011–3012.

³⁵ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market ... But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

³⁶ Source: TokenTerminal.

Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Franklin Ethereum ETF

Delaware Trust Company is the trustee ("Trustee"). Bank of New York Mellon is the custodian for the Fund's cash and cash equivalents³⁷ (the "Cash Custodian") and also serves as the Fund's administrator and transfer agent (the "Administrator" or "Transfer Agent"). Coinbase Trust Company, LLC (the "Custodian") will be responsible for custody of the Fund's ether.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Fund's net assets. The Fund's assets will only consist of ether, cash, and cash equivalents.

According to the Registration Statement, the Trust is neither an investment company registered under the 1940 Act,³⁸ nor a commodity pool for purposes of the Commodity Exchange Act ("CEA"), and neither the

Trust, the Fund nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust or the Fund, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust or Fund will, directly or indirectly, engage in action where any portion of the Fund's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Fund will not acquire and will disclaim any incidental right ("IR") or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Fund sells or redeems its Shares, it will do so in cash transactions in large blocks of 50,000 Shares (a "Creation Basket") at the Fund's net asset value ("NAV"). For creations, authorized participants will deliver, or facilitate the delivery of, cash to the Fund's account with the Cash Custodian in exchange for Shares. Upon receipt of an approved creation order, the Sponsor, on behalf of the Fund, will submit an order to buy the amount of ether represented by a Creation Basket. Based off ether executions, the Cash Custodian will request the required cash from the authorized participant. Following receipt by the Cash Custodian of the cash from an authorized participant, the Sponsor, on behalf of the Fund, will approve an order with one or more previously onboarded trading partners to purchase the amount of ether represented by the Creation Basket.³⁹ Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Fund's assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Fund.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Fund is to generally reflect the performance of the price of ether before payment of the Fund's expenses and

liabilities. In seeking to achieve its investment objective, the Fund will hold only ether, cash, and cash equivalents. The Fund will value its Shares daily based on the value of ether as reflected by the CME CF Ether-Dollar Reference Rate—New York Variant (the "Index"), which is an independently calculated value based on an aggregation of executed trade flow of major ether spot trading platforms. Specifically, the Index is calculated based on certain transactions of all of its constituent ether trading platforms, which are currently Bitstamp, Coinbase, itBit, Kraken, Gemini, and LMAX Digital, and which may change from time to time. If the Index is not available or the Sponsor determines, in its sole discretion, that the Index should not be used, the Fund's holdings may be fair valued in accordance with the policy approved by the Sponsor.⁴⁰

The Index

As described in the Registration Statement, the Fund will value its Shares daily based on the value of ether as reflected by the Index. The Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. The Index is designed based on the International Organization of Securities Commissions ("IOSCO") Principals for Financial Indexes. The administrator of the Index is CF Benchmarks Ltd. (the "Index Provider").

The Index serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/ETH), calculated as of 4:00 p.m. ET. The Index aggregates the trade flow of several ether trading platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. Specifically, the Index is calculated based on the "Relevant Transactions" (as defined below) of all of its constituent ether trading platforms, which are currently Coinbase, Bitstamp, Kraken, itBit, LMAX Digital and Gemini (the "Constituent Platforms"), as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.
- The list is partitioned by timestamp into 12 equally-sized time intervals of 5 (five) minute length.
- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and

³⁷ Cash equivalents are short-term instruments with maturities of less than 3 months.

³⁸ 15 U.S.C. 80a-1.

³⁹ For redemptions, the process will occur in the reverse order. Upon receipt of an approved redemption order, the Sponsor, on behalf of the Fund, will submit an order to sell the amount of ether represented by a Creation Basket and the cash proceeds will be remitted to the authorized participant when the large block of Shares is received by the Transfer Agent.

⁴⁰ Any alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

sizes of all Relevant Transactions, *i.e.*, across all Constituent Platforms. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.

- The Index is then determined by the equally-weighted average of the volume medians of all partitions.

The Index does not include any futures prices in its methodology. A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a Constituent Platform in the ETH/USD pair that is reported and disseminated by a Constituent Platform through its publicly available Application Programming Interface (“API”) and observed by the Index Provider.

The Sponsor believes that the use of the Index is reflective of a reasonable valuation of the average spot price of ether and that resistance to manipulation is a priority aim of its design methodology. The methodology: (i) takes an observation period and divides it into equal partitions of time; (ii) then calculates the volume-weighted median of all transactions within each partition; and (iii) the value is determined from the arithmetic mean of the volume-weighted medians, equally weighted. By employing the foregoing steps, the Index thereby seeks to ensure that transactions in ether conducted at outlying prices do not have an undue effect on the value of the Index, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the Index value, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the Index value.

In addition, the Sponsor notes that an oversight function is implemented by the Index Provider in seeking to ensure that the Index is administered through codified policies for Index integrity.

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarks.com>.

Net Asset Value

NAV means the total assets of the Fund (which includes ether, cash and cash equivalents) less total liabilities of the Fund. The Administrator will determine the NAV of the Fund on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. ET. The NAV of the Fund is the aggregate value of the Fund’s assets less its estimated accrued but

unpaid liabilities (which include accrued expenses). In determining the Fund’s NAV, the Administrator values the ether held by the Fund based on the price set by the Index as of 4:00 p.m. ET. The Administrator also determines the NAV per Share.

The NAV for the Fund will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.

If the Index is not available or the Sponsor determines, in its sole discretion, that the Index should not be used, the Fund’s holdings may be fair valued in accordance with the policy approved by the Sponsor.

Availability of Information

The website for the Fund, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day’s NAV per Share and the reported BZX Official Closing Price;⁴¹ (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Fund, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned information will be published as of the close of business available on the Fund’s website at <https://www.franklin templeton.com/investments/options/exchange-traded-funds>, or any successor thereto. The Fund will also disseminate its holdings on a daily basis on its website.

The Intraday Indicative Value (“IIV”) will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Fund’s ether holdings during the trading day, which is based on CME CF Ether-Dollar Real Time Index. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Trading Hours

⁴¹ As defined in Rule 11.23(a)(3), the term “BZX Official Closing Price” shall mean the price disseminated to the consolidated tape as the market center closing trade.

through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. Index data, the Index value, and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarks.com>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is also available from ether trading platforms. The normal trading hours for ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. Information regarding the previous day’s BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The Custodian

The Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Fund’s private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Fund maintains exclusive ownership of its assets. The Custodian will keep the private keys associated with the Fund’s ether in “cold storage”⁴² (the “Cold

⁴² The term “cold storage” refers to a safeguarding method by which the private keys corresponding to ether stored on a digital wallet are removed from any computers actively connected to the internet.

Vault Balance”). The hardware, software, systems, and procedures of the ether Custodian may not be available or cost-effective for many investors to access directly. Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor, acting alone or together, will be able to access or use any of the private keys that hold the Fund’s ether.

Creation and Redemption of Shares

When the Fund sells or redeems its Shares, it will do so in cash transactions in blocks of Shares (*e.g.*, a Creation Basket) that are based on the quantity of ether attributable to each Share of the Fund at the NAV. According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders for cash transaction Creation Baskets must be placed by 2:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation Baskets being created determined as of 4:00 p.m. ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ether held by the Fund as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Fund as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket. The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The authorized participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, authorized participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or

otherwise direct the Fund or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process.

The Fund will create Shares by receiving ether from a third party that is not the authorized participant and the Fund—not the authorized participant—is responsible for selecting the third party to deliver the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ether to the Fund or acting at the direction of the authorized participant with respect to the delivery of the ether to the Fund. The Fund will redeem Shares by delivering ether to a third party that is not the authorized participant and the Fund—not the authorized participant—is responsible for selecting the third party to receive the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ether from the Fund or acting at the direction of the authorized participant with respect to the receipt of the ether from the Fund.

The Sponsor (including its delegates) will maintain ownership and control of the Fund’s ether in a manner consistent with good delivery requirements for spot commodity transactions.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the NAV will be calculated daily and that the NAV and information about the assets of the Fund will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴³ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number,

may be redeemed at a holder’s request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Fund, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Fund in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (“Market Maker”) in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, *e.g.*, Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available

Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

⁴³ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ether, CME Ether Futures, options on CME Ether Futures, or any other ether derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Fund will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other ether derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other ether derivative from such markets and other entities.⁴⁴ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other ether derivative via ISG, from other exchanges who are members or affiliates of the ISG, or with which the

Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Fund or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Fund's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴⁵ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures contracts and options on CME Ether Futures contracts.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to

⁴⁴ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁵ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁶ in general and Section 6(b)(5) of the Act⁴⁷ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴⁸ including Commodity-Based Trust Shares,⁴⁹ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁵⁰ and

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁵¹ with a regulated market of significant size. Both the Exchange and CME are members of ISG.⁵² The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing

agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵³

The Commission has also recognized that the "regulated market of significant size" standard is not the only means for satisfying Section 6(b)(5) of the Act, specifically providing that a listing exchange could demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵⁴

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵⁵

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in

⁴⁶ 15 U.S.C. 78f.

⁴⁷ 15 U.S.C. 78f(b)(5).

⁴⁸ See Exchange Rule 14.11(f).

⁴⁹ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁵⁰ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or OTC platform. As a result, the potential for manipulation on a trading platform would

require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁵¹ As previously articulated by the Commission, "The standard requires such surveillance-sharing agreements since 'they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'" The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party." The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁵² For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵³ See Wilshire Phoenix Disapproval.

⁵⁴ See Winklevoss Order at 37580. The Commission has also specifically noted that it "is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met." *Id.* at 37582.

⁵⁵ See the Spot Bitcoin ETP Approval Order at 3011-3012.

surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Fund would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵⁶ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵⁷ The Sponsor expects that the Fund would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Fund’s assets and, thus, the Fund would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to

prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange’s surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund or the Shares to comply with the

continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

In addition to the price transparency of the Index, the Fund will provide information regarding the Fund’s ETH holdings as well as additional data regarding the Fund. The website for the Fund, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day’s NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Fund, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned information will be published as of the close of business available on the Fund’s website at <https://www.franklintempleton.com/investments/options/exchange-traded-funds>, or any successor thereto. The Fund will also disseminate its holdings on a daily basis on its website.

The IIV will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Fund’s ether holdings during the trading day, which is based on CME CF Ether-Dollar Real Time Index. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Trading Hours through the facilities of the CTA and CQS high

⁵⁶ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

⁵⁷ Source: TokenTerminal.

speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. Index data, the Index value, and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarks.com>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is also available from ether trading platforms. The normal trading hours for ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. Premium and discount volatility, high fees, rolling costs, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis that could potentially be eliminated through access to a Spot Ether ETP. As such, the Exchange believes that this proposal acts to limit

the risk to U.S. investors that are increasingly seeking exposure to ether by providing direct, 1-for-1 exposure to ether in a regulated, transparent, exchange-traded vehicle, specifically by: (i) reducing premium/discount volatility; (ii) reducing management fees through meaningful competition; (iii) providing an alternative to Ether Futures ETFs which will eliminate roll cost; (iv) reducing risks associated with investing in operating companies that are imperfect proxies for ether exposure; and (v) providing an alternative to custodying spot ether. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. As discussed throughout, this growth investor protection concerns need to be reevaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establishes the CME Ether Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Ether Futures market is a significant market as it relates to the CME Ether Futures market, but not a significant market as it relates to the ether spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2024-018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeBZX-2024-018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2024-018 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-11710 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

⁵⁸ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100209; File No. SR–ISE–2024–19]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Cabinet Proximity Option Fee To Establish a Reservation Fee for Cabinets With Power Densities Greater Than 10 kW

May 22, 2024.

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 May 9, 2024, 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 Cabinet Proximity Option Fee at General 8, Section 1, as described further below.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change³ is to amend the Exchange’s Cabinet Proximity Option Fee at General 8, Section 1(d) by establishing a reservation fee for cabinets with power densities greater than 10 kilowatts (“kW”).⁴

The Exchange currently offers a Cabinet Proximity Option program where, for a monthly fee, customers can obtain an option for future use on available, unused cabinet space in proximity to their existing equipment. Cabinets reserved under the Cabinet Proximity Option program are unused cabinets that customers reserve for future use and can be converted to a powered cabinet at the customer’s request. Under the program, customers can reserve up to maximum of 20 cabinets that the Exchange endeavors to provide as close as reasonably possible to the customer’s existing cabinet space, taking into consideration power availability within segments of the data center and the overall efficiency of use of data center resources as determined by the Exchange. Should reserved data center space be needed for use, the reserving customer will have three business days to formally contract with the Exchange for full payment for the reserved cabinet space or it will be reassigned. In making determinations to require exercise or relinquishment of reserved space as among numerous customers, the Exchange will take into consideration several factors, including: proximity between available reserved cabinet space and the existing space of a customer seeking additional space for actual cabinet usage; a customer’s ratio of cabinets in use to those reserved; the length of time that a particular reservation(s) has been in place; and any other factor that the Exchange deems relevant to ensure overall efficiency in use of the data center space.⁵

³ The Exchange initially filed the proposed pricing change on March 1, 2024 (SR–ISE–2024–10). On March 13, 2024, the Exchange withdrew that filing and submitted SR–ISE–2024–13. On May 9, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ On February 26, 2024, the Exchange filed a proposal to offer the Exchange’s Cabinet Proximity Option program for cabinets with power densities greater than 10 kW. See Securities Exchange Act Release No. 34–99647 (February 29, 2024), 89 FR 16047 (March 6, 2024) (SR–ISE–2024–07).

⁵ See Securities Exchange Act Release No. 34–62397 (June 28, 2010), 75 FR 38860 (July 6, 2010) (SR–NASDAQ–2010–019). In 2017, the Exchange synchronized its options for connecting to the Exchange with that of its sister exchanges and

The applicable monthly fees for the Cabinet Proximity Option program are in General 8, Section 1(d). The Cabinet Proximity Option fee is \$1,055/month per medium or low density cabinets and \$1,583/month per medium/high or high density cabinets.⁶ The Exchange proposes to establish a Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the addition to the existing Cabinet Proximity Option fees.

Currently, the Exchange offers Super High Density Cabinets with power densities greater than 10 kW and less than or equal to 17.3 kW.⁷ In addition, the Exchange intends to expand its data center and offer cabinets with increased power densities in the future, including power densities greater than 17.3 kW.⁸ Customers will not be liable to pay fees under the Cabinet Proximity Option program until such time as cabinets can be converted to powered cabinets. To be clear, the Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW would apply to any such reservations in the existing data center. Although the Exchange has an expansion of the data center underway, the fees for the Cabinet Proximity Option program would not apply to the expanded data center until the expansion is operational and cabinets are available and able to be converted to powered cabinets.⁹

The proposed Cabinet Proximity Option fee of \$3,000 would only be charged to those customers that voluntarily choose to reserve cabinets with power densities greater than 10 kW. Such option is available to all customers. Similar to other fees related to cabinet and power usage, the Cabinet Proximity Option fee is incremental, with higher fees being imposed based

adopted uniform colocation services, including the Cabinet Proximity Option program. See Securities Exchange Act Release No. 34–81903 (October 19, 2017), 82 FR 49450 (October 25, 2017) (SR–ISE–2017–91).

⁶ Low density cabinets are cabinets with power densities less than or equal to 2.88 kW. Medium density cabinets are cabinets with power densities greater than 2.88 kW and less than or equal to 5 kW. Medium/High density cabinets are cabinets with power densities greater than 5 kW and less than or equal to 7 kW. High density cabinets are cabinets with power densities greater than 7 kW and less than 10 kW. See General 8, Section 1(a).

⁷ See General 8, Section 1(a).

⁸ The Exchange will submit proposed rule change(s) to the Commission regarding any proposal to expand its services, including a proposal to offer cabinets with new power densities.

⁹ Although the timing is subject to change, the Exchange anticipates that the data center expansion will be complete by September 2024.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

on higher levels of cabinet and power allocation. The proposed Cabinet Proximity Option fee of \$3,000 for cabinets with power densities greater than 10 kW is comparable to pricing for “PNU cabinets”¹⁰ available to customers of co-location facilities of the New York Stock Exchange LLC (“NYSE”), which charges a monthly fee of \$360 per kW for PNU cabinets.¹¹

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹³ 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.

First, the proposal is reasonable because the proposed fee is comparable to NYSE’s monthly fee of \$360 per kW for PNU cabinets.¹⁴ As noted above, NYSE offers “PNU cabinets,” which are reserved cabinets that are not active and can be converted to powered, dedicated cabinets when the user requests.¹⁵ The Exchange’s proposal would establish a flat \$3,000 Cabinet Proximity Option fee for cabinets with power densities greater than 10 kW. Under NYSE’s fee schedule, a reservation for a cabinet with power density equal to 10 kW would be \$3,600 (e.g., 10 kW × \$360). Because NYSE’s PNU cabinet fees are charged on a per kW basis, PNU cabinet fees for cabinets with power densities greater than 10 kW would be more than \$3,600 and increase as the power density of the cabinet increases. Therefore, the Exchange’s proposal

reflects a discounted price to reserve such cabinets as compared to NYSE’s fees for comparable PNU cabinets.

Furthermore, the Exchange offers the Cabinet Proximity Option program as a convenience to customers, providing an option to reserve unused cabinet space in proximity to their existing equipment. No firms are required to reserve cabinets via the Cabinet Proximity Option program. Clients may simply order cabinets without utilizing reservations. The proposed Cabinet Proximity Option fee of \$3,000 would only be charged to those customers that voluntarily choose to reserve cabinets with power densities greater than 10 kW and such option is available to all customers.

The Exchange believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange,¹⁶ connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of options products within markets which do not require connectivity to the Exchange, such as the Over-the-Counter (OTC) markets. Market participants that wish to connect to the Exchange will continue to choose the method of connectivity based on their specific needs. Market participants that wish to connect to the Exchange but want to avoid or mitigate the effect of this proposed fee can choose to connect to the Exchange through a vendor (or order cabinets without reservations, as noted above).

In offering the Cabinet Proximity Option the Exchange incurs certain costs, including costs related to the data center, including maintaining an adequate level of power so that reserved cabinets can be available and powered on promptly at the request of customers.

If the Exchange is incorrect in its determination that the proposed fee reflects the value of the Cabinet Proximity Option for cabinets with power densities greater than 10 kW, customers will not reserve such cabinets.

In summary, the proposal represents an equitable allocation of reasonable dues, fees and other charges because the proposed fee is less than NYSE’s fee for a comparable service, customers have choices in how they connect to the Exchange, and reservations under the Cabinet Proximity Option program are optional and provided as a convenience to customers.

The Exchange believes that the proposed fee change is not unfairly discriminatory because the Cabinet Proximity Option fee is assessed uniformly across all market participants that voluntarily select the option, which is available to all customers. All customers have the choice of whether and how to connect to the Exchange and may order cabinets without utilizing reservations.

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.

Nothing in the proposal burdens inter-market competition because approval of the proposal does not impose any burden on the ability of other exchanges to compete. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative exchanges that they may participate on and direct their order flow, as well as off-exchange venues, where competitive products are available for trading.

Nothing in the proposal burdens intra-market competition because the Cabinet Proximity Option program is available to any customer under the same fees as any other customer, and any customer that wishes to reserve a cabinet pursuant to the Cabinet Proximity Option program 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

¹⁰ Similar to the Exchange’s Cabinet Proximity Option program, the New York Stock Exchange offers “PNU cabinets,” which are reserved cabinets that are not active and can be converted to powered, dedicated cabinets when the user requests. Due to heightened demand for power and cabinets, NYSE established certain procedures related to PNU cabinet conversion and restrictions on new PNU cabinet offerings. NYSE adopted a policy that, if unallocated cabinet inventory is at or below 40 cabinets, new PNU cabinets are not offered. However, when the unallocated cabinet inventory is more than 40 cabinets, NYSE may continue to offer PNU cabinets. See Securities Exchange Act Release No. 34–90732 (December 18, 2020), 85 FR 84443 (December 28, 2020). See also Securities Exchange Act Release No. 34–91515 (April 8, 2021), 86 FR 19674 (April 14, 2021).

¹¹ See NYSE Connectivity Fee Schedule, available at https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See NYSE Connectivity Fee Schedule, available at https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.

¹⁵ *Supra* note 10.

¹⁶ There are currently 17 exchanges offering options trading services. No single options exchange trades more than 14% of the options market by volume and only one of the 17 options exchanges has a market share over 10 percent. See Nasdaq, Options Market Statistics (Last updated January 11, 2024), available at https://www.nasdaq.com/Trader.aspx?id=Options_VolumeSummary. This broad dispersion of market share demonstrates that market participants can and do exercise choice in trading venues. Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers.

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-2024-19 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-ISE-2024-19. 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-ISE-2024-19 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-11701 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100216; File No. SR-CboeBZX-2023-070]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To List and Trade Shares of the ARK 21Shares Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

May 22, 2024.

On September 6, 2023, Cboe BZX Exchange, Inc. ("BZX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares ("Shares") of the ARK 21Shares Ethereum ETF ("Trust") under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on September 27, 2023.³ On September 27, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the

Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 18, 2023, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On February 14, 2024, the Exchange filed Amendment No. 1, which replaced and superseded the proposed rule change in its entirety. On March 19, 2024, the Commission provided notice of Amendment No. 1 to the proposed rule change and designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.⁸ On May 21, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 2 amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. ("BZX" or the "Exchange") is filing with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change to list and trade shares of the ARK 21Shares Ethereum ETF (the "Trust"),⁹ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

⁵ See Securities Exchange Act Release No. 98565, 88 FR 68187 (Oct. 3, 2023).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99196, 88 FR 88685 (Dec. 22, 2023).

⁸ See Securities Exchange Act Release No. 99772, 89 FR 20721 (Mar. 25, 2024).

⁹ The Trust was formed as a Delaware statutory trust on September 5, 2023, and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

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. 98467 (Sept. 21, 2023), 88 FR 66515 ("Notice"). Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-070/sr-cboebzx2023070.htm>.

⁴ 15 U.S.C. 78s(b)(2).

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

This Amendment No. 2 to SR–CboeBZX–2023–070 amends and replaces in its entirety the proposal as originally submitted on September 6, 2023 and as amended by Amendment No. 1 on February 14, 2024. The Exchange submits this Amendment No. 2 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),¹⁰ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.¹¹ 21Shares US LLC is the sponsor of the Trust (the “Sponsor”). The Shares will be registered with the Commission by means of the Trust’s registration statement on Form S–1 (the “Registration Statement”).¹² According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,¹³ nor a commodity pool for purposes of

the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹⁴ With this in mind, the Chicago Mercantile Exchange (“CME”) ether futures (“Ether Futures”) market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (“Spot Bitcoin ETPs”).¹⁵ By way of background, in

¹⁴ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the “Winklevoss Proposal”). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the “CFTC”) regulated futures market. Further to this point, the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP “was based on an assumption that the currency market and the spot gold market were largely unregulated.” See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁵ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of

2022 the Commission disapproved proposals¹⁶ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁷ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.¹⁸ In considering the remand of the Grayscale Order and the Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record. . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.¹⁹

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size as it

Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹⁶ See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR–CboeBZX–2022–035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹⁷ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (the “Grayscale Order”).

¹⁸ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

¹⁹ See the Spot Bitcoin ETP Approval Order at 3011–3012.

¹⁰ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

¹¹ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, “Continued Listing Representations”) shall constitute continued listing requirements for the Shares listed on the Exchange.

¹² See the Registration Statement on Form S–1, dated September 6, 2023, submitted by the Sponsor on behalf of the Trust. The descriptions of the Trust, the Shares, and the Index (as defined below) contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹³ 15 U.S.C. 80a–1.

relates to the CME Ether Futures market and that this proposal should be approved.

Background

Ethereum is a decentralized smart contract platform that revolutionized the world of blockchain technology beyond its initial use case of peer-to-peer payments. It introduced the idea of “smart contracts,” self-executing agreements with predefined rules, enabling developers and entrepreneurs worldwide to code and deploy decentralized applications on top of the Ethereum network. “Ether” or “ETH”, the native crypto asset of the network, is the fuel that allows Ethereum to operate in the same way that we use oil to propel vehicles, heat buildings, and produce electricity in the physical world. Users must pay a “gas fee” or a transaction tax in ether for every transaction they perform on the network. The term “gas” refers to the unit that measures the computational effort required to execute specific operations on the Ethereum blockchain. Thus, ether is analogous to a digital commodity powering the Ethereum network. For instance, an entire virtual economy has emerged with ether as the unit of account and medium of exchange. This phenomenon is similar to the spontaneous adoption of commodities like coffee and, most notably, precious metals like gold as money by various civilizations throughout history, except this time, in a digital-native realm.

With more than 5,946 monthly active developers as of June 2023, Ethereum is the world’s largest developer ecosystem. Moreover, the platform is explored and experimented with by various private banks and central banks globally. Since its launch in 2015, Ethereum has driven the evolution of the blockchain space with innovations, ranging from decentralized finance (DeFi), non-fungible tokens (NFTs), digital identity solutions, and the tokenizations of off-chain, or as it’s commonly referred to, “real-world” assets. Some of the most important innovations that have come out of DeFi include ‘stablecoins,’ decentralized exchanges (DEXs), and automated lending protocols. Stablecoins maintain price parity with a target asset, such as the U.S. dollar. Decentralized exchanges (DEXs), such as Uniswap, allow users to trade assets without the need for an intermediary against an “automated market-maker” (AMM), settling trillions of dollars of value since their inception. As a final example, overcollateralized lending protocols like MakerDAO, Aave, or Compound have taken traditional credit

risk out of the equation, relying instead on smart contract automation and operators to liquidate loans when the collateralization ratio falls below a predetermined threshold. These and many other DeFi innovations reveal one of the core value propositions of Ethereum—the ability to act as a credibly neutral settlement layer where developers can automate away the need for centralized intermediaries.

Much like bitcoin, access for U.S. retail investors to gain exposure to ether via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds (“OTC Ether Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ether. Similarly, investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through fewer and more risky means. For example, investors in OTC Ether Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC Ether Funds. Many retail investors likely suffered losses due to this premium/discount in OTC Ether Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,²⁰ Celsius Network LLC,²¹ BlockFi Inc.,²² and Voyager Digital Holdings, Inc.²³ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a

portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ether, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Ether ETPs. Such rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as

²⁰ See FTX Trading Ltd., et al., Case No. 22–11068.

²¹ See Celsius Network LLC, et al., Case No. 22–10964.

²² See BlockFi Inc., Case No. 22–19361.

²³ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

warranted based on the Commission's concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures contracts),²⁴ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with the Custodian (as discussed below) to provide, as further outlined below. In the Custody Statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian's holding of the Trust's ether. After diligent investigation, the Sponsor believes that the Custodian's policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust's ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services ("NYDFS"), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment

of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors would benefit immensely from holding Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures²⁵

CME began offering trading in ether futures ("CME Ether Futures") in February 2021. Each contract represents 50 ether and is based on the CME CF Ether-Dollar Reference Rate.²⁶ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 138,692 CME Ether Futures contracts traded in January 2024 (approximately \$16.7 billion) compared to 99,496 (\$14.6 billion) and 96,621 (\$7.1 billion) contracts traded in January 2022, and January 2023 respectively.²⁷

In addition, according to Sponsor's research, trading volume for CME Ether Futures amounts to a total volume of \$16,655,693,654 for January 2024, up from \$6,123,830,768.67 for August 2023. This January 2024 trading volume represents 125,356 in open interest for CME Ether Futures, with an average value of \$309,838,188.62, compared to 3,646.26 in open interest for CME Ether Futures, with an average value of \$319,051,613.52 for August 2023. For January 2024, there were a total of 138,692 contracts for CME Ether Futures (equivalent to 6,934,600 ETH), compared to a total of 72,223 contracts for CME Ether Futures (equivalent to 3,611,150 ETH) in August 2023.

Sponsor's analyses further demonstrate that the correlation in pricing between CME Ether Futures and spot ETH is significantly correlated. Notably, the Sponsor performed a pairwise correlation of ether daily returns across top centralized spot cryptocurrency trading platforms and the CME from January 1, 2022 to February 1, 2024. The Sponsor's research indicates that daily correlation between the spot ETH and the CME Ether Futures during this time period was over 99.89%.

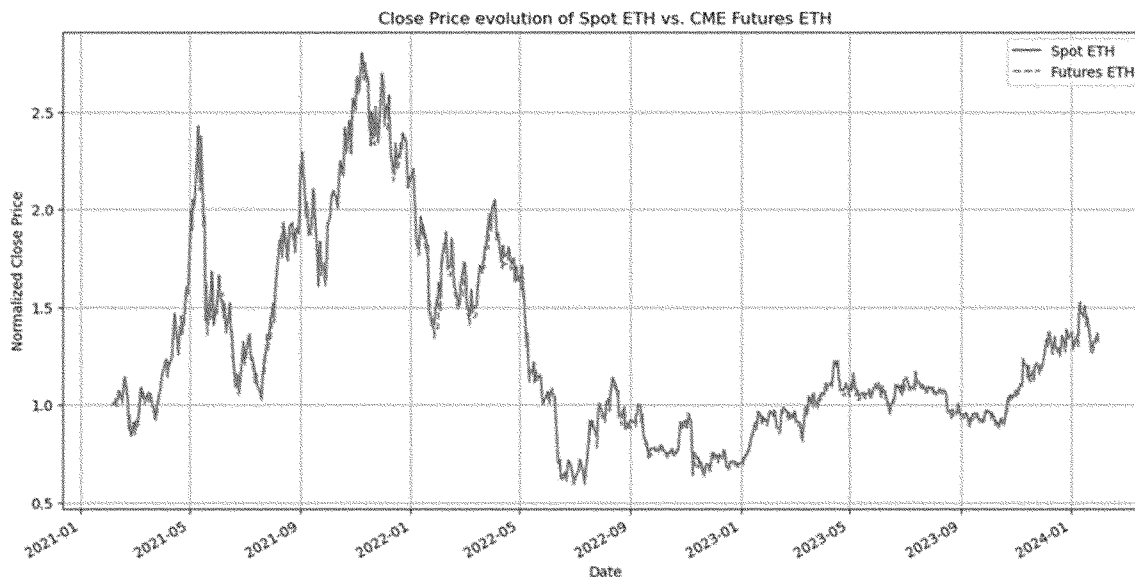
²⁵ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²⁶ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, iBit, Kraken, and LMAX Digital.

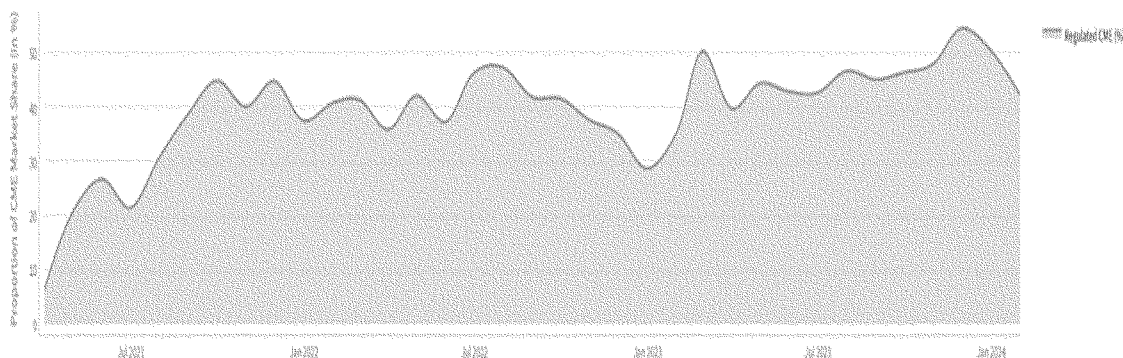
²⁷ Source: CME, February 2024

²⁴ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 ("The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled").

BILLING CODE 8011-01-P



Proportion of CME Traded Volume Market Share From March 31, 2021 to January 31, 2024



BILLING CODE 8011-01-C

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,²⁸ including Commodity-Based Trust Shares,²⁹ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and

manipulative acts and practices;³⁰ and

³⁰ Much like bitcoin, the Exchange believes that ether is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ether trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ether platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ether prices through continuous trading activity challenging. To the extent that there are ether trading platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ether on other markets, such pricing does not normally impact prices on other trading platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ether markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ether on any single venue would require manipulation of the global ether price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues

advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ether trading platforms or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

²⁸ See Exchange Rule 14.11(f).

²⁹ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place³¹ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”). The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³²

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the

requisite surveillance-sharing agreement.³³

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁴

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁵ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$15.82 billion over the year ending February 1, 2024.³⁶ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC Ether Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs.

³¹ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See *Wilshire Phoenix Disapproval*.

³² See *Wilshire Phoenix Disapproval*.

³³ See *Winklevoss Order* at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

³⁴ See the Spot Bitcoin ETP Approval Order at 3011–3012.

³⁵ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

³⁶ Source: CryptoCompare.

With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC Ether Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

ARK 21Shares Ethereum Trust

Delaware Trust Company is the trustee ("Trustee"). The Bank of New York Mellon will be the administrator ("Administrator") and transfer agent ("Transfer Agent"). Foreside Global Services, LLC will be the marketing agent ("Marketing Agent") in connection with the creation and redemption of "Baskets" of Shares. ARK Investment Management LLC (the "Subadvisor") is the sub-advisor of the Trust and will provide data, research, and as needed, operational support to the Trust including with respect to assistance in the marketing of the Shares. As noted above, Coinbase Custody Trust Company, LLC, a third-party regulated custodian (the "Custodian"), will be responsible for custody of the Trust's ether. The Bank of New York Mellon (the "Cash Custodian") will act as custodian of the Trust's cash and cash equivalents.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the Trust. The Trust's assets will only consist of ether, cash, or cash and cash equivalents.³⁷

According to the Registration Statement, the Trust will be neither an investment company registered under the Investment Company Act of 1940, as

amended,³⁸ nor a commodity pool for purposes of the Commodity Exchange Act ("CEA"), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right ("IR") or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Trust creates or redeems its Shares, it will do so in cash transactions in blocks of 10,000 Shares (a "Creation Basket") at the Trust's net asset value ("NAV"). Authorized participants will deliver, or facilitate the delivery of, cash to the Trust's account with the Cash Custodian in exchange for Shares when they create Shares, and the Trust, through the Cash Custodian, will deliver cash to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a transaction.

As noted above, the Trust is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding ether on centralized platforms. Specifically, the Trust is designed to protect investors as follows:

(i) Assets of the Trust Protected From Insolvency

The Trust's ether will be held by its Custodian,³⁹ which is a New York chartered trust company overseen by the NYDFS and a qualified custodian under Rule 206-4 of the Investment Adviser Act. The Custodian will custody the Trust's ether pursuant to a custody agreement, which requires the Custodian to maintain the Trust's ether in segregated accounts that clearly identify the Trust as owner of the accounts and assets held on those accounts; the segregation will be both from the proprietary property of the Custodian and the assets of any other customer. Such an arrangement is

generally deemed to be "bankruptcy remote," that is, in the event of an insolvency of the Custodian, assets held in such segregated accounts would not become property of the Custodian's estate and would not be available to satisfy claims of creditors of the Custodian. In addition, according to the Registration Statement, the Custodian carries fidelity insurance, which covers assets held by the Custodian in custody from risks such as theft of funds. These arrangements provide significant protections to investors and could have mitigated the type of losses incurred by investors in the numerous crypto-related insolvencies, including Celsius, Voyager, BlockFi and FTX.

(ii) Trust's Transfer Agent Will Instruct Disposition of Trust's Ether

According to the Registration Statement, except with respect to sale of ether from time to time to cover expenses of the Trust, the only time ether will move into or out from the Trust will be with respect to creations or redemptions of Shares of the Trust. In such cases, a third party will use cash to buy and deliver ether to create Shares or withdraw and sell ether for cash to redeem Shares, on behalf of the Trust. Authorized participants will deliver cash to the Trust's account with the Cash Custodian in exchange for Shares of the Trust, and the Trust, through the Cash Custodian, will deliver cash to authorized participants when those authorized participants redeem Shares of the Trust. The Transfer Agent will facilitate the settlement of Shares in response to the placement of creation orders and redemption orders from authorized participants. The creation and redemption procedures are administered by the Transfer Agent, an independent third party. Specifically, Shares are issued in registered form in accordance with the Trust agreement.⁴⁰ The Transfer Agent has been appointed registrar and transfer agent for the purpose of transferring Shares in certificated form. The Transfer Agent keeps a record of all holders of the Shares in certified form in the registry. The Sponsor recognizes transfers of Shares in certified form only if done in accordance with the Trust agreement. In other words, according to the Registration Statement, with very limited exceptions, the Sponsor will not give instructions with respect to the transfer or disposition of the Trust's ether. Ether owned by the Trust will at all times be held by, and in the control

³⁸ 15 U.S.C. 80a-1.

³⁹ According to the Registration Statement, the Trust's cash will be held at The Bank of New York Mellon pursuant to a cash custody agreement.

⁴⁰ The Trust agreement refers to the "Amended and Restated Trust Agreement of Ark 21Shares Ethereum ETF."

³⁷ Cash equivalents are short-term instruments with maturities of less than 3 months.

of, the Custodian, and transfer of such ether to or from the Custodian will occur only in connection with creation and redemptions of Shares. This will provide safeguards against the movement of ether owned by the Trust by or to the Sponsor or affiliates of the Sponsor.

(iii) Trust's Assets Are Subject to Regular Audit

According to the Registration Statement, audit trails exist for all movement of ether within Custodian-controlled ether wallets and are audited annually for accuracy and completeness by an independent external audit firm. In addition, the Trust will be audited by an independent registered public accounting firm on a regular basis.

(iv) Trust Is Subject to the Exchange's Obligations of Companies Listed on the Exchange and Applicable Corporate Governance Requirements

The Trust will be subject to the obligations of companies listed on the Exchange set forth in BZX Rule 14.6, which require the listed companies to make public disclosure of material events and any notifications of deficiency by the Exchange, file and distribute period financial reports, engage independent public accountants registered with the Exchange, among other things. Such disclosures serve a key investor protection role. In addition, the Trust will be subject to the corporate governance requirements for companies listed on the Exchange set forth in BZX Rule 14.10.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Trust will be to seek to track the performance of ether, as measured by the performance of the CME CF Ether-Dollar Reference Rate—New York Variant (the "Index"), adjusted for the Trust's expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold ether and will value the Shares daily based on the Index. The Trust will process all creations and redemptions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

The Trust will use the Index to calculate the Trust's NAV. The Trust will determine the ether Index price and value its Shares daily based on the value of ether as reflected by the Index. The Index is calculated daily and aggregates the notional value of ether trading

across major ether spot trading platforms. The Index currently uses substantially the same methodology as the CME CF Ether Dollar Reference Rate ("ERR"), including utilizing the same six ether trading platforms, which is the underlying rate to determine settlement of CME Ether Futures contracts, except that the Index is calculated as of 4:00 p.m. ET, whereas the ERR is calculated as of 4:00 p.m. London time. The administrator of the Index is CF Benchmarks Ltd. (the "Index Provider").

The Index, which was introduced on November 14, 2016, is based on materially the same methodology (except calculation time) as the Index Provider's ERR, which was first introduced on May 14, 2018, and is the rate on which CME Ether Futures contracts are cash-settled in U.S. dollars at the CME. The Index is designed based on the IOSCO Principals for Financial Benchmarks. The administrator of the Index is the Index Provider. The Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms.

The Sponsor believes that the use of the Index is reflective of a reasonable valuation of the average spot price of ether and that resistance to manipulation is a priority aim of its design methodology. The methodology: (i) takes an observation period and divides it into equal partitions of time; (ii) then calculates the volume-weighted median of all transactions within each partition; and (iii) the value is determined from the arithmetic mean of the volume-weighted medians, equally weighted. By employing the foregoing steps, the Index thereby seeks to ensure that transactions in ether conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the Index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the Index level.

In addition, the Sponsor notes that an oversight function is implemented by the Index Provider in seeking to ensure that the Index is administered through codified policies for Index integrity. The Trust will determine the value of its Shares daily based on the value of ether as reflected by the Index. The Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. The Index is designed based on the IOSCO Principals for Financial Benchmarks. The Trust also uses the

ether price determined by the Index to calculate its "Ether Holdings," which is the aggregate U.S. Dollar value of ether in the Trust, based on the ether price determined by the Index, less its liabilities and expenses. "Ether Holdings per Share" is calculated by dividing Ether Holdings by the number of Shares currently outstanding. Ether Holdings and Ether Holdings per Share are not measures calculated in accordance with GAAP. Ether Holdings is not intended to be a substitute for the Trust's NAV calculated in accordance with GAAP, and Ether Holdings per Share is not intended to be a substitute for the Trust's NAV per Share calculated in accordance with GAAP.

The Index was created to facilitate financial products based on ether. It serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/ETH), calculated as of 4:00 p.m. ET. The Index aggregates the trade flow of several ether trading platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. Specifically, the Index is calculated based on the "Relevant Transactions" (as defined below) of all of its constituent ether trading platforms, which are currently Coinbase, Bitstamp, Kraken, itBit, LMAX Digital and Gemini (the "Constituent Platforms"), as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.
- The list is partitioned by timestamp into 12 equally sized time intervals of five-minute length.
- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, *i.e.*, across all Constituent Platforms. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.
- The Index is then determined by the equally weighted average of the volume medians of all partitions.

The Index does not include any futures prices in its methodology. A "Relevant Transaction" is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. Eastern time on a Constituent Platform in the ETH/USD pair that is reported and disseminated by a Constituent Platform through its publicly available API and observed by the Index Provider. An oversight function is implemented by the Index Provider in seeking to ensure that the

Index is administered through the Index Provider's codified policies for Index integrity.

Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarkmarks.com>.

Net Asset Value

NAV means the total assets of the Trust (which includes all ether and cash and cash equivalents) less total liabilities of the Trust. The Administrator determines the NAV of the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. ET. The NAV of the Trust is the aggregate value of the Trust's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust's NAV, the Administrator values the ether held by the Trust based on the price set by the Index as of 4:00 p.m. ET. The Administrator also determines the NAV per Share.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.

If the Index is not available, or if the Sponsor determines in good faith that the Index does not reflect an accurate ether price, then the Administrator will employ an alternative method to determine the fair value of the Trust's assets.⁴¹

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ether holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price;⁴² (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous

calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned information will be published as of the close of business and available on the Sponsor's website at www.21shares.com, or any successor thereto.

The Intraday Indicative Value ("IIV") will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's ether during the trading day. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price (the NAV uses the Index price as of 4 p.m. ET, whereas the IIV draws prices from the last trade on each Constituent Platform⁴³ in an effort to produce a relevant, real-time price). The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. Index data, value, and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarkmarks.com>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is

also available from ether trading platforms. The normal trading hours for ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The Ether Custodian

The Custodian carefully considers the design of the physical, operational, and cryptographic systems for secure storage of the Trust's private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Trust maintains exclusive ownership of its assets. The operational procedures of the Custodian are reviewed by third-party advisors with specific expertise in physical security. The devices that store the keys will never be connected to the internet or any other public or private distributed network—this is colloquially known as "cold storage." Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor or the investment professionals managing the Trust, acting alone or together, will be able to access or use any of the private keys that hold the Trust's ether.

Creation and Redemption of Shares

When the Trust creates or redeems its Shares, it will do so in cash transactions in blocks of 10,000 Shares that are based on the quantity of ether attributable to each Share of the Trust (e.g., a Creation Basket) at the Trust's NAV. The authorized participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, authorized participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process. The Trust will create Shares by receiving ether from a third party that is

⁴¹ Such alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

⁴² As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

⁴³ The Constituent Platforms are the same platforms used to calculate the Index.

not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to deliver the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ether to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ether to the Trust. The Trust will redeem shares by delivering ether to a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to receive the ether. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ether from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ether from the Trust.

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by 12:00 p.m. Eastern Time, the close of regular trading on the Exchange, or another time determined by the Sponsor. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation Baskets being created determined as of 4:00 p.m. ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a Creation Basket for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The Sponsor will maintain ownership and control of ether in a manner consistent with good delivery requirements for spot commodity transactions.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that,

for initial and continued listing, the Trust must be in compliance with Rule 10A–3 under the Act. A minimum of 10,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the NAV will be calculated daily and information about the NAV and the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁴ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker ("Market Maker") in the

Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ether, CME Ether Futures, options on CME Ether Futures, or any other ether derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for

⁴⁴ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. FINRA conducts certain cross-market surveillances on behalf of the Exchange

pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other ether derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other ether derivative from such markets and other entities.⁴⁵ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other ether derivative via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴⁶

⁴⁵ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁶ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures and options on CME Ether Futures.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁷ in general and Section 6(b)(5) of the Act⁴⁸ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴⁹ including Commodity-Based Trust Shares,⁵⁰ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁵¹ and

⁴⁷ 15 U.S.C. 78f.

⁴⁸ 15 U.S.C. 78f(b)(5).

⁴⁹ See Exchange Rule 14.11(f).

⁵⁰ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁵¹ Much like bitcoin, the Exchange believes that ether is resistant to price manipulation and that

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁵² with a regulated

“other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ether trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ether platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ether prices through continuous trading activity challenging. To the extent that there are ether trading platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ether on other markets, such pricing does not normally impact prices on other trading platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ether markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ether price on any single venue would require manipulation of the global ether price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ether trading platform or OTC platforms. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁵² As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading

market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵³

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.^{54 55}

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting

activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See *Wilshire Phoenix Disapproval*.

⁵³ See *Wilshire Phoenix Disapproval*.

⁵⁴ See *Winklevoss Order* at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

⁵⁵ According to reports, the Commission is poised to allow the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ether primarily through CME Ether Futures (“ETH Futures ETFs”) as early as October 2023. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ETH. <https://www.bloomberg.com/news/articles/2023-08-17/sec-said-to-be-poised-to-allow-us-debut-of-ether-futures-etfs-eth#xj4y7vzkg>.

and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to the Bitcoin Futures ETF and in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵⁶

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market or spot market for a number of reasons, including the significant volume in the CME Ether Futures market, the size of ether’s market cap, and the significant liquidity available in the spot market. In addition to the CME Ether Futures market data points cited above, the spot market for ether is also very liquid.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to

⁵⁶ See the Spot Bitcoin ETP Approval Order at 3011–3012.

justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC Ether Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC Ether Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under

Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ether holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The aforementioned information will be published as of the close of business and available on the Sponsor's website at www.21shares.com, or any successor thereto.

The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's ether during the trading day. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price (the NAV uses the Index price as of 4 p.m. ET, whereas the IIV draws prices from the last trade on each Constituent Platform in an effort to produce a relevant, real-time price). The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the

Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services.

The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot trading platforms. Index data, value, and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarks.com>.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the trading platforms on which ether are traded. Depth of book information is also available from ether trading platforms. The normal trading hours for ether trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs

for ether Futures ETFs and premium/discount volatility and management fees for OTC Ether Funds. As discussed throughout, this growth investor protection concerns need to be re-evaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establish the CME Ether Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Ether Futures market is a significant market as it relates to the CME Ether Futures market, but not a significant market as it relates to the ether spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ChoeBZX-2023-070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-ChoeBZX-2023-070. 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-ChoeBZX-2023-070 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁷

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024-11708 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100220; File No. SR-NYSE-2024-18]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Amend Section 102.06 of the NYSE Listed Company Manual To Provide That a Special Purpose Acquisition Company Can Remain Listed Until Forty-Two Months From Its Original Listing Date if It Has Entered Into a Definitive Agreement With Respect to a Business Combination Within Three Years of Listing

May 22, 2024.

On March 27, 2024, The New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Section 102.06 of the NYSE Listed Company Manual ("Manual") to provide that a special purpose acquisition company ("SPAC") can remain listed until forty-two months from its original listing date if it has entered into a definitive agreement with respect to a business combination within three years of listing. The proposed rule change was published for comment in the **Federal Register** on April 10, 2024.³ The Commission has received no comments on the proposal.

Section 19(b)(2) of the Act⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is May 25, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99906 (April 4, 2024), 89 FR 25291.

⁴ 15 U.S.C. 78s(b)(2).

⁵⁷ 17 CFR 200.30-3(a)(12).

rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates July 9, 2024, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSE-2024-18).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-11712 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100208; File No. SR-NASDAQ-2024-019]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Rules 5605, 5615 and 5810 To Clarify and Modify Phase-In Schedules for Certain Corporate Governance Requirements and Clarify Applicability of Certain Cure Periods

May 22, 2024

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 8, 2024, 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 change Rules 5605, 5615 and 5810 to clarify and modify phase-in schedules for certain corporate governance requirements and clarify applicability of certain cure periods.

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.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to clarify and modify the phase-in schedules to the independent director and committee requirement for certain companies. Nasdaq is also proposing to clarify the applicability of certain cure periods.

Initial Public Offerings

Nasdaq is proposing to clarify and modify the phase-in schedules to the independent director and committee requirements for IPOs. Specifically, Rule 5615(b)(1) currently references that a company listing in connection with an IPO is permitted to phase in its independent audit committee requirements in accordance with SEC Rule 10A-3(b)(1)(iv)(A) under the Act but does not restate the provisions of this rule. Nasdaq proposes to amend Rule 5615(b)(1) by specifically restating the phase-in provisions in the text of the rule and state that a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the date the company’s securities first trade on Nasdaq (the “Listing Date”); (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.³

Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. As a result, companies listed in connection with an IPO which are not required to have a fully independent audit committee until one year from the Listing Date may appoint non-

independent directors to the audit committee in order to satisfy the three-person minimum requirement. Nasdaq proposes to amend Rule 5615(b)(1) to provide that companies listing in conjunction with an IPO may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date. This proposal is consistent with the approach of the NYSE.⁴ Nasdaq notes that in the NYSE Approval Order the Commission indicated that “permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for [affected] companies.”⁵

Rule 5615(b)(1) currently allows companies listing in connection with an IPO to phase in the requirements for their independent nominations and compensation committees but requires one member to satisfy the requirements at the time of listing. Some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date IPO closes.⁶ To accommodate this practice, Nasdaq proposes to amend Rule 5615(b)(1) to allow the companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the earlier of the date of the initial public offering closes or five business days from the Listing Date. This proposal is consistent with the approach of the NYSE.⁷

⁴ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89) (the “NYSE Approval Order”).

⁵ The NYSE Approval Order at 63811.

⁶ See e.g. NYSE IPO Guide, page 41 at https://www.nyse.com/publicdocs/nyse/listing/nyse_ipo_guide.pdf#process-timeline (“After building a book of demand, the lead bookrunners will agree on the offering price with the company and shareholders, execute the underwriting agreement and allocate the IPO to investors. The following day, the company begins publicly trading on the NYSE or another exchange, rings the opening bell and hosts other key marketing events associated with being a public company. Two business days later, the IPO closes, at which point stock is delivered to investors against payment of the offering price, and various legal opinions are delivered by counsel.”)

⁷ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25,

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See 17 CFR 240.10A-3(b)(1)(iv)(A).

Nasdaq is also proposing to correct a misleading rule reference in Rule 5615(b)(1), which allows a Company not to adopt a nominations committee but instead rely upon a majority of the Independent Directors to discharge responsibilities under Rule 5605(b). The responsibilities of the nominations committee are found in Rule 5605(e), not Rule 5605(b). Accordingly, new Rule 5615(b)(1)(C) allows a majority of the Independent Directors to discharge responsibilities of the nominations committee under Rule 5605(e).

Nasdaq is also proposing to eliminate the reference to Rule 5625 in Rule 5615(b)(1) which states that: “For purposes of . . . Rule 5625, a Company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in Rule 10A–3(b)(1)(iv)(A) under the Act, namely, that the Company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.” By its terms, Rule 5625 (Notification of Noncompliance) applies to any company listed on Nasdaq, including in conjunction with an IPO, and requires that a “Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.” This notification of noncompliance requirement of Rule 5625 is not affected or modified in any way by the aforementioned reference in Rule 5615(b) because Rule 5625 applies to a Nasdaq-listed company regardless of whether it was listed “in conjunction with an initial public offering” or not. Moreover, Rule 5615(b)(1) does not provide an exemption from Rule 5625 for any company. Accordingly, Nasdaq proposes to eliminate the references to Rule 5625 in Rule 5615(b)(1) to simplify the rules to eliminate potential confusion without any substantive impact.

Companies Emerging From Bankruptcy

Rule 5615(b)(2) allows a company that is emerging from bankruptcy to phase in independent nominations and compensation committees and majority independent boards requirements. Nasdaq proposes to amend Rule 5615(b)(2) to codify its current position that a company emerging from bankruptcy must comply with the audit committee composition requirements

set forth in Rule 5605(c)(2)⁸ by the Listing Date unless an exemption is available pursuant to Rule 10A–3. Nasdaq also proposes to make additional clarifications to improve the readability of the rule without changing its substance, including to provide that the applicable phase-in periods will be computed beginning on the Listing Date.

Companies Transferring From National Securities Exchanges

Rule 5615(b)(3) provides that companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Rule 5615(b)(3) further provides that companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq.

Nasdaq proposes to clarify that the phase-in period currently contained in Rule 5615(b)(3) is applicable only to companies that transfer securities registered pursuant to Section 12(b) of the Act⁹ from another national securities exchange to Nasdaq and to specify requirements applicable to a company listing securities registered pursuant to Section 12(g) of the Act,¹⁰ as described below.

Companies Listing Securities Previously Registered Under Section 12(g)

Nasdaq proposes to modify Rule 5615(b)(3) to provide that a company with securities registered pursuant to Section 12(g) of the Act¹¹ that lists those securities on Nasdaq must satisfy the audit committee requirements set forth in the Rule 5605(c) except for the requirement to have at least three members on the audit committee, as described below, by the Listing Date, unless an exemption is available pursuant to Rule 10A–3 under the Act.

Nasdaq proposes to modify Rule 5615(b)(3) to also provide that a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq will be provided a similar phase-in period as available to companies listing in connection with an IPO, other than the audit committee requirements. Like a company conducting an IPO, these companies would not have been subject to another exchange’s corporate

governance standards at the time of their listing. Therefore, Nasdaq proposes to allow these companies a similar phase-in period as currently provided to an IPO, other than the audit committee requirements, and require, on the nominations and compensation committee, one independent director upon listing, a majority of independent directors within 90 days of Listing Date, and a fully independent committee within one year of Listing Date.¹² The company also would have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b).

Under the revised rule, for a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq, only directors who are independent, as defined in Rule 5605(a)(2), and meet the criteria for independence set forth in Rule 10A–3(b)(1) under the Act would be permitted on the audit committee during the transition period (unless an exemption is available under Rule 10A–3 under the Act).¹³ However, a phase-in period would be permitted with respect to the committee size requirement: at least one independent director member is required as of the date of listing, two independent director members within ninety days of the Listing Date, and three independent director members within one year of the Listing Date.¹⁴ These changes adopt the same phase-in schedule for these companies as is in place for a similar company listing on the New York Stock Exchange (“NYSE”).¹⁵ The revised rule would also specify that a company’s compensation committee must have at least one member at the time of listing

¹² The independent directors serving on the compensation committee would also be required to satisfy the requirements of Rule 10C–1 under the Act.

¹³ Each member of the audit committee must also: (1) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (2) be able to read and understand fundamental financial statements, including a company’s balance sheet, income statement, and cash flow statement. *See* Rule 5605(c)(2)(A).

¹⁴ During the phase-in period a company must comply with the requirement in Rule 5605(c)(2)(A) that every listed company’s audit committee—without distinction as to the committee’s size—have at least one member who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual’s financial sophistication.

¹⁵ *See* Section 303A.00 of the NYSE Listed Company Manual. *See also* Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR–NYSE–2009–89).

⁸ Rule 5605(c)(2) requires a company to have, an audit committee of at least three members, which must meet certain independence, professional competence and other requirements as specified in the rule.

⁹ 15 U.S.C. 78l(b).

¹⁰ 15 U.S.C. 78l(g).

¹¹ 15 U.S.C. 78l(g).

and at least two members within one year of listing.¹⁶

Companies Listing in Connection With a Carve-Out or Spin-Off Transaction

Nasdaq proposes to provide that a company listing in connection with a carve-out or spin-off transaction will have a similar phase-in period as currently available to companies listing in connection with an IPO. Like a company conducting an IPO, these companies would not have been subject to another exchange's corporate governance standards at the time of their listing. Therefore, Nasdaq proposes to adopt Rule 5615(b)(4)¹⁷ specifying the phase-in provisions and stating that a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the Listing Date; (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.

Nasdaq also proposes to allow these companies a similar phase-in period as an IPO and require that a company listing in connection with a carve-out or spin-off transaction shall have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b), and, on the nominations and compensation committee, one independent director by the date the transaction closes, a majority of independent directors within 90 days of the Listing Date, and a fully independent committee within one year of the Listing Date.¹⁸ Nasdaq also proposes to provide that, regarding the requirement to have at least two members on the compensation committee, a company's compensation committee must have at least one member by the date the transaction closes and at least two members within one year of the Listing Date.¹⁹

Nasdaq's current policy is to treat companies listing in connection with a carve-out or spin-off transaction as IPOs for purposes of phase-in periods. Thus, Nasdaq allows such companies to phase in the requirements for their independent nominations and compensation committees but require one member to satisfy the requirements at the time of listing. Some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date a carve-out or spin-off transaction closes. To accommodate this practice, Nasdaq proposes to allow the companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the date such carve-out or spin-off transaction closes. This proposal is consistent with the approach of the NYSE.²⁰

Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. As a result, companies listed in connection with a carve-out or spin-off transaction which are not required to have a fully independent audit committee until one year from the Listing Date may appoint non-independent directors to the audit committee in order to satisfy the three-person minimum requirement. Nasdaq proposes to provide that companies listing in connection with a carve-out or spin-off transaction may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date.²¹ This proposal is consistent with the approach of the NYSE.²²

Companies Ceasing To Be a Smaller Reporting Company

Nasdaq proposes to amend the title of Rule 5615(b)(4), renumber it to Rule

5615(b)(5) and add an introductory sentence to improve the readability of the rule without changing its substance.

Companies Ceasing To Qualify as a Foreign Private Issuer

Pursuant to Rule 5615(a)(3), a Foreign Private Issuer, as defined under SEC Rule 3b-4 under the Exchange Act of 1934 (the "Act"), may follow its home country practice in lieu of the requirements of the Rule 5600 Series, provided, however, that such a Company is required to comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii).

A Foreign Private Issuer that ceases to qualify as such under SEC rules becomes subject to all relevant corporate governance requirements of Rule 5605. Depending on the type of issuer, these may include the requirement to have independent nominations and compensation committees and a majority of independent directors. In addition, the company's directors may be required to meet the definition of independence under Rule 5605(a). Pursuant to Rule 3b-4 under the Act, a company must test its status as a Foreign Private Issuer on an annual basis at the end of its most recently completed second fiscal quarter (for purposes of this subsection, the "Foreign Private Issuer Determination Date"). Nasdaq proposes to modify its rules to take into consideration Rule 3b-4 under the Act. Under this rule, a company's determination that it fails to qualify as a Foreign Private Issuer governs its eligibility to use the forms and rules designated for Foreign Private Issuers beginning on the first day of the fiscal year following the determination date, effectively providing the company with a six-month grace period. Similarly, Nasdaq proposes to require a company that ceases to be a Foreign Private Issuer to be in compliance with the domestic company requirements within the same timeframe of six months, except for the requirement set forth in Rule 5605(c)(2)(A)(ii).

Specifically, the company shall have six months from the Foreign Private Issuer Determination Date to comply with the majority independent board requirement set forth in Rule 5605(b); the independent compensation and nominations committee requirements

¹⁶ See Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of Filing for SR-NASDAQ-2012-109) at footnote 67. See also Securities Exchange Act Release No. 34-68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (approving SR-NASDAQ-2012-109).

¹⁷ Nasdaq proposes to renumber current Rule 5615(b)(4) regarding phase-in schedule for a company ceasing to be a Smaller Reporting Company to Rule 5615(b)(5).

¹⁸ The independent directors serving on the compensation committee would also be required to satisfy the requirements of SEC Rule 10C-1 under the Act.

¹⁹ See Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012)

(Notice of Filing for SR-NASDAQ-2012-109) at footnote 67. See also Securities Exchange Act Release No. 34-68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (approving SR-NASDAQ-2012-109).

²⁰ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²¹ See footnote 15 above.

²² See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

set forth in Rules 5605(d)(2) and (e)(1)(B); and audit committee requirements set forth in Rule 5605(c)(2), including the three-person audit committee requirement. During the phase-in period, a company shall have an audit committee that satisfies Rule 5605(c)(3) and members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). This proposal is consistent with the approach of the NYSE.²³

Preamble to Phase-In Rules

Nasdaq proposes to add an introductory paragraph to Rule 5615(b) to improve the readability of the rules without changing its substance. Nasdaq also proposes to codify its current policy that a company that demonstrates compliance with a requirement during a phase-in period but subsequently falls out of compliance with that requirement before the end of the phase-in period, would not be considered deficient with the requirement until the end of the phase-in period. This treatment is consistent with treatment of a company that relied on a phase-in period throughout its duration.

Unavailability of Grace Periods Following the Expiration of Phase-In Periods

Nasdaq proposes to amend Rules 5605(b)(1), 5605(c)(4), 5605(d)(4), and 5810(c)(3)(E) to codify its current position that a company relying on any phase-in period in Rule 5615(b) is not eligible for a cure period provided by Rule 5810(c)(3)(E), immediately following the expiration of the phase-in period, unless the company complied with the audit committee composition requirement in Rule 5605(c)(2)(A), the compensation committee composition requirement in Rule 5605(d)(2)(A), or the majority independent board requirement in Rule 5605(b)(1), as applicable, during such phase-in period but fell out of compliance with such requirement after having complied with the requirement before the end of the phase-in period. Nasdaq also proposes to codify its current policy that, if a company demonstrated compliance with the applicable requirement during the phase-in period, but subsequently fell out of compliance before the end of the phase-in period, for purposes of

computing the applicable cure period, the event that caused the failure to comply is the event causing the company to fall out of compliance after having complied with the requirement, and not the end of the phase-in period. In these circumstances, as described above, the company would not be considered deficient with the requirement until the end of the phase-in period.

In a situation where a company lists on Nasdaq or becomes subject to the requirements after it lists, relies on the phase-in period for one of the independent committees or the independent board requirements, and allows the phase-in period to run out without demonstrating compliance with the rule, Nasdaq believes it is not appropriate for the company to rely on the grace period immediately thereafter thus effectively extending the phase-in period. In such a case, Nasdaq will issue a Staff Delisting Determination letter to delist the Company's securities.

Nasdaq also proposes to amend Rule 5810(c)(3)(E) to describe procedures for administering a cure period in the event a company fails to comply with the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy. Specifically, as amended, Rule 5810(c)(3)(E) will provide that if a company fails to meet the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy, or one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the Listing Qualifications Department will promptly notify the company and inform it has until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement to cure the deficiency. However, if the company's next annual shareholders' meeting is held sooner than 180 days after the event that caused the deficiency, then the company has 180 days from the event that caused the deficiency to cure it.

Renumbering of Certain Rules and Other Clarifications

Nasdaq proposes to amend Rule 5615(c)(3) to clarify that the applicable phase-in periods for companies ceasing to be a Controlled Company will be computed beginning on the date the company ceases to be a Controlled Company.

In light of the proposed clarifications and modifications described above and to promote a coherent structure of the Listing Rules, Nasdaq proposes to

renumber Rules 5615(c)(1), 5615(c)(2), and 5615(c)(3) as 5615(a)(7)(A), 5615(a)(7)(B), and 5615(b)(7). Nasdaq also proposes to amend the title of the proposed Rule 5615(b)(7) to improve the readability of the rule without changing its substance and update cross references to account for renumbering of the rules.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁴ in general and with Sections 6(b)(5) of the Act,²⁵ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange further believes that the proposal is consistent with Rule 10A-3 under the Act concerning audit committee requirements for listed companies.

In approving substantially similar amendments by the NYSE, except for the clarification of the unavailability of a grace period following the expiration of a phase-in period, as described above, the Commission indicated that it believes that:

the proposed amendments relating to the phase-in period for specified companies newly listing on the [NYSE] (or newly becoming subject to certain corporate governance listing standards as a result of change in status) are reasonable. The proposed rules would permit a phase-in schedule similar to that allowed under the current rules for a company listing in conjunction with an IPO, and would extend such a phase-in schedule appropriately to companies listing in conjunction with spin-off and carve-out transactions, while offering an acceptable minimal tolerance for the special circumstances of each of these types of new listings with respect to the point in time that the standards would begin to apply. The Commission notes that the [NYSE's] proposal does not make adjustments for compliance with any requirements of Rule 10A-3 under the Act.

The proposed rule change also would allow a company listing in conjunction with an IPO, a spin-off, or a carve-out a phase-in period with respect to the NYSE requirement that the audit committee of a listed company have at least three members. In the

²³ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²⁴ 15 U.S.C. 78f.

²⁵ 15 U.S.C. 78f(b)(5).

Commission's view, permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for such companies.²⁶

The proposed rule change is also consistent with the provisions of Section 6 of the Act,²⁷ in general and with Sections 6(b)(5) of the Act, in that it will clarify Nasdaq's current position as to the applicability of the phase-in periods for independent board and committee requirements for companies listing in connection with the IPO and codify treatment of a carve-out or spin-off transaction in this regard. The amended rules will also provide for treatment of companies that ceased to qualify as a foreign private issuer, the eventuality on which the rules are currently silent. This greater clarity and uniformity of treatment will promote just and equitable principles of trade. The proposed changes will enhance investor protection by making the impacted rules more transparent and easier to understand. In addition, Nasdaq will continue to protect investors and the public interest by maintaining the current requirements for the audit, nominations, and compensation committees, as well as the requirement for a majority independent board.

The proposed rule change is also designed to provide companies that are newly listing on Nasdaq and becoming subject to certain corporate governance listing standards as a result of this change in status a reasonable transition period, similar to that allowed under the current rules for a company listing in conjunction with an IPO and to that allowed by the NYSE. In this regard, the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change makes no adjustments for compliance with any requirements of SEC Rules 10A-3 or 10C-1 under the Act, nor does the proposed rule change grant an exemption or phase-in period with respect to the requirement in Rule 5605(c)(2)(A) that every listed company's audit committee—without distinction as to the committee's size—have at least one member who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's

financial sophistication. The revised rules will also require that, for a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq, only independent directors, as defined in Rule 5605(a)(2), be permitted on the audit committee during the transition period. In addition, SEC Rule 10A-3 under the Act requires at least one member of a listed company's audit committee to be independent as of the Listing Date, even when the company is allowed a phase-in period with respect to the other audit committee members.²⁸ As a result, Nasdaq believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

To improve the readability of the rules Nasdaq proposes to renumber certain rules and make other clarifying and conforming changes without changing the substance of such rules. Nasdaq believes that the improved readability of the rules will perfect the mechanism of a free and open market by making the rules easier to understand and apply.

Finally, Nasdaq proposes to amend Listing Rules 5605(b)(1), 5605(c)(4), 5605(d)(4), and 5810(c)(3)(E) to codify its current position that a company relying on any phase-in period in Rule 5615(b) is not eligible for a cure period provided by Rule 5810(c)(3)(E), immediately following the expiration of the phase-in period, unless the Company demonstrated compliance with the applicable requirement during such phase-in period. In a situation where a company lists on Nasdaq, relies on the phase-in period for one of the independent committees or the independent board requirements, and allows the phase-in period to run out without gaining compliance with the rule, Nasdaq believes it is not appropriate for the Company to rely on the grace period immediately thereafter thus effectively extending the phase-in period. Nasdaq believes that this rule change will protect investors and the public interest by limiting the maximum time a company may remain listed without fully complying with independent committees or the independent board requirements.

Finally, Nasdaq believes that codifying Nasdaq's position regarding the computation of the applicable phase-in periods, as well as other clarifying changes will perfect the

mechanism of a free and open market by making the rules easier to understand and apply.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change will have little or no impact on competition as it merely eliminates potential confusion, clarifies Nasdaq current position as to the applicability of its rules, and harmonizes Nasdaq's rules regarding the applicability of the phase-in periods for audit, nominations, and compensation committees, as well as the requirement for a majority independent board with the requirements of the NYSE.²⁹ Similarly, Nasdaq believes that the proposed amendments will have little or no impact on the intra market competition.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

²⁹ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²⁶ See the NYSE Approval Order at 63,810.

²⁷ 15 U.S.C. 78f.

²⁸ See 17 CFR 240.10A-3(b)(1)(iv) (providing an exemption for an issuer that was not required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Act).

• Send an email to rule-comments@sec.gov. Please include file number SR–NASDAQ–2024–019 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NASDAQ–2024–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NASDAQ–2024–019 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–11700 Filed 5–28–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100213; File No. SR–NYSEARCA–2024–31]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the Bitwise Ethereum ETF

May 22, 2024.

On March 28, 2024, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares of the Bitwise Ethereum ETF under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on April 8, 2024.³ On May 21, 2024, the Exchange filed Amendment No. 1 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 1 replaced and superseded the proposed rule change in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Bitwise Ethereum ETF (the “Trust”) under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). This Amendment No. 1 to SR–NYSEARCA–2024–31 replaces SR–NYSEARCA–2024–31 as originally filed and supersedes such filing in its entirety. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change

and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (“Shares”) of the Trust⁴ pursuant to NYSE Arca Rule 8.201–E, which governs the listing and trading of Commodity Based Trust Shares.⁵

According to the Registration Statement, the Trust will not be registered as an investment company under the Investment Company Act of 1940,⁶ and is not required to register thereunder. The Trust is not a commodity pool for purposes of the Commodity Exchange Act.⁷

The Exchange represents that the Shares satisfy the requirements of NYSE Arca Rule 8.201–E and thereby qualify for listing on the Exchange.⁸

Operation of the Trust⁹

The Trust will issue the Shares which, according to the Registration Statement, represent units of undivided beneficial ownership of the Trust. The Trust is a Delaware statutory trust and will operate pursuant to a trust agreement (the “Trust Agreement”) between Bitwise Investment Advisers, LLC (the “Sponsor” or “Bitwise”) and Delaware Trust Company, as the Trust's trustee (the “Trustee”). Coinbase Custody Trust Company, LLC will maintain custody of the Trust's ether (the “Ether Custodian”). Bank of New York Mellon will be the custodian for

⁴ The Trust is a Delaware statutory trust. On March 28, 2024, the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the most recent Registration Statement. The Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁵ Commodity-Based Trust Shares are securities issued by a trust that represents investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the trust.

⁶ 15 U.S.C. 80a–1.

⁷ 17 U.S.C. 1.

⁸ With respect to the application of Rule 10A–3 (17 CFR 240.10A–3) under the Act, the Trust relies on the exemption contained in Rule 10A–3(c)(7).

⁹ The description of the operation of the Trust, the Shares, and the ether market contained herein is based, in part, on the Registration Statement. See note 4, *supra*.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 99889 (Apr. 2, 2024), 89 FR 24509. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nysearca-2024-31/srnysearca202431.htm>.

³⁰ 17 CFR 200.30–3(a)(12).

the Trust's cash holdings (in such role, the "Cash Custodian"), the administrator of the Trust (in such role, the "Administrator"), and the transfer agent for the Trust (in such role, the "Transfer Agent").

According to the Registration Statement, the investment objective of the Trust is to seek to provide exposure to the value of ether held by the Trust, less the expenses of the Trust's operations. In seeking to achieve its investment objective, the Trust will hold ether and establish its Net Asset Value ("NAV") at the end of every business day by reference to the CME CF Ether Reference Rate—New York Variant (the "Pricing Index").¹⁰

The Trust's only assets will be ether and cash.¹¹ The Trust does not seek to hold any non-ether crypto assets and has expressly disclaimed ownership of any such assets in the event the Trust

¹⁰ The Pricing Index is designed to provide a daily, 4:00 p.m. New York time reference rate of the U.S. dollar price of one ether that may be used to develop financial products. The Pricing Index uses the same methodology as the CME CF Ether Reference Rate ("ERR"), which was designed by the CME Group and CF Benchmarks Ltd. (the "Benchmark Provider") to facilitate the cash settlement of ether futures contracts traded on the Chicago Mercantile Exchange ("CME"). The only material difference between the Pricing Index and ERR is that the ERR measures the U.S. dollar price of one ether as of 4:00 p.m. London time, and the Pricing Index measures the U.S. dollar price of one ether as of 4:00 p.m. Eastern time ("E.T."). The CME Group also publishes the CME CF Ether Real Time Index (the "CME Ether Real Time Price"), which is a continuous measure of the U.S. dollar price of one ether calculated once per second.

¹¹ The Trust conducts creations and redemptions of its Shares for cash. Authorized Participants will deliver cash to the Cash Custodian pursuant to creation orders for Shares and the Cash Custodian will hold such cash until such time as it can be converted to ether, which the Trust intends to do on the same business day in which such cash is received by the Cash Custodian. Additionally, the Trust will sell ether in exchange for cash pursuant to redemption orders of its Shares. In connection with such sales, an approved Ether Trading Counterparty (defined below) will send cash to the Cash Custodian. The Cash Custodian will hold such cash until it can be distributed to the redeeming Authorized Participant, which it intends to do on the same business day in which it is received. In connection with the purchases and sales of ether pursuant to its creation and redemption activity, it is possible that the Trust may retain de minimis amounts of cash as a result of rounding differences. The Trust may also initially hold small amounts of cash to initiate Trust operations in the immediate aftermath of its Registration Statement being declared effective. Lastly, the Trust may also sell ether and temporarily hold cash as part of a liquidation of the Trust or to pay certain extraordinary expenses not assumed by the Sponsor. Under the Trust Agreement, the Sponsor has agreed to assume the normal operating expenses of the Trust, subject to certain limitations. For example, the Trust will bear any indemnification or litigation liabilities as extraordinary expenses. In any event, in the ongoing course of business, the amounts of cash retained by the Trust are not expected to constitute a material portion of the Trust's holdings.

ever involuntarily comes into possession of such assets.¹² The Trust will not use derivatives that may subject the Trust to counterparty and credit risks. The Trust will process creations and redemptions in cash. The Trust's only recurring ordinary expense is expected to be the Sponsor's unitary management fee (the "Sponsor Fee"), which will accrue daily and will be payable in ether monthly in arrears. The Administrator will calculate the Sponsor Fee on a daily basis by applying an annualized rate to the Trust's total ether holdings, and the amount of ether payable in respect of each daily accrual shall be determined by reference to the Pricing Index. Financial institutions authorized to create and redeem Shares (each, an "Authorized Participant") will deliver, or cause to be delivered, cash in exchange for Shares of the Trust, and the Trust will deliver cash to Authorized Participants when those Authorized Participants redeem Shares of the Trust.

Custody of the Trust's Ether

The Trust's Ether Custodian will maintain custody of all of the Trust's ether, other than that which is maintained in a trading account (the "Trading Balance") with Coinbase, Inc. (the "Prime Execution Agent," which is an affiliate of the Ether Custodian), in the "Trust Ether Account." The Trading Balance will only be used in the limited circumstances in which the Trust is using the Agent Execution Model (as defined below) to effectuate the purchases and sales of ether. The Ether Custodian provides safekeeping of ether using a multi-layer cold storage security platform designed to provide offline security of the ether held by the Ether Custodian.

Valuation of the Trust's Ether

The net assets of the Trust and its Shares are valued on a daily basis with reference to the Pricing Index, a

¹² The Trust may, from time to time, passively receive, by virtue of holding ether, certain additional digital assets ("IR Assets") or rights to receive IR Assets ("Incidental Rights") through a fork of the Ethereum network or an airdrop of assets. The Trust will not seek to acquire such IR Assets or Incidental Rights. Pursuant to the terms of the Trust Agreement, the Trust has disclaimed ownership in any such IR Assets and/or Incidental Rights to make clear that such assets are not and shall never be considered assets of the Trust and will not be taken into account for purposes of determining the Trust's NAV or NAV per Share. Neither the Trust, nor the Sponsor, nor the Ether Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ether becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ether or generate income or other earnings.

standardized reference rate published by the Benchmark Provider that is designed to reflect the performance of ether in U.S. dollars. The Pricing Index was created to facilitate financial products based on ether. It serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/ETH), calculated as of 4:00 p.m. ET. The Pricing Index aggregates the trade flow of several major ether trading venues, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. The Pricing Index currently uses substantially the same methodology as the ERR, including utilizing the same constituent ether trading platforms, which is the underlying rate to determine settlement of CME ether futures contracts, except that the Pricing Index is calculated as of 4:00 p.m. ET, whereas the ERR is calculated as of 4:00 p.m. London time. The Pricing Index, which was introduced on February 28, 2022, is based on materially the same methodology (except calculation time) as the ERR, which was first introduced on June 4, 2018. Each of the Pricing Index, ERR, and the CME Ether Real Time Price are representative of the ether trading activity on the Constituent Platforms,¹³ which include, as of the date of this filing, Bitstamp, Coinbase, Gemini, iBit, LMAX, and Kraken.

The Pricing Index is designed based on the IOSCO Principals for Financial Benchmarks. The Trust uses the Pricing Index to calculate its NAV, as described below in "Net Asset Value."

The Sponsor, in its sole discretion, may cause the Trust to price its portfolio based upon an index, benchmark, or standard other than the Pricing Index at any time, with prior notice to the shareholders, if investment conditions change or the Sponsor believes that another index, benchmark, or standard better aligns with the Trust's investment objective and strategy. The Sponsor may make this decision for a number of reasons, including, but not limited to, a determination that the Pricing Index price of ether differs materially from the global market price of ether and/or that third parties are able to purchase and sell ether on public or private markets not included among the Constituent Platforms, and such transactions may take place at prices materially higher or lower than the Pricing Index price. The Sponsor, however, is under no obligation whatsoever to make such changes in any circumstance. In the event that the Sponsor intends to establish the Trust's NAV by reference

¹³ The "Constituent Platforms" are the ether trading venues included in the Pricing Index.

to an index, benchmark, or standard other than the Pricing Index, it will provide shareholders with notice in a prospectus supplement and/or through a current report on Form 8-K or in the Trust's annual or quarterly reports.¹⁴

Net Asset Value

The Trust's only asset will be ether and, under limited circumstances, cash. The Trust's NAV and NAV per Share will be determined by the Administrator once each Exchange trading day as of 4:00 p.m. E.T., or as soon thereafter as practicable. The Administrator will calculate the NAV by multiplying the number of ether held by the Trust by the Pricing Index for such day, adding any additional receivables and subtracting the accrued but unpaid liabilities of the Trust. The NAV per Share is calculated by dividing the NAV by the number of Shares then outstanding. The Administrator will determine the price of the Trust's ether by reference to the Pricing Index, which is published and calculated as set forth above.

Intraday Trust Value

The Trust uses the CME Ether Real Time Price to calculate an Indicative Trust Value ("ITV"). One or more major market data vendors will disseminate the ITV, updated every 15 seconds each trading day as calculated by the Exchange or a third-party financial data provider during the Exchange's Core Trading Session (9:30 a.m. to 4:00 p.m., E.T.). The ITV will be calculated throughout the trading day by using the prior day's holdings at the close of business and the most recently reported price level of the CME Ether Real Time Price as reported by Bloomberg, L.P. or another reporting service. The ITV will be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session.

Creation and Redemption of Shares

The Trust creates and redeems Shares from time to time, but only in one or more Creation Units, which will initially consist of at least 10,000 Shares, but may be subject to change ("Creation Unit"). A Creation Unit is only made in exchange for delivery to the Trust or the distribution by the Trust of an amount of cash, equivalent to the value of ether represented by the Creation Unit being created or redeemed, the amount of which is representative of the combined NAV of the number of Shares included in the

Creation Units being created or redeemed determined as of 4:00 p.m. E.T. on the day the order to create or redeem Creation Units is properly received. Except when aggregated in Creation Units or under extraordinary circumstances permitted under the Trust Agreement, the Shares are not redeemable securities.

Authorized Participants are the only persons that may place orders to create and redeem Creation Units. Authorized Participants must be (1) registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions described below, and (2) Depository Trust Company ("DTC") participants. To become an Authorized Participant, a person must enter into an Authorized Participant Agreement with the Trust and/or the Trust's marketing agent (the "Marketing Agent").

According to the Registration Statement, when purchasing or selling ether in response to the purchase of Creation Units or the redemption of Creation Units, which will be processed in cash, the Trust would do so pursuant to either (1) a "Trust-Directed Trade Model," or (2) an "Agent Execution Model," which are each described in more detail below.

The Trust intends to utilize the Trust-Directed Trade Model for all purchases and sales of ether and would only utilize the Agent Execution Model in the event that no ether trading counterparty approved by the Sponsor (an "Ether Trading Counterparty")¹⁵ is able to effectuate the Trust's purchase or sale of ether. Under the Trust-Directed Trade Model, in connection with receipt of a purchase order or redemption order, the Sponsor, on behalf of the Trust, would be responsible for acquiring ether from an approved Ether Trading Counterparty in an amount equal to the Basket Amount. When seeking to purchase ether on behalf of the Trust, the Sponsor will seek to purchase ether at commercially reasonable price and terms from any of the approved Ether Trading Counterparties.¹⁶ Once agreed

upon, the transaction will generally occur on an "over-the-counter" basis.

Whether utilizing the Trust-Directed Trade Model or the Agent Execution Model, the Authorized Participants will deliver only cash to create shares and will receive only cash when redeeming Shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process. Additionally, under either the Trust-Directed Trade Model or the Agent Execution Model, the Trust will create Shares by receiving ether from a third party that is not the Authorized Participant and is not affiliated with the Sponsor or the Trust, and the Trust—not the Authorized Participant—is responsible for selecting the third party to deliver the ether. The third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the ether to the Trust or acting at the direction of the Authorized Participant with respect to the delivery of the ether to the Trust. Additionally, the Trust will redeem Shares by delivering ether to a third party that is not the Authorized Participant and is not affiliated with the Sponsor or the Trust, and the Trust—not the Authorized Participant—is responsible for selecting the third party to receive the ether. Finally, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the ether from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the ether from the Trust.

Acquiring and Selling Ether Pursuant to Creation and Redemption of Shares Under the Trust-Directed Trade Model

Under the Trust-Directed Trade Model and as set forth in the Registration Statement, on any business day, an Authorized Participant may create Shares by placing an order to purchase one or more Creation Units with the Transfer Agent through the Marketing Agent. Such orders are subject to approval by the Marketing Agent and the Transfer Agent. For purposes of processing creation and redemption orders, a "business day" means any day other than a day when the Exchange is closed for regular trading ("Business Day"). To be processed on the date submitted, creation orders must be placed before

delivery requirements for spot commodity transactions.

¹⁴ The Sponsor will provide notice of any such changes in the Trust's periodic or current reports and, if the Sponsor makes such a change other than on an ad hoc or temporary basis, will file a proposed rule change with the Commission.

¹⁵ The Ether Trading Counterparties with which the Sponsor will engage in ether transactions are unaffiliated third-parties that are not acting as agents of the Trust, the Sponsor or the Authorized Participant, and all transactions will be done on an arms-length basis. There is no contractual relationship between the Trust, the Sponsor or the Ether Trading Counterparty. When seeking to sell ether on behalf of the Trust, the Sponsor will seek to sell ether at commercially reasonable price and terms to any of the approved Ether Trading Counterparties. Once agreed upon, the transaction will generally occur on an "over-the-counter" basis.

¹⁶ The Sponsor will maintain ownership and control of ether in a manner consistent with good

4:00 p.m. E.T. or the close of regular trading on the Exchange, whichever is earlier, but may be required to be placed earlier at the discretion of the Sponsor. A purchase order will be effective on the date it is received by the Transfer Agent and approved by the Marketing Agent ("Purchase Order Date").

Creation Units are processed in cash. By placing a purchase order, an Authorized Participant agrees to deposit, or cause to be deposited, an amount of cash equal to the quantity of ether attributable to each Share of the Trust (net of accrued but unpaid expenses and liabilities) multiplied by the number of Shares (10,000) comprising a Creation Unit (the "Basket Amount"). The Sponsor will cause to be published each Business Day, prior to the commencement of trading on the Exchange, the Basket Amount relating to a Creation Unit applicable for such Business Day. That amount is derived by multiplying the Basket Amount by the value of ether ascribed by the Pricing Index. However, the Authorized Participant is also responsible for any additional cash required to account for the price at which the Trust agrees to purchase the requisite amount of ether from an Ether Trading Counterparty to the extent it is greater than the Pricing Index price on each Purchase Order Date.

Prior to the delivery of Creation Units, the Authorized Participant must also have wired to the Transfer Agent the nonrefundable transaction fee due for the creation order. Authorized Participants may not withdraw a creation request. If an Authorized Participant fails to consummate the foregoing, the order may be cancelled.

Following the acceptance of a purchase order, the Authorized Participant must wire the cash amount described above to the Cash Custodian, and the Ether Trading Counterparty must deposit the required amount of ether with the Ether Custodian by the end of the day E.T. on the Business Day following the Purchase Order Date. The ether will be purchased from Ether Trading Counterparties that are not acting as agents of the Trust or agents of the Authorized Participant. These transactions will be done on an arms-length basis, and there is no contractual relationship between the Trust, the Sponsor, or the Ether Trading Counterparty to acquire such ether. Prior to any movement of cash from the Cash Custodian to the Ether Trading Counterparty or movement of Shares from the Transfer Agent to the Authorized Participant's DTC account to settle the transaction, the ether must be deposited at the Ether Custodian.

The Ether Trading Counterparty must deposit the required amount of ether by end of day E.T. on the Business Day following the Purchase Order Date prior to any movement of cash from the Cash Custodian or Shares from the Transfer Agent. Upon receipt of the deposit amount of ether at the Ether Custodian from the Ether Trading Counterparty, the Ether Custodian will notify the Sponsor that the ether has been received. The Sponsor will then notify the Transfer Agent that the ether has been received, and the Transfer Agent will direct DTC to credit the number of Shares ordered to the Authorized Participant's DTC account and will wire the cash previously sent by the Authorized Participant to the Ether Trading Counterparty to complete settlement of the Purchase Order and the acquisition of the ether by the Trust, as described above.

As between the Trust and the Authorized Participant, the expense and risk of the difference between the value of ether calculated by the Administrator for daily valuation using the Pricing Index and the price at which the Trust acquires the ether will be borne solely by the Authorized Participant to the extent that the Trust pays more for ether than the price used by the Trust for daily valuation. Any such additional cash amount will be included in the amount of cash calculated by the Administrator on the Purchase Order Date, communicated to the Authorized Participant on the Purchase Order Date, and wired by the Authorized Participant to the Cash Custodian on the day following the Purchase Order Date. If the Ether Trading Counterparty fails to deliver the ether to the Ether Custodian, no cash is sent from the Cash Custodian to the Ether Trading Counterparty, no Shares are transferred to the Authorized Participant's DTC account, the cash is returned to the Authorized Participant, and the Purchase Order is cancelled.

Under the Trust-Directed Trade Model and according to the Registration Statement, the procedures by which an Authorized Participant can redeem one or more Creation Units mirror the procedures for the creation of Creation Units. On any Business Day, an Authorized Participant may place an order with the Transfer Agent through the Marketing Agent to redeem one or more Creation Units. To be processed on the date submitted, redemption orders must be placed before 4:00 p.m. E.T. or the close of regular trading on the Exchange, whichever is earlier, or earlier as determined by the Sponsor. A redemption order will be effective on the date it is received by the Transfer Agent and approved by the Marketing

Agent ("Redemption Order Date"). The redemption procedures allow Authorized Participants to redeem Creation Units and do not entitle an individual shareholder to redeem any Shares in an amount less than a Creation Unit, or to redeem Creation Units other than through an Authorized Participant. In connection with receipt of a redemption order accepted by the Marketing Agent and Transfer Agent, the Sponsor, on behalf of the Trust, is responsible for selling the ether to an approved Ether Trading Counterparty in an amount equal to the Basket Amount.

The redemption distribution from the Trust will consist of a transfer to the redeeming Authorized Participant, or its agent, of the amount of cash the Trust received in connection with a sale of the Basket Amount of ether to an Ether Trading Counterparty made pursuant to the redemption order. The Sponsor will cause to be published each Business Day, prior to the commencement of trading on the Exchange, the redemption distribution amount relating to a Creation Unit applicable for such Business Day. The redemption distribution amount is derived by multiplying the Basket Amount by the value of ether ascribed by the Pricing Index. However, as between the Trust and the Authorized Participant, the expense and risk of the difference between the value of ether ascribed by the Pricing Index and the price at which the Trust sells the ether will be borne solely by the Authorized Participant to the extent that the Trust receives less for ether than the value ascribed by Pricing Index.

Prior to the delivery of Creation Units, the Authorized Participant must also have wired to the Transfer Agent the nonrefundable transaction fee due for the redemption order.

The redemption distribution due from the Trust will be delivered by the Transfer Agent to the Authorized Participant once the Cash Custodian has received the cash from the Ether Trading Counterparty. The Ether Custodian will not send the Basket Amount of ether to the Ether Trading Counterparty until the Cash Custodian has received the cash from the Ether Trading Counterparty and is instructed by the Sponsor to make such transfer. Once the Ether Trading Counterparty has sent the cash to the Cash Custodian in an agreed upon amount to settle the agreed upon sale of the Basket Amount of ether, the Transfer Agent will notify Sponsor. The Sponsor will then notify the Ether Custodian to transfer the ether to the Ether Trading Counterparty, and the Transfer Agent will wire the cash proceeds to the Authorized Participant

once the Trust's DTC account has been credited with the Shares represented by the Creation Unit from the redeeming Authorized Participant. Once the Authorized Participant has delivered the Shares represented by the Creation Unit to be redeemed to the Trust's DTC account, the Cash Custodian will wire the requisite amount of cash to the Authorized Participant. If the Trust's DTC account has not been credited with all of the Shares of the Creation Unit to be redeemed, the redemption distribution will be delayed until such time as the Transfer Agent confirms receipt of all such Shares. If the Ether Trading Counterparty fails to deliver the cash to the Cash Custodian, the transaction will be cancelled, and no transfer of ether or Shares will occur.

Acquiring and Selling Ether Pursuant to Creation and Redemption of Shares Under the Agent Execution Model

Under the Agent Execution Model, the Prime Execution Agent, acting in an agency capacity, would conduct ether purchases and sales on behalf of the Trust with third parties through its Coinbase Prime service pursuant to the Prime Execution Agent Agreement. To utilize the Agent Execution Model, the Trust may maintain some ether or cash in the Trading Balance with the Prime Execution Agent. The Prime Execution Agent Agreement provides that the Trust does not have an identifiable claim to any particular ether (and cash); rather, the Trust's Trading Balance represents an entitlement to a pro rata share of the ether (and cash) the Prime Execution Agent holds on behalf of customers who hold similar entitlements against the Prime Execution Agent. In this way, the Trust's Trading Balance represents an omnibus claim on the Prime Execution Agent's ether (and cash) held on behalf of the Prime Execution Agent's customers.

To avoid having to pre-fund purchases or sales of ether in connection with cash creations and redemptions and sales of ether to pay Trust expenses not assumed by the Sponsor, to the extent applicable, the Trust may borrow ether or cash as trade credit ("Trade Credit") from Coinbase Credit, Inc. (the "Trade Credit Lender") on a short-term basis pursuant to the Coinbase Credit Committed Trade Financing Agreement (the "Trade Financing Agreement").

On the day of the Purchase Order Date, the Trust would enter into a transaction to buy ether through the Prime Execution Agent for cash. Because the Trust's Trading Balance may not be funded with cash on the

Purchase Order Date for the purchase of ether in connection with the Purchase Order under the Agent Execution Model, the Trust may borrow Trade Credits in the form of cash from the Trade Credit Lender pursuant to the Trade Financing Agreement or may require the Authorized Participant to deliver the required cash for the Purchase Order on the Purchase Order Date. The extension of Trade Credits on the Purchase Order Date allows the Trust to purchase ether through the Prime Execution Agent on the Purchase Order Date, with such ether being deposited in the Trust's Trading Balance.

On the day following the Purchase Order Date (the "Purchase Order Settlement Date"), the Trust would deliver Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. Where applicable, the Trust would use the cash to repay the Trade Credits borrowed from the Trade Credit Lender. On the Purchase Order Settlement Date for a Purchase Order utilizing the Agent Execution Model, the ether associated with the Purchase Order and purchased on the Purchase Order Date is swept from the Trust's Trading Balance with the Prime Execution Agent to the Trust Ether Account with the Ether Custodian pursuant to a regular end-of-day sweep process. Transfers of ether into the Trust's Trading Balance are off-chain transactions and transfers from the Trust's Trading Balance to the Trust Ether Account are "on-chain" transactions represented on the ether blockchain. Any financing fee owed to the Trade Credit Lender is deemed part of trade execution costs and embedded in the trade price for each transaction.

For a Redemption Order utilizing the Agent Execution Model, on the day of the Redemption Order Date the Trust would enter into a transaction to sell ether through the Prime Execution Agent for cash. The Trust's Trading Balance with the Prime Execution Agent may not be funded with ether on trade date for the sale of ether in connection with the redemption order under the Agent Execution Model, when ether remains in the Trust Ether Account with the Ether Custodian at the point of intended execution of a sale of ether. In those circumstances the Trust may borrow Trade Credits in the form of ether from the Trade Credit Lender, which allows the Trust to sell ether through the Prime Execution Agent on the Redemption Order Date, and the cash proceeds are deposited in the Trust's Trading Balance with the Prime Execution Agent. On the business day

following the Redemption Order Date (the "Redemption Order Settlement Date") for a redemption order utilizing the Agent Execution Model where Trade Credits were utilized, the Trust delivers cash to the Authorized Participant in exchange for Shares received from the Authorized Participant. In the event Trade Credits were used, the Trust will use the ether that is moved from the Trust Ether Account with the Ether Custodian to the Trading Balance with the Prime Execution Agent to repay the Trade Credits borrowed from the Trade Credit Lender.

For a redemption of Creation Units utilizing the Agent Execution Model, the Sponsor would instruct the Ether Custodian to prepare to transfer the ether associated with the redemption order from the Trust Ether Account with the Ether Custodian to the Trust's Trading Balance with the Prime Execution Agent. On the Redemption Order Settlement Date, the Trust would enter into a transaction to sell ether through the Prime Execution Agent for cash, and the Prime Execution Agent credits the Trust's Trading Balance with the cash. On the same day, the Authorized Participant would deliver the necessary Shares to the Trust and the Trust delivers cash to the Authorized Participant.

Fee Accrual

According to the Registration Statement, the Trust's only recurring ordinary expense is expected to be the Sponsor Fee, which will accrue daily and will be payable in ether monthly in arrears. The Administrator will calculate the Sponsor Fee on a daily basis by applying an annualized rate to the Trust's total ether holdings, and the amount of ether payable in respect of each daily accrual shall be determined by reference to the Pricing Index.

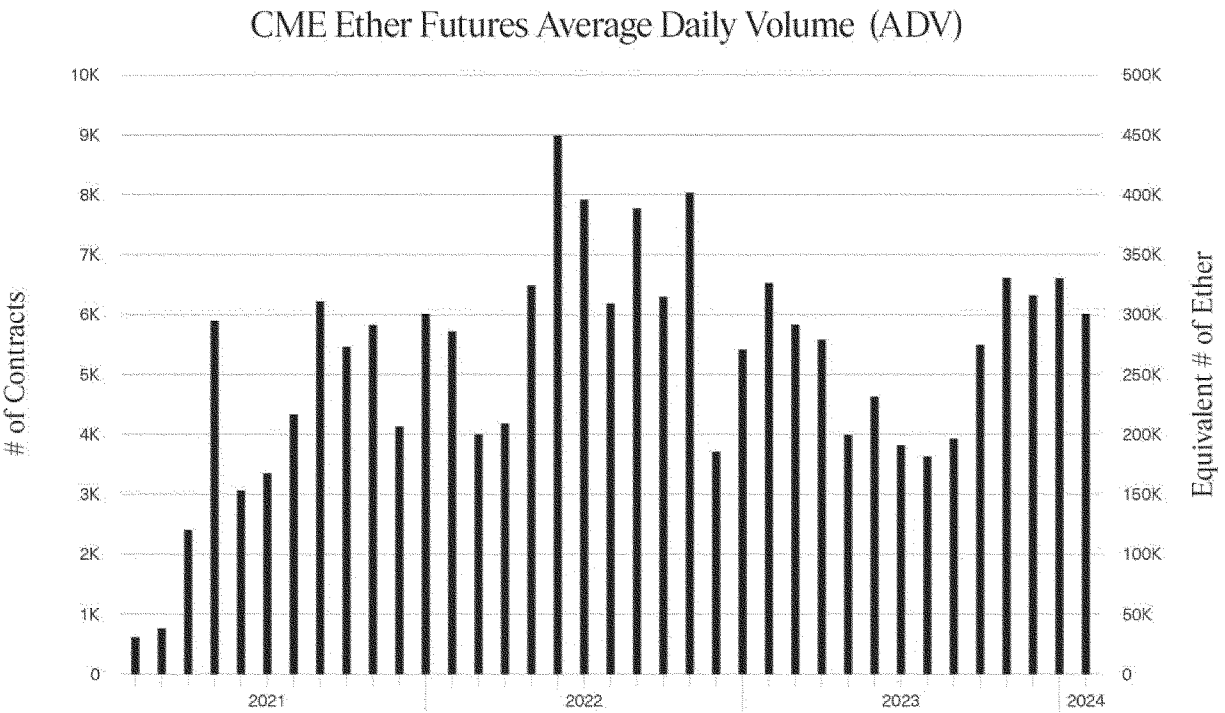
CME Ether Futures Market

CME began offering trading in ether futures on February 8, 2021.¹⁷ Each contract represents fifty ether and is based on the ERR. The contracts trade and settle like other cash settled commodity futures contracts.

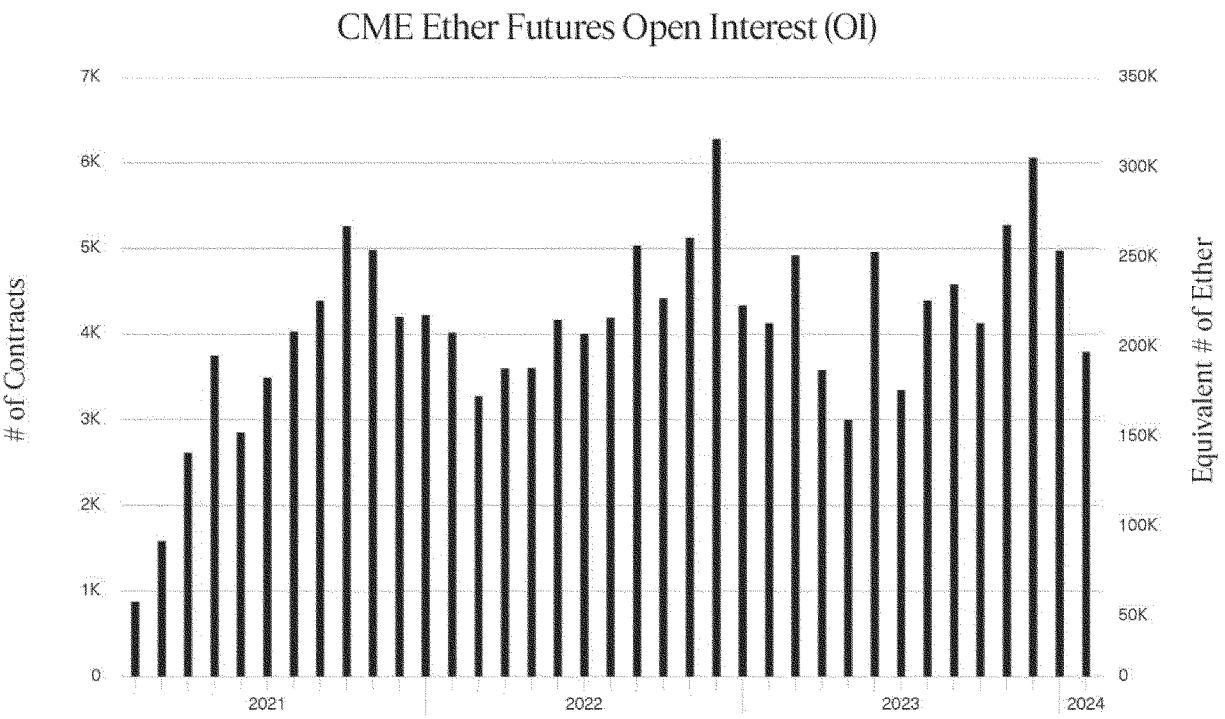
Most measurable metrics related to CME ether futures have trended up since launch. For example, there were 174,261 CME ether futures contracts traded in February 2024 (approximately \$24.3 billion) compared to 182,631 contracts (\$14.9 billion), 160,108 contracts (\$23.1 billion), and 17,149

¹⁷ See "CME Group Announces Launch of Ether Futures," February 8, 2021, available at https://www.cmegroup.com/media-room/press-release/2012/2/08/cme_group_announceslaunchofetherfutures.html.

contracts (\$1.5 billion) traded in February 2023, February 2022, and February 2021, respectively.¹⁸



Open interest was 3792 CME ether futures contracts in February 2024 (approximately \$529 million) compared to 4919 contracts (\$337 million), 4014 contracts (\$578 million), and 877 contracts (\$77 million) in February 2023, February 2022, and February 2021 respectively.¹⁹



¹⁸ Data from CME Volume and Average Daily Volume Reports, available at <https://www.cmegroup.com/market-data/volume-open-interest.html#volumeTools>.

¹⁹ Data from CME Open Interest Reports, available at <https://www.cmegroup.com/market-data/volume-open-interest.html#openInterestTools>.

The number of large open interest holders has increased as well, as

demonstrated in the figure that follows.²⁰

CME Ether Futures Large Open Interest Holders (LOIH)



The Commodity Futures Trading Commission (“CFTC”) regulates the CME ether futures market, and both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).²¹

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. Ethereum employs an array of computer code-based logic, called a protocol, to create a unified understanding of ownership, commercial activity, and economic logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. No single intermediary or entity operates or controls the Ethereum network, the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or

ether, which are recorded on a distributed, public recordkeeping system or ledger known as a blockchain, and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on spot trading platforms or in individual peer-to-peer transactions. By combining the recordkeeping system of the Ethereum blockchain with a flexible scripting language that can be used to implement a wide variety of instructions, the Ethereum network is intended to act as a public computational layer on top of which users can build their own public software programs, as an alternative to centralized web services. On the Ethereum network, ether is the unit of account that users pay for the computational resources consumed by running programs of their choice.

Previously, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain direct exposure to ether. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing

spot ether directly, or (ii) over-the-counter ether funds (“OTC Ether Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding spot ether) to gain exposure to ether.²²

To this point, the lack of an ETP that holds spot ether (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors who would otherwise seek exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC Ether Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors potentially suffering losses due to drastic movements in the premium/discount of OTC Ether Funds. Additionally, many U.S. investors who held their digital assets in accounts at FTX,²³ Celsius Network LLC,²⁴ BlockFi

²⁰ A large open interest holder in ether futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. Data from The Block, available at <https://www.theblock.co/data/cryptomarkets/cme-cots/large-open-interest-holders-of-cme-ether-futures>.

²¹ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

²² The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have

either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

²³ See FTX Trading Ltd., et al., Case No. 22–11068.

²⁴ See Celsius Network LLC, et al., Case No. 22–10964.

Inc.,²⁵ and Voyager Digital Holdings, Inc.²⁶ have become unsecured creditors in the insolvencies of those entities. The Sponsor believes that, if a Spot Ether ETP had been available to U.S. investors, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in the transparent, regulated, and well-understood structure of a Spot Ether ETP. The Sponsor thus believes that the approval of a Spot Ether ETP would represent a major step towards protection of U.S. investors.

Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot, Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.²⁷ However, the Commission recently approved the listing and trading of shares of spot bitcoin exchange-traded products (“Spot Bitcoin ETP”), finding that there were

“other means” of preventing fraud and manipulation sufficient to satisfy the requirements of Section 6(b)(5) of the Exchange Act.²⁸ In the Spot Bitcoin ETP Approval Order, the Commission concluded, through a robust correlation analysis, that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices.²⁹ The Commission further found that, because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, a listing exchange’s comprehensive surveillance sharing agreement (“CSSA”) with the CME can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the Spot Bitcoin ETP. In support of this proposed rule change to permit the listing and trading of a Spot Ether ETP, the Sponsor has conducted a similarly robust correlation analysis between the spot ether markets and the CME ether futures market to determine if fraud or manipulation that impacts prices in spot ether markets would be likely to similarly impact CME ether futures prices. The Sponsor used stationary time series of price returns data at hourly, five-minute, and one-minute intervals for the spot ETH/USD

trading pair on Coinbase and Kraken, as well as for the closest-to- maturity CME ether futures contract, over a lengthy sample period from August 1, 2021 through March 20, 2024. Pearson correlation statistics were calculated for the full sample period, as well as for rolling three-month segments within the sample period. The Sponsor’s correlation analysis utilized frequent intra-day trading data over the sample period on this subset of spot ether platforms and on the CME ether futures market as well. The results of the Sponsor’s analysis support that the CME ether futures market has been highly correlated with this subset of the spot ether platforms throughout the past two and a half years. The correlation between the CME ether futures market and this subset of spot ether platforms for the full sample period is no less than 98.6% using data at an hourly interval; 90.0% using data at a five-minute interval; and 70.9% using data at a one-minute interval. The rolling three-month correlation results are similar, ranging between 95.7 and 99.3% using data at an hourly interval; 86.8 and 92.9% using data at a five-minute interval; and 65.0 and 79.5% using data at a one-minute interval.

CORRELATIONS BETWEEN CERTAIN SPOT ETHER MARKETS AND THE CME ETHER FUTURES MARKET

	Coinbase			Kraken		
	Hourly	5 Minutes	1 Minute	Hourly	5 Minutes	1 Minute
Full Sample: 08/01/21 to 03/20/24	98.6	90.0	70.9	98.6	90.3	72.6
Rolling Three-Month Correlations Over the Full Sample Period:						
Maximum	99.3	92.7	78.7	99.3	92.9	79.5
Minimum	95.7	86.8	65.0	95.7	87.2	67.3

²⁵ See BlockFi Inc., Case No. 22–19361.
²⁶ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.
²⁷ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR–BatsBZX–2016–30) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust) (“Winklevoss Order”). In the Winklevoss Order, the Commission set forth both the importance and definition of a surveilled, regulated market of significant size, explaining that for approved commodity-trust ETPs, “there has been in every case at least one significant, regulated market for trading futures on the underlying

commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.” Winklevoss Order, 83 FR at 37594.
²⁸ See Securities Exchange Act Release No. 34–99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (SR–NYSEARCA–2021–90; SR–NYSEARCA–2023–44; SR–NYSEARCA–2023–58; SR–NYSEARCA–2023–016; SR–NYSEARCA–2023–019; SR–CboeBZX–2023–028; SR–CboeBZX–2023–038; SR–CboeBZX–2023–040; SR–CboeBZX–2023–042; SR–CboeBZX–2023–044; SR–CboeBZX–2023–072) (Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based

Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).
²⁹ In the Spot Bitcoin ETP Approval Order, the Commission noted that “[t]he robustness of the Commission’s correlation analysis rests on the prerequisites of (1) the correlations being calculated with respect to bitcoin futures that trade on the CME, a U.S. market regulated by the CFTC, (2) the lengthy sample period of price returns for both the CME bitcoin futures market and the spot bitcoin market, (3) the frequent intra-day trading data in both the CME bitcoin futures market and the spot bitcoin market over that lengthy sample period, and (4) the consistency of the correlation results throughout the lengthy sample period.” Spot Bitcoin ETP Approval Order, 89 FR at 3010 n.38.

The Sponsor believes that the results of its robust correlation analysis constitute empirical evidence that prices generally move in close (although not perfect) alignment between the spot ether market and the CME ether futures market. As a result, the Sponsor believes that fraud or manipulation that impacts prices in spot ether markets would likely similarly impact CME ether futures prices, and therefore, because CME surveillance can assist in detecting those impacts on CME ether futures prices, the Exchange and CME's common membership in the ISG³⁰ can be reasonably expected to assist the Exchange in surveilling for fraudulent and manipulative acts and practices in the spot ether markets in satisfaction of the requirement of Section 6(b)(5) of the Exchange Act that there are "other means" of preventing fraud and manipulation.

Availability of Information

The NAV per Share will be calculated and disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The ITV will be calculated every 15 seconds throughout the core trading session each trading day.

The Sponsor will cause information about the Shares to be posted to the Trust's website (<https://www.bitwiseinvestments.com/>): (1) the NAV and NAV per Share for each Exchange trading day, posted at end of day; (2) the daily holdings of the Trust, before 9:30 a.m. E.T. on each Exchange trading day; (3) the Trust's effective prospectus, in a form available for download; and (4) the Shares' ticker and CUSIP information, along with additional quantitative information updated on a daily basis for the Trust. For example, the Trust's website will include (1) the prior Business Day's trading volume, the prior Business Day's reported NAV and closing price, and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation ("Bid/Ask Price") against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and

premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The Trust's website will be publicly available prior to the public offering of Shares and accessible at no charge.

Investors may obtain on a 24-hour basis ether pricing information based on the Pricing Index, ERR, and CME Ether Real Time Price, spot ether market prices and ether futures price from various financial information service providers. Current ether spot market prices are also available with bid/ask spreads from ether trading platforms, including the Constituent Platforms of the Pricing Index.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.³¹ Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the ITV, CME Ether Real Time Price, or Pricing Index (if the Exchange becomes aware that the Pricing Index is not being published) occurs.³² If the interruption to the dissemination of the ITV, CME Ether Real Time Price, or Pricing Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

³¹ See NYSE Arca Rule 7.12-E.

³² A limit up/limit down condition in the futures market would not be considered an interruption requiring the Trust to be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. E.T. in accordance with NYSE Arca Rule 7.34-E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.201-E. The trading of the Shares will be subject to NYSE Arca Rule 8.201-E(g), which sets forth certain restrictions on Equity Trading Permit ("ETP") Holders acting as registered Market Makers in Commodity-Based Trust Shares to facilitate surveillance.³³ The Exchange represents that, for initial and continued listing, the Trust will be in compliance with Rule 10A-3 under the Act,³⁴ as provided by NYSE Arca Rule 5.3-E. A minimum of 100,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well

³³ Under NYSE Arca Rule 8.201-E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its accounts for trading in the underlying commodity, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3-E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments including the Shares). As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

³⁴ 17 CFR 240.10A-3. See note 8, *supra*.

³⁰ The Commission has previously recognized that common membership between a listing exchange and a futures market such as the CME in the ISG functions as "the equivalent of a comprehensive surveillance sharing agreement." See Securities Exchange Act Release No. 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E.

as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.³⁵ The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and ether derivatives from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and ether derivatives from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and any underlying ether, ether futures contracts, options on ether futures, or any other ether derivatives in connection with ETP Holders' proprietary trades, or customer trades effected through ETP Holders on any relevant market. Under NYSE Arca Rule 8.201–E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its accounts for trading in any underlying commodity, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3–E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the

related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares). As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts and that subsidiary or affiliate is a member of another regulatory organization, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through a surveillance sharing agreement with that regulatory organization.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the index, portfolio, or reference asset of the Trust, (b) limitations on index or portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an "Information Bulletin" of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the procedures for creations of Shares in Creation Units; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) information regarding how the value of the ITV and NAV is disseminated; (4) the possibility that trading spreads and the resulting premium or discount on

the Shares may widen during the Opening and Late Trading Sessions, when an updated ITV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction and (6) trading information.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as described in the annual report. The Information Bulletin will disclose that information about the Shares of the Trust is publicly available on the Trust's website.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)³⁶ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. Further, the Exchange has demonstrated its ability to share information with the CME, pursuant to common ISG membership, can be reasonably expected to assist the Exchange in surveilling for fraudulent and manipulative acts and practices with respect to trading in the Shares, such that there are sufficient means of preventing fraud and manipulation sufficient to satisfy the requirements of Section 6(b)(5) of the Exchange Act. As discussed above, the results of the Sponsor's comprehensive correlation analysis support that prices on the spot ether and CME ether futures markets generally move in close alignment; accordingly, it is likely that fraud or manipulation that impacts prices in spot ether markets would likely similarly impact CME ether futures prices.

The Exchange has in place surveillance procedures that are adequate to properly monitor Exchange trading in the Shares in all trading

³⁵ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

³⁶ 15 U.S.C. 78f(b)(5).

sessions and to deter and detect attempted manipulation of the Shares or other violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and other futures with the CME and other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and other futures or the underlying ether through ETP Holders, in connection with such ETP Holders' proprietary trades which they effect on any relevant market.

Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The Trust's website will also include a form of the prospectus for the Trust that may be downloaded. The website will include the Shares' ticker and CUSIP information, along with additional quantitative information updated on a daily basis for the Trust. The Trust's website will include (1) daily trading volume, the prior Business Day's reported NAV and closing price, and a calculation of the premium and discount of the closing price or midpoint of the Bid/Ask Price against the NAV; and (ii) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The Trust's website will be publicly available prior to the public offering of Shares and accessible at no charge.

Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of a new type of exchange-traded product based on the price of ether that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above,

the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of a new type of Commodity-Based Trust Share based on the price of ether that would enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. 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-NYSEARCA-2024-31 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSEARCA-2024-31. 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-NYSEARCA-2024-31 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-11705 Filed 5-28-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100219; File No. SR-CboeBZX-2023-087]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the Invesco Galaxy Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

May 22, 2024.

On October 20, 2023, Cboe BZX Exchange, Inc. ("BZX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares ("Shares") of the Invesco Galaxy Ethereum ETF ("Trust") under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on November 8, 2023.³

³⁷ 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. 98846 (Nov. 2, 2023), 88 FR 77116. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/2023/2023087>

Continued

On December 13, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On February 6, 2024, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On May 6, 2024, the Commission designated a longer period for Commission action on the proposed rule change.⁸ On May 21, 2024, the Exchange filed Amendment No. 1 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 1 amended and replaced the proposed rule change in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. ("BZX" or the "Exchange") is filing with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change to list and trade shares of the Invesco Galaxy Ethereum ETF (the "Trust"),⁹ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 to SR-CboeBZX-2023-087 amends and replaces in its entirety the proposal as originally submitted on October 20, 2023. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),¹⁰ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.¹¹ Invesco Capital Management is the sponsor of the Trust ("Sponsor"). The Shares will be registered with the Commission by means of the Trust's registration statement on Form S-1 (the "Registration Statement").¹²

The Exchange proposes to list and trade the Shares of the Invesco Galaxy Ethereum ETF¹³ under BZX Rule 14.11(e)(4),¹⁴ which governs the listing

and trading of Commodity-Based Trust Shares on the Exchange.¹⁵

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹⁶ With this in mind, the Chicago Mercantile Exchange ("CME") ether futures ("Ether Futures") market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) ("Spot Bitcoin ETPs").¹⁷ By way of background, in

¹⁵ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

¹⁶ See Securities Exchange Act Release No. 78262 (July 8, 2016), 81 FR 78262 (July 14, 2016) (the "Winklevoss Proposal"). The Winklevoss Proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the "Winklevoss Order"). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the "CFTC") regulated futures market. Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP "was based on an assumption that the currency market and the spot gold market were largely unregulated." See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁷ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-

www.sec.gov/comments/sr-cboebzx-2023-087/sr-cboebzx2023087.htm.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99151, 88 FR 87822 (Dec. 19, 2023).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99479, 89 FR 9880 (Feb. 12, 2024).

⁸ See Securities Exchange Act Release No. 100065, 89 FR 40516 (May 10, 2024).

⁹ The Trust was formed as a Delaware statutory trust on September 27, 2023, and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

¹⁰ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

¹¹ Any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, or the applicability of Exchange listing rules specified in this filing to list a series of Other Securities (collectively, "Continued Listing Representations") shall constitute continued listing requirements for the Shares listed on the Exchange.

¹² On September 29, 2023, the Trust filed with the Commission an initial registration statement (the "Registration Statement") on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹³ On September 29, 2023, the Trust filed with the Commission an initial registration statement (the "Registration Statement") on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹⁴ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

2022 the Commission disapproved proposals¹⁸ to list Spot Bitcoin ETPs, including a proposal sponsored by Grayscale Investments, LLC (“Grayscale”).¹⁹ Grayscale appealed the decision with the U.S. Court of Appeals for the D.C. Circuit, which held that the Commission had failed to adequately explain its reasoning that the proposing exchange had not established that the CME bitcoin futures market was a market of significant size related to spot bitcoin, or that the “other means” asserted were sufficient to satisfy the statutory standard. As a result, the court vacated the Grayscale Order and remanded the matter to the Commission.²⁰ In considering the remand of the Grayscale Order and Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME bitcoin futures (“Bitcoin Futures”) market is highly correlated to spot bitcoin. Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record . . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of “significant size” related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.²¹

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis

are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size and that this proposal should be approved.

Background

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of logic, called a protocol, to create a unified understanding of ownership, commercial activity, and business logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. It is widely understood that no single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, referred to as “ether” or “ETH”, which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the “Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a limited-purpose, peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Heretofore, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead current options include: (i) facing the counter-party risk, legal

uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.²²

To this point, the lack of an ETP that holds spot ETH (a “Spot Ether ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 69% loss due to the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,²³ Celsius Network LLC,²⁴ BlockFi Inc.²⁵ and Voyager Digital Holdings, Inc.²⁶ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Ether ETP. To this

²² The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

²³ See FTX Trading Ltd., et al., Case No. 22–11068.

²⁴ See Celsius Network LLC, et al., Case No. 22–10964.

²⁵ See BlockFi Inc., Case No. 22–19361.

²⁶ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the “Spot Bitcoin ETP Approval Order”).

¹⁸ See Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 97102 (Mar. 10, 2023), 88 FR 16055 (Mar. 15, 2023) (SR–CboeBZX–2022–035) (“VanEck Order II”) and n.11 therein for the complete list of previous proposals.

¹⁹ See Securities Exchange Act Release No. 95180 (June 29, 2022) 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) (the “Grayscale Order”).

²⁰ See Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023).

²¹ See the Spot Bitcoin ETP Approval Order at 3011–3012.

point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Ether Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”) that provide exposure to ether primarily through CME Ether Futures (“Ether Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

The structure of Ether Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Ether ETP. Specifically, the cost of rolling CME Ether Futures contracts will cause the Ether Futures ETFs to lag the performance of ether itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Ether ETPs. Such rolling costs would not be required for Spot Ether ETPs that hold ether. Further, Ether Futures ETFs could potentially hit CME position limits, which would force an Ether Futures ETF to invest in non-futures assets for ether exposure and cause potential investor confusion and lack of certainty about what such Ether Futures ETFs are actually holding to try to get exposure to ether, not to mention completely changing the risk profile associated with such an ETF. While Ether Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to ether that will unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Ether ETPs and the Exchange believes that any proposal to list and trade a Spot Ether ETP should be reviewed by the Commission with this important investor protection context in mind.

To the extent the Commission may view differential treatment of Ether Futures ETFs and Spot Ether ETPs as warranted based on the Commission’s concerns about the custody of physical ether that a Spot Ether ETP would hold (compared to cash-settled futures

contracts),²⁷ the Sponsor believes this concern is mitigated to a significant degree by the custodial arrangements that the Trust has contracted with the Custodian (as defined below) to provide, as further outlined below. In the custody statement, the Commission stated that the fourth step that a broker-dealer could take to shield traditional securities customers and others from the risks and consequences of digital asset security fraud, theft, or loss is to establish, maintain, and enforce reasonably designed written policies, procedures, and controls for safekeeping and demonstrating the broker-dealer has exclusive possession or control over digital asset securities that are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys necessary to access and transfer the digital asset securities the broker-dealer holds in custody. While ether is not a security and the Custodian is not a broker-dealer, the Sponsor believes that similar considerations apply to the Custodian’s holding of the Trust’s ether. After diligent investigation, the Sponsor believes that the Custodian’s policies, procedures, and controls for safekeeping, exclusively possessing, and controlling the Trust’s ether holdings are consistent with industry best practices to protect against the theft, loss, and unauthorized and accidental use of the private keys. As a trust company chartered by the New York Department of Financial Services (“NYDFS”), the Sponsor notes that the Custodian is subject to extensive regulation and has among longest track records in the industry of providing custodial services for digital asset private keys. Under the circumstances, therefore, to the extent the Commission believes that its concerns about the risks of spot ether custody justifies differential treatment of a Ether Futures ETF versus a Spot Ether ETP, the Sponsor believes that the fact that the Custodian employs the same types of policies, procedures, and safeguards in handling spot ether that the Commission has stated that broker-dealers should implement with respect to digital asset securities would appear to weaken the justification for treating a Ether Futures ETF compared to a Spot

Ether ETP differently due to spot ether custody concerns.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Ether ETPs compared to the Ether Futures ETFs would lead to the conclusion that Spot Ether ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Ether ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Ether Futures ETFs as compared to Spot Ether ETPs, losses which could be prevented by the Commission approving Spot Ether ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving Spot Ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Ether ETPs to be listed and traded alongside Ether Futures ETFs and Spot Bitcoin ETPs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for ether exposure, and offer flexibility in the means of gaining exposure to ether through transparent, regulated, U.S. exchange-listed vehicles.

CME Ether Futures²⁸

CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.²⁹ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch,

²⁸ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

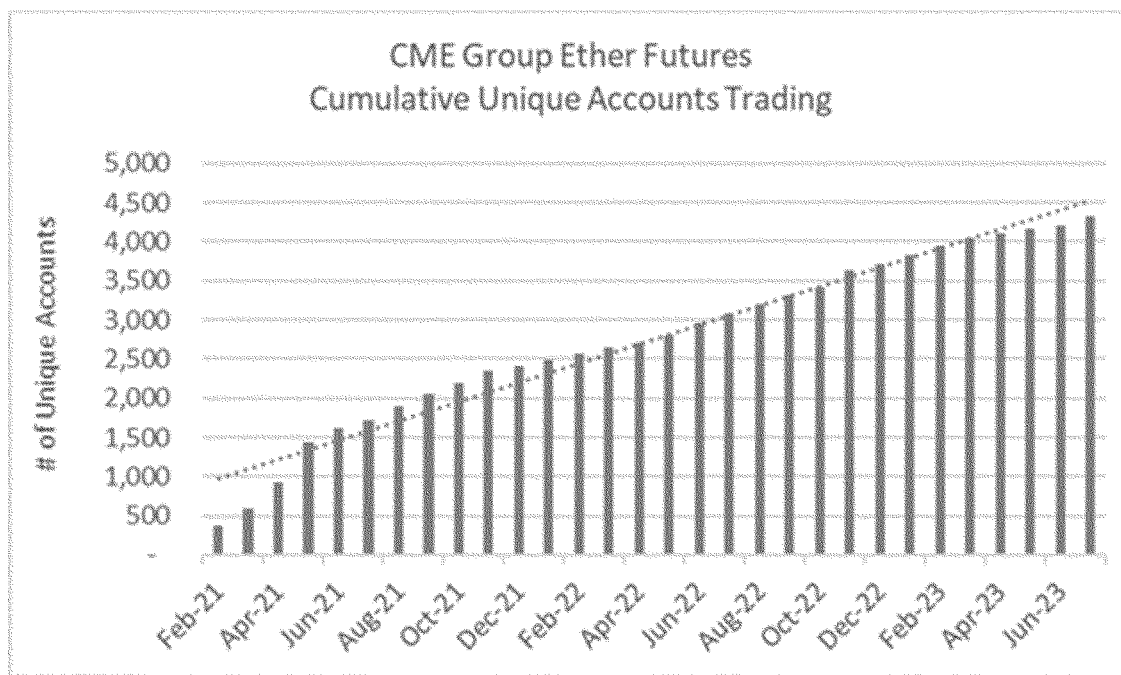
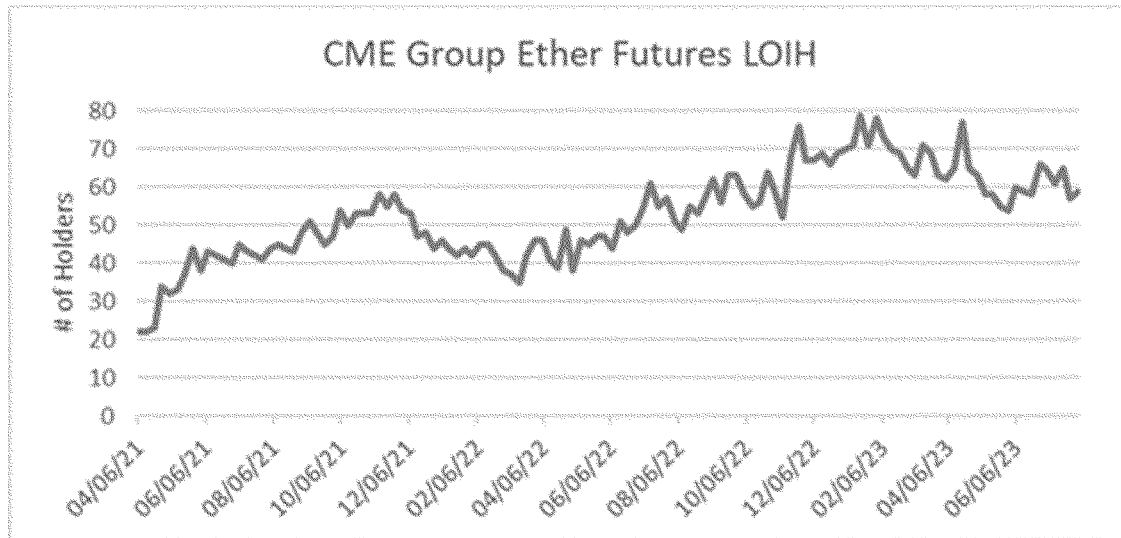
²⁹ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁷ See, e.g., Division of Investment Management Staff, Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market, May 11, 2021 (“The Bitcoin Futures market also has not presented the custody challenges associated with some cryptocurrency-based investing because the futures are cash-settled”).

although some metrics have slowed recently. For example, there were 76,293 CME Ether Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion)

contracts traded in July 2021, and July 2022 respectively.³⁰ The Sponsor's research indicates daily correlation between the spot ETH and the CME Ether Futures is 0.998 from the period of 9/1/22 through 9/1/23.

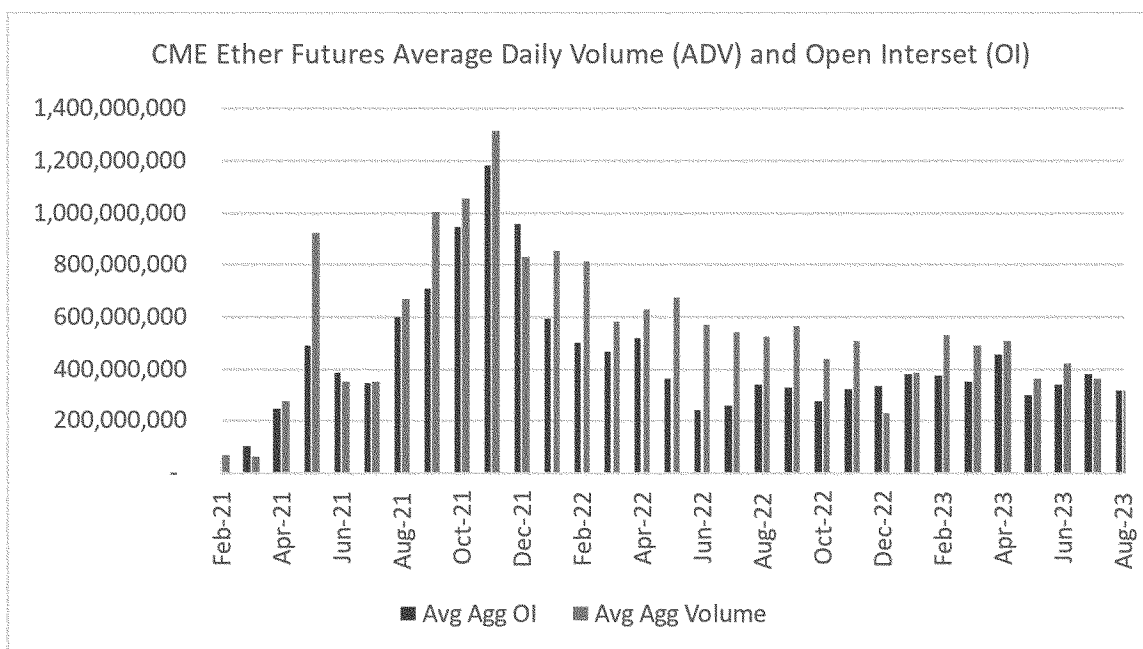
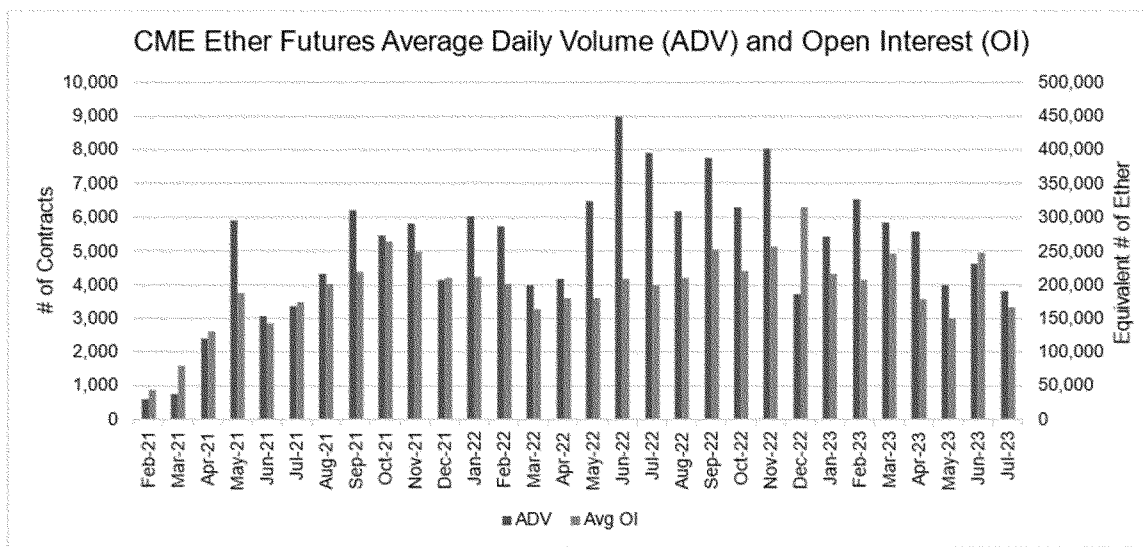
The number of large open interest holders³¹ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened Ether price volatility.



³⁰ Source: CME, 7/31/23.

³¹ A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price

of approximately \$1,867 per Ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures.



Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,³² including Commodity-Based Trust Shares,³³ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are

designed to prevent fraudulent and manipulative acts and practices;³⁴ and

³⁴ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently

presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

³² See Exchange Rule 14.11(f).

³³ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place³⁵ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group (“ISG”).³⁶ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the

predominant influence on prices in that market.³⁷

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.³⁸

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

... fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME. . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁹

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission

believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁴⁰ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁴¹ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The

³⁵ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the “Wilshire Phoenix Disapproval”).

³⁶ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

³⁷ See Wilshire Phoenix Disapproval.

³⁸ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

³⁹ See the Spot Bitcoin ETP Approval Order at 3011–3012.

⁴⁰ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market. . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

⁴¹ Source: TokenTerminal.

Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Invesco Galaxy Ethereum ETF

Delaware Trust Company is the trustee ("Trustee"). The Bank of New York Mellon will be the administrator ("Administrator") and transfer agent ("Transfer Agent"). As noted above, Coinbase Custody Trust Company, LLC, is the Custodian and will be responsible for custody of the Trust's ETH. The Bank of New York Mellon (the "Cash Custodian") will act as custodian of the Trust's cash and cash equivalents.⁴²

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest and ownership in the Trust. The Trust's assets will consist only of ETH, cash, and cash equivalents.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,⁴³ nor a commodity pool for

purposes of the Commodity Exchange Act ("CEA"), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

Neither the Trust, nor the Sponsor, nor the Custodian, nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings. The Trust will not acquire and will disclaim any incidental right ("IR") or IR asset received, for example as a result of forks or airdrops, and such assets will not be taken into account for purposes of determining NAV.

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (a "Creation Basket") at the Trust's net asset value ("NAV"). Authorized participants will deliver, or facilitate the delivery of, cash to the Trust's account with the Cash Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Cash Custodian, will deliver cash to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust's assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

Investment Objective

According to the Registration Statement, the investment objective of the Trust is for the Shares to reflect the spot price of Ether as measured by using the Lukka Prime Reference Rate (the "Index") less the Trust's expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold only ETH, cash, and cash equivalents. The Trust will value its Shares daily based on the value of the Index as of 4:00 p.m. ET, which is calculated based on the fair market value price for ETH, reflecting the execution price of ETH on its principal market as determined by Lukka Inc., an independent third-party digital asset company (the "Index Provider"). The Trust will process all creations and redemptions in cash transactions with authorized participants. The Trust is not actively managed.

The Index

As described in the Registration Statement, the Trust will use the Index to calculate the Trust's NAV. The Index is designed to be a robust price for ETH in USD and there is no component other than ETH in the index. The underlying trading platforms are sourced from the Index Provider. As of December 2023, the following platforms are considered to be eligible by the Index Provider: Binance, Bitfinex, Bitflyer, Bittrex, Bitstamp, Coinbase, Crypto.com, Gemini, HitBTC, Huobi, Kraken, KuCoin, OKEx, Poloniex (collectively, "Index Pricing Sources"). The Index Provider reviews eligible trading platforms quarterly. In determining which trading platforms to include, the Index Provider evaluates each trading platform using proprietary ratings criteria. The Index Provider constantly reassesses the trading platforms to be eligible for inclusion in the Index, and makes adjustments as needed.

In determining the value of ETH, the Index Provider applies a five-step weighting process for identifying the principal trading platform for Ether and the last price on that trading platform. A "base exchange score" ("BES") that takes into account this criteria is assigned to each Index Pricing Source in order to select the most appropriate primary trading platform and then an executed trading platform price is determined at 4:00 p.m. ET., although the Index Provider performs this calculation every second each day.

Step 1: Assign each platform for Ether and U.S. Dollars a BES reflecting static platform characteristics such as oversight, microstructure and technology.

Step 2: Adjust the BES based on the relative monthly volume each platform services. This new score is the Volume Adjusted Score ("VAS").

Step 3: Decay the adjusted score based on the time passed since last trade on platform, assessing the level of activity in the market by considering the frequency (volume) of trades. The decay factor reflects the time since the last trade on the platform. This is the final Decayed Volume Adjusted Score (DVAS), which reflects freshness of data by tracking most recent trades.

Step 4: Rank the platforms by the DVAS score and designate the highest-ranking platform as the Principal Market for that point in time—the principal market is the exchange with highest DVAS.

Step 5: An executed platform price is used to represent fair market value at 4:00 p.m. Eastern time.

Index data and the description of the Index are based on information made

⁴² Cash equivalents are short-term instruments with maturities of less than 3 months.

⁴³ 15 U.S.C. 80a-1.

publicly available by the Index Provider on its website at <https://lukka.tech>.

Net Asset Value

The Trust's NAV per Share is calculated by (1) taking the current market value of its ETH (calculated by the Index Provider) and any other assets; (2) subtracting any liabilities (including accrued by unpaid expenses); and (3) dividing that total by the total number of outstanding Shares. The Administrator calculates the NAV of the Trust on each day that the Exchange is open for regular trading, using the execution price of ETH on the principal market selected by the Index Provider as of 4:00 p.m. ET. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. ET and almost always by 8:00 p.m. ET).

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time.

In the event that the Index is unavailable or if the Sponsor or Administrator determines that the price provided by the Index does not reflect an accurate ETH price, the Sponsor's pricing team will evaluate the prices of other similar benchmarks in an effort to ensure that the Trust's NAV is determined based on consistent, accurate pricing that the Sponsor believes is reflective of the value of the Trust's ETH, and also a transparent index methodology and process. The pricing team will recommend the price to be used to the Sponsor's valuation committee who will then review the recommendation and approve it for use by the Trust if found appropriate.⁴⁴

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV per Share and the reported BZX Official Closing Price;⁴⁵ (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in

chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor's website at www.invesco.com/etfs, or any successor thereto.

The Intraday Indicative Value ("IIV") will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the consolidated tape association (CTA) and Consolidated Quotation System (CQS) high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

Quotation and last sale information for ETH is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the trading platforms on which ETH are traded. Depth of book information is also available from ETH trading platforms. The normal trading hours for ETH trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's BZX Official Closing Price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

The ETH Custodian

The Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Trust's private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Trust maintains exclusive ownership of its assets. The operational procedures of the Custodian are reviewed by third-party advisors with specific expertise in physical security. The devices that store the keys will never be connected to the internet or any other public or private distributed network—this is colloquially known as "cold storage." Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor or the investment professionals managing the Trust, acting alone or together, will be able to access or use any of the private keys that hold the Trust's ETH.

Creation and Redemption of Shares

When the Trust sells or redeems its Shares, it will do so in cash transactions in blocks of 5,000 Shares (*e.g.*, a Creation Basket) that are based on the quantity of ETH attributable to each Share of the Trust at the Trust's NAV. According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more Creation Baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of cash required is based on the combined NAV of the number of Shares included in the Creation Baskets being created determined as of 4:00 ET on the date the order to purchase is properly received. The Administrator determines the quantity of ether associated with a

⁴⁴ Such alternative method will only be employed on an ad hoc basis. Any permanent change to the calculation of the NAV would require a proposed rule change under Rule 19b-4.

⁴⁵ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

Creation Basket for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Basket.

The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

The authorized participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, authorized participants will not directly or indirectly purchase, hold, deliver, or receive ETH as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ETH as part of the creation or redemption process.

The Trust will create Shares by receiving ETH from a third party that is not the authorized participant and the Trust (through an execution agent that is acting in an agency capacity)—not the authorized participant—is responsible for selecting the third party to deliver the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the delivery of the ETH to the Trust or acting at the direction of the authorized participant with respect to the delivery of the ETH to the Trust. The Trust will redeem Shares by delivering ETH to a third party that is not the authorized participant and the Trust—not the authorized participant—is responsible for selecting the third party to receive the ETH. Further, the third party will not be acting as an agent of the authorized participant with respect to the receipt of the ETH from the Trust or acting at the direction of the authorized participant with respect to the receipt of the ETH from the Trust.

The Sponsor will maintain ownership and control of ETH in a manner consistent with good delivery requirements for spot commodity transactions.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange represents that, for initial and continued listing, the Trust must be in compliance with Rule

10A-3 under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of listing on the Exchange. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and the NAV and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds (1) a specified commodity⁴⁶ deposited with the trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange in a manner prescribed by the Exchange

⁴⁶ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act.

and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ETH, CME Ether Futures, options on CME Ether Futures, or any other ETH derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which include any person or entity controlling a Member. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of a Member that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares

inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share. The Shares of the Trust will conform to the initial and continued listing criteria set forth in BZX Rule 14.11(e)(4).

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible

for FINRA's performance under this regulatory services agreement.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, CME Ether Futures, or any other derivative with other markets and other entities that are members of the ISG, and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares, CME Ether Futures, or any other derivative from such markets and other entities.⁴⁷ The Exchange may obtain information regarding trading in the Shares, CME Ether Futures, or any other derivative via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours⁴⁸ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a

prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures and options on CME Ether Futures.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁹ in general and Section 6(b)(5) of the Act⁵⁰ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁵¹ including Commodity-Based Trust Shares,⁵² to be listed on U.S. national securities. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁵³ and (ii) the requirement that

⁴⁹ 15 U.S.C. 78f.

⁵⁰ 15 U.S.C. 78f(b)(5).

⁵¹ See Exchange Rule 14.11(f).

⁵² Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁵³ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the

⁴⁷ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁴⁸ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁵⁴ with a regulated

requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

⁵⁴ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since “they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or

market of significant size. Both the Exchange and CME are members of ISG.⁵⁵ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵⁶

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵⁷

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that:

practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in ISG constitutes such a surveillance sharing agreement. See *Wilshire Phoenix Disapproval*.

⁵⁵ For a list of the current members and affiliate members of ISG, see www.isgportal.com.

⁵⁶ See *Wilshire Phoenix Disapproval*.

⁵⁷ See *Winklevoss Order* at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

. . . fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME’s surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges’ comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵⁸

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME “can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵⁹ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁶⁰ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and

⁵⁸ See the Spot Bitcoin ETP Approval Order at 3011–3012.

⁵⁹ This logic is reflected by the U.S. Court of Appeals for the D.C. Circuit on its review of the Grayscale Order at 17–18. See *Grayscale Investments, LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023). Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

⁶⁰ Source: TokenTerminal.

therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the U.S. Court of Appeals for the D.C. Circuit found in its review of the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC ETH Funds has grown into the tens of billions of dollars and more than a billion dollars of exposure through Ether Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through roll costs for Ether Futures ETFs and premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, also believes that such concerns are now outweighed by these investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in Ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange’s surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information regarding the Trust’s ETH holdings as well as additional data regarding the Trust. The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day’s NAV per Share and the reported BZX Official Closing Price; (b) the BZX Official Closing Price in relation to the NAV per Share as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV per Share; (c) data in chart form displaying the frequency distribution of discounts and premiums of the BZX Official Closing Price against the NAV per Share, within appropriate ranges for

each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate its holdings on a daily basis on its website. The aforementioned information will be published as of the close of business available on the Sponsor’s website at www.invesco.com/etfs, or any successor thereto.

The IIV will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the most recently reported price of ETH as reported by the Index Provider or another reporting service. The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV may differ from the NAV due to the differences in the time window of trades used to calculate each price. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through the facilities of the CTA and CQS high speed lines. In addition, the IIV will be available through on-line information services such as Bloomberg and Reuters.

The price of ETH will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

As noted above, the Index is designed to provide an estimated fair market value for ETH. Information about the Index and Index value, including key elements of how the Index is calculated, will be publicly available at <https://lukka.tech>.

Quotation and last sale information for ETH is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the trading platforms on which ETH are traded. Depth of book information is also available from ETH trading platforms. The normal trading hours for ETH trading platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. Information regarding the previous day’s BZX Official Closing Price and trading volume information

for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal. For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather than facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-087 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBZX-2023-087. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-087 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶¹

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024-11711 Filed 5-28-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100212; File No. SR-NASDAQ-2023-045]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 to Proposed Rule Change to List and Trade Shares of the iShares Ethereum Trust Under Nasdaq Rule 5711(d) (Commodity-Based Trust Shares)

May 22, 2024.

On November 21, 2023, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities

and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares of the iShares Ethereum Trust under Nasdaq Rule 5711(d), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on December 11, 2023.³ On January 24, 2024, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On March 4, 2024, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On April 19, 2024, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety. On April 23, 2024, the Commission published notice of Amendment No. 1 to the proposed rule change.⁸ On May 22, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 2 amended and superseded the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the iShares Ethereum Trust (the "Trust") under Nasdaq Rule 5711(d) ("Commodity-Based Trust Shares"). The shares of the Trust are referred to herein as the "Shares." This Amendment No. 2 supersedes the Amendment No 1 in its entirety.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99081 (Dec. 5, 2023), 88 FR 85945. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nasdaq-2023-045/srnasdaq2023045.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99419, 89 FR 5970 (Jan. 30, 2024).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 99665, 89 FR 16811 (Mar. 8, 2024).

⁸ See Securities Exchange Act Release No. 100016, 89 FR 33414 (Apr. 29, 2024).

⁶¹ 17 CFR 200.30-3(a)(12).

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

(a) Purpose

The Exchange proposes to list and trade the Shares under Nasdaq Rule 5711(d),⁹ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange. iShares Delaware Trust Sponsor LLC, a Delaware limited liability company and an indirect subsidiary of BlackRock, Inc. ("BlackRock"), is the sponsor of the Trust (the "Sponsor"). The Shares will be registered with the SEC by means of the Trust's registration statement on Form S-1 (the "Registration Statement").¹⁰

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the "Trust Agreement") between the Sponsor, BlackRock Fund Advisors (the "Trustee") as the trustee of the Trust and will appoint Wilmington Trust, National Association, as Delaware Trustee of the Trust (the "Delaware Trustee") by such time that the Registration Statement is effective. The Trust issues Shares representing fractional undivided beneficial interests in its net assets. The assets of the Trust will consist only of ether ("ether" or "ETH") held by a custodian on behalf of the Trust, except under limited circumstances when transferred through

the Trust's prime broker temporarily (described below), and cash. Neither the Trust, nor the Sponsor, nor the Ether Custodian (as defined below), nor any other person associated with the Trust will, directly or indirectly, engage in action where any portion of the Trust's ETH becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ETH or generate income or other earnings.

From time to time, the Trust may be entitled to or come into possession of rights to acquire, or otherwise establish dominion and control over, any virtual currency (for avoidance of doubt, other than ether) or other asset or right, which rights are incident to the Trust's ownership of ether and arise without any action of the Trust, or of the Sponsor or Delaware Trustee on behalf of the Trust ("Incidental Rights") and/or virtual currency tokens, or other assets or rights, acquired by the Trust through the exercise (subject to the applicable provisions of the Trust Agreement) of any Incidental Right ("IR Virtual Currency") by virtue of its ownership of ether, generally through a fork in the Ethereum blockchain, an airdrop offered to holders of ether or other similar event.

With respect to a fork, airdrop or similar event, the Sponsor will cause the Trust to permanently and irrevocably abandon any such Incidental Rights and IR Virtual Currency and no such Incidental Right or IR Virtual Currency shall be taken into account for purposes of determining the NAV of the Trust.

Coinbase Custody Trust Company, LLC (the "Ether Custodian"), is the custodian for the Trust's ether holdings, and maintains a custody account for the Trust ("Custody Account"); Coinbase, Inc. (the "Prime Execution Agent"), an affiliate of the Ether Custodian, is the prime broker for the Trust and maintains a trading account for the Trust ("Trading Account"); and The Bank of New York Mellon is the custodian for the Trust's cash holdings (the "Cash Custodian") and together with the Ether Custodian, the "Custodians") and the administrator of the Trust (the "Trust Administrator"). Under the Trust Agreement, the Trustee may delegate all or a portion of its duties to any agent, and has delegated the bulk of the day-to-day responsibilities to the Trust Administrator and certain other administrative and record-keeping functions to its affiliates and other agents. The Trust is not an investment company registered under the Investment Company Act of 1940, as amended (the "1940 Act").

The investment objective of the Trust is to reflect generally the performance of the price of ether. The Trust seeks to reflect such performance before payment of the Trust's expenses and liabilities. The Shares are intended to constitute a simple means of making an investment similar to an investment in ether through the public securities market rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset platform. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in ether, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the ether owned by the Trust at such time, less the Trust's expenses and liabilities. Although the Shares are not the exact equivalent of a direct investment in ether, they provide investors with an alternative method of achieving investment exposure to ether through the public securities market, which may be more familiar to them.

Custody of the Trust's Ether and Creation and Redemption

An investment in the Shares is backed by ether held by the Ether Custodian on behalf of the Trust. All of the Trust's ether will be held in the Custody Account, other than the Trust's ether which is temporarily maintained in the Trading Account under limited circumstances, *i.e.*, in connection with creation and redemption Basket¹¹ activity or sales of ether deducted from the Trust's holdings in payment of Trust expenses or the Sponsor's fee (or, in extraordinary circumstances, upon liquidation of the Trust). The Custody Account includes all of the Trust's ether held at the Ether Custodian, but does not include the Trust's ether temporarily maintained at the Prime Execution Agent in the Trading Account from time to time. The Ether Custodian will keep all of the private keys associated with the Trust's ether held in the Custody Account in "cold storage".¹² The hardware, software, systems, and procedures of the Ether Custodian may not be available or cost-

⁹ The Commission approved Nasdaq Rule 5711 in Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR-NASDAQ-2012-013).

¹⁰ See Registration Statement on Form S-1, dated November 15, 2023, filed with the Commission by the Sponsor on behalf of the Trust. The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

¹¹ The Trust issues and redeems Shares only in blocks of 40,000 or integral multiples thereof. A block of 40,000 Shares is called a "Basket." These transactions take place in exchange for ether.

¹² The term "cold storage" refers to a safeguarding method by which the private keys corresponding to the Trust's ether are generated and stored in an offline manner, subject to layers of procedures designed to enhance security. Private keys are generated by the Ether Custodian in offline computers that are not connected to the internet so that they are more resistant to being hacked.

effective for many investors to access directly.

The Trust's ether holdings and cash holdings from time to time may temporarily be maintained in the Trading Account held with the Prime Execution Agent, an affiliate of the Ether Custodian. Coinbase Inc. serves as the Trust's Prime Execution Agent pursuant to the Trust's agreement with the Prime Execution Agent ("Prime Execution Agent Agreement"). In this capacity, the Prime Execution Agent facilitates the buying and selling of ether by the Trust in response to cash creations and redemptions between the Trust and registered broker-dealers that are Depositary Trust Company ("DTC") participants that enter into an authorized participant agreement with the Sponsor and the Trustee ("Authorized Participants"), and the sale of ether to pay the Sponsor's fee, any other Trust expenses not assumed by the Sponsor, to the extent applicable, and in extraordinary circumstances, in connection with the liquidation of the Trust's ether.

The Authorized Participants will deliver only cash to create shares and will receive only cash when redeeming shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process.

The Trust will create shares by receiving ether from a third party that is not the Authorized Participant and the Trust—not the Authorized Participant—is responsible for selecting the third party to deliver the ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the ether to the Trust or acting at the direction of the Authorized Participant with respect to the delivery of the ether to the Trust. The Trust will redeem shares by delivering ether to a third party that is not the Authorized Participant and the Trust—not the Authorized Participant—is responsible for selecting the third party to receive the ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the ether from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the ether from the Trust. The third party will be unaffiliated with the Trust and the Sponsor.

In connection with cash creations and cash redemptions, the Authorized Participants will submit orders to create

or redeem Baskets exclusively in exchange for cash. The Trust will engage in ether transactions to convert cash into ether (in association with creation orders) and ether into cash (in association with redemption orders). The Trust will conduct its ether purchase and sale transactions by, in its sole discretion, choosing to trade directly with designated third parties (each, an "Ether Trading Counterparty"), who are not registered broker-dealers pursuant to written agreements between each such Ether Trading Counterparty and the Trust, or choosing to trade through the Prime Execution Agent acting in an agency capacity with third parties through its Coinbase Prime service¹³ pursuant to the Prime Execution Agent Agreement. Ether Trading Counterparties settle trades with the Trust using their own accounts at the Prime Execution Agent when trading with the Trust.

For a creation of a Basket, the Authorized Participant will be required to submit the creation order by an early order cutoff ("Creation Early Cutoff Time"). The Creation Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date.

On the date of the Creation Early Cutoff Time for a creation order, the Trust will choose, in its sole discretion, to enter into a transaction with an Ether Trading Counterparty or the Prime Execution Agent to buy ether in exchange for the cash proceeds from such creation order. On settlement date for a creation, the Trust delivers Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. Also, on or around the settlement date, the Ether Trading Counterparty or Prime Execution Agent, as applicable, deposits the required ether pursuant to its trade with the Trust into the Trust's Trading Account in exchange for cash. In the event the Trust has not been able to successfully execute and complete settlement of an ether transaction by the settlement date of the creation order, the Authorized Participant will be given the option to (1) cancel the creation order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date of

the creation order. With respect to a creation order, as between the Trust and the Authorized Participant, the Authorized Participant is responsible for the dollar cost of the difference between the ether price utilized in calculating NAV per Share on trade date and the price at which the Trust acquires the ether to the extent the price realized in buying the ether is higher than the ether price utilized in the NAV. To the extent the price realized in buying the ether is lower than the price utilized in the NAV, the Authorized Participant shall get to keep the dollar impact of any such difference.

Because the Trust's Trading Account may not be funded with cash on trade date for the purchase of ether associated with a cash creation order, the Trust may borrow trade credits ("Trade Credits") in the form of cash from Coinbase Credit, Inc. (the "Trade Credit Lender"), an affiliate of the Prime Execution Agent, under the trade financing agreement ("Trade Financing Agreement") or may require the Authorized Participant to deliver the required cash for the creation order on trade date. The extension of Trade Credits on trade date allows the Trust to purchase ether through the Prime Execution Agent on trade date, with such ether being deposited in the Trust's Trading Account. On settlement date for a creation order, the Trust delivers Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. To the extent Trade Credits were utilized, the Trust uses the cash to repay the Trade Credits borrowed from the Trade Credit Lender. On settlement date for a creation order, the ether purchased is swept from the Trust's Trading Account to the Trust's Custody Account pursuant to a regular end-of-day sweep process.

For a redemption of a Basket, the Authorized Participant will be required to submit a redemption order by an early order cutoff (the "Redemption Early Cutoff Time"). The Redemption Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date. On the date of the Redemption Early Cutoff Time for a redemption order, the Trust may choose, in its sole discretion, to enter into a transaction with an Ether Trading Counterparty or the Prime Execution Agent, to sell ether in exchange for cash. After the Redemption Early Cutoff Time, the Trust instructs the Ether Custodian to prepare to move the associated ether from the Trust's Custody Account to the Trust's Trading Account. On settlement date for a redemption order, the Authorized Participant delivers the

¹³ The Coinbase Prime service is an execution service pursuant to which Coinbase will execute ether orders for the Trust by accessing liquidity from sources such as ether trading platforms, which can include Coinbase's own platform, and other liquidity providers. Trades can be executed according to an algorithm or on the basis of firm quotes sought by requests-for-quote ("RFQ") for a two-way price sent to liquidity providers. Algorithmic trades can be self-directed or executed by Coinbase's high touch execution desk, Coinbase Execution Services.

necessary Shares to the Trust, and on or around settlement date, an Ether Trading Counterparty or Prime Execution Agent, as applicable, delivers the cash associated with the Trust's sale of ether to the Trust in exchange for the Trust's ether, and the Trust delivers cash to the Authorized Participant. In the event the Trust has not been able to successfully execute and complete settlement of an ether transaction by the settlement date, the Authorized Participant will be given the option to (1) cancel the redemption order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date. With respect to a redemption order, between the Trust and the Authorized Participant, the Authorized Participant will be responsible for the dollar cost of the difference between the ether price utilized in calculating the NAV per Share on trade date and the price realized in selling the ether to raise the cash needed for the cash redemption order to the extent the price realized in selling the ether is lower than the ether price utilized in the NAV. To the extent the price realized in selling the ether is higher than the price utilized in the NAV, the Authorized Participant will get to keep the dollar impact of any such difference.

The Trust may use financing in connection with a redemption order when ether remains in the Trust's Custody Account at the point of intended execution of a sale of ether. In those circumstances, the Trust may borrow Trade Credits in the form of ether from the Trade Credit Lender, which allows the Trust to sell ether through the Prime Execution Agent on trade date, and the cash proceeds are deposited in the Trust's Trading Account. On settlement date for a redemption order, the Trust delivers cash to the Authorized Participant in exchange for Shares received from the Authorized Participant. In the event financing was used, the Trust will use the ether moved from the Trust's Custody Account to the Trading Account to repay the Trade Credits borrowed from the Trade Credit Lender.

Net Asset Value

The net asset value ("NAV") of the Trust is used by the Trust in its day-to-day operations to measure the net value of the Trust's assets. The NAV of the Trust will be equal to the total assets of the Trust, which will consist of ether and cash, less total liabilities of the Trust, each determined by the Trustee pursuant to policies established from time to time by the Trustee or its affiliates as described herein.

The Sponsor has the exclusive authority to determine the Trust's NAV, which it has delegated to the Trustee under the Trust Agreement. The Trustee has delegated to the Trust Administrator the responsibility to calculate the NAV and the NAV per Share for the Trust, based on a pricing source selected by the Trustee. In determining the Trust's NAV per Share, the Trust Administrator will value the ether held by the Trust based on the index price, unless the Sponsor in its sole discretion determines that the index is unreliable. The CME CF Ether-Dollar Reference Rate-New York Variant for the Ether-U.S. Dollar trading pair (the "CF Benchmarks Index") shall constitute the index ("the Index"), unless the CF Benchmarks Index is not available or the Sponsor in its sole discretion determines that the CF Benchmarks Index is unreliable and therefore determines not to use the CF Benchmarks Index as the Index. If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index is unreliable, (together a "Fair Value Event"), the Trust's holdings may be fair valued on a temporary basis in accordance with the fair value policies approved by the Trustee. If the CF Benchmarks Index is not used as the Index price, owners of the beneficial interests of Shares (the "Shareholders") will be notified in a prospectus supplement or on the Trust's website and, if this index change is on a permanent basis, a filing with the SEC under Rule 19b-4 of the Act will be required.

A Fair Value Event value determination will be based upon all available factors that the Sponsor or Trustee deems relevant at the time of the determination, and may be based on analytical values determined by the Sponsor or Trustee using third-party valuation models.

Fair value policies approved by the Trustee will seek to determine the fair value price that the Trust might reasonably expect to receive from the current sale of that asset or liability in an arm's-length transaction on the date on which the asset or liability is being valued consistent with "Relevant Transactions".¹⁴ In the instance of a Fair Value Event and pursuant the Sponsor's

fair valuation policies and procedures Volume Weighted Average Prices ("VWAP") or Volume Weighted Median Prices ("VWMP") from another index administrator ("Secondary Index") would be utilized. If a Secondary Index is not available or the Sponsor in its sole discretion determines the Secondary Index is unreliable, then the price set by the Trust's principal market as of 4:00 p.m. ET, on the valuation date would be utilized.

In the event the principal market price is not available or the Sponsor in its sole discretion determines the principal market valuation is unreliable, then the Sponsor will use its best judgment to determine a good faith estimate of fair value. The Trustee identifies and determines the Trust's principal market (or in the absence of a principal market, the most advantageous market) for ether consistent with the application of fair value measurement framework in FASB ASC 820-10.¹⁵ The principal market is the market where the reporting entity would normally enter into a transaction to sell the asset or transfer the liability. The principal market must be available to and be accessible by the reporting entity. The reporting entity is the Trust.

Net Asset Value Calculation and Index

On each Business Day (as defined below), as soon as practicable after 4:00 p.m. ET, the Trust Administrator evaluates the value of ether held by the Trust as reflected by the CF Benchmarks Index and determines the NAV per Share. For purposes of making these calculations, a Business Day means any day other than a day when Nasdaq is closed for regular trading ("Business Day").

The CF Benchmarks Index employed by the Trust is calculated on each Business Day by aggregating the notional value of ether trading activity across major ether spot platforms. The CF Benchmarks Index is designed based on the IOSCO Principles for Financial Benchmarks. The administrator of the CF Benchmarks Index is CF Benchmarks Ltd. (the "Index Administrator"). The CF Benchmarks Index serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/ETH), calculated as of 4:00 p.m. ET. The CF Benchmarks Index aggregates the trade flow of

¹⁴ A "Relevant Transaction" is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a "Constituent Platform" in the ETH/USD pair that is reported and disseminated by a Constituent Platform through its publicly available application programming interface and observed by the "Index Administrator", as such terms are defined below.

¹⁵ See FASB (Financial Accounting Standards Board) Accounting standards codification (ASC) 820-10. For financial reporting purposes only, the Trustee has adopted a valuation policy that outlines the methodology for valuing the Trust's assets. The policy also outlines the methodology for determining the principal market (or in the absence of a principal market, the most advantageous market) in accordance with FASB ASC 820-10.

several ether platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. Specifically, the CF Benchmarks Index is calculated based on the “Relevant Transactions” of all of its constituent ether platforms, which are currently: Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital (the “Constituent Platforms”), and which may change from time to time.

If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index is unreliable and so should not be used, the Trust’s holdings may be fair valued in accordance with the policy approved by the Trustee.¹⁶

Intraday Indicative Value

In order to provide updated information relating to the Trust for use by Shareholders, the Trust intends to publish an intraday indicative value per Share (“IIV”) using the CME CF Ether-Dollar Real Time Index.¹⁷ One or more major market data vendors will provide an IIV updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange’s regular market session of 9:30 a.m. to 4:00 p.m. ET (the “Regular Market Session”). The IIV will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during the Exchange’s Regular Market Session based on the CME CF Ether-Dollar Real Time Index to reflect changes in the value of the Trust’s NAV per Share during the trading day.

The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange’s Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services. All aspects of the Index methodology are publicly available at the website of Index Administrator, CF Benchmarks (<https://www.cfbenchmarks.com>).

Creation and Redemption of Shares

The Trust issues and redeems Baskets¹⁸ on a continuous basis.

¹⁶ If the Sponsor determines that the CF Benchmarks Index is unreliable and so should not be used on a permanent basis, the Exchange will file a 19b-4 application to use a new index instead of the CF Benchmarks Index.

¹⁷ The CME CF Ether-Dollar Real Time Index is a once a second benchmark index price for ether that aggregates order data from ether-USD markets operated by major cryptocurrency platforms that conform to certain constituent platform criteria.

¹⁸ Baskets will be offered continuously at the NAV per Share for 40,000 Shares. Therefore, a Basket of Shares would be valued at NAV per Share

Baskets are only issued or redeemed in exchange for an amount of cash determined by the Trustee on each day that Nasdaq is open for regular trading. No Shares are issued unless the Cash Custodian has allocated to the Trust’s account the corresponding amount of cash. The amount of cash necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust. Baskets may be created or redeemed only by Authorized Participants, who pay a transaction fee for each order to create or redeem Baskets to BlackRock Investments, LLC (“BRIL”), an affiliate of the Trustee and a wholly owned subsidiary of BlackRock, Inc., which has been retained by the Trust to perform certain order processing, Authorized Participant communications, and related services in connection with the issuance and redemption of Baskets.

The Sponsor will maintain ownership and control of the ether in a manner consistent with good delivery requirements for spot commodity transactions.

Overview of the Ethereum Industry

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of computer code-based logic, called a protocol, to create a unified understanding of ownership, commercial activity, and economic logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. No single intermediary or entity operates or controls the Ethereum network (referred to as “decentralization”), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or ether (“ETH”), which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the

multiplied by the Basket size and the value of ether required to be delivered in exchange for a creation of a Basket would equal the dollar value of the NAV per Share multiplied by the Basket size for such creations. The Trust may change the number of Shares in a Basket. Only Authorized Participants may purchase or redeem Baskets. Shares will be offered to the public from time to time at varying prices that will reflect the price of ether and the trading price of the Shares on Nasdaq at the time of the offer.

“Ethereum Blockchain”), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Up to now, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether or (ii) over-the-counter ether funds (“OTC ETH Funds”) with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹⁹

To this point, the lack of an ETP that holds spot ETH (a “Spot ETH ETP”) exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot ETH ETP are forced to find alternative exposure through generally riskier means. For

¹⁹ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot ETH ETPs.

example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot ETH ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 30% loss due to the change in the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot ETH ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,²⁰ Celsius Network LLC,²¹ BlockFi Inc.,²² and Voyager Digital Holdings, Inc.²³ have become unsecured creditors in the insolvencies of those entities. If a Spot ETH ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot ETH ETP. To this point, approval of a Spot ETH ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts,²⁴ including spot based Commodity-Based Trust Shares,²⁵ on

the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.²⁶ Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (“CFTC”) regulated futures market.²⁷ Further to

such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (3) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash.

²⁶ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

²⁷ See streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22) (the “First Gold Approval Order”); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR–Amex–2005–072); ETFs Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR–NYSEArca–2009–40); ETFs Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR–NYSEArca–2009–28); ETFs Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFs Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR–NYSEArca–2009–113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR–NYSEArca–2010–84); ETFs Precious Metals Basket

Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR–NYSEArca–2010–56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFs White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR–NYSEArca–2010–71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFs Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR–NYSEArca–2010–95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR–NYSEArca–2012–111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange ... and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APME Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR–NYSEArca–2012–18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR–NYSEArca–2012–66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR–NYSEArca–2013–61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFs Gold Trust, in which

Continued

²⁰ See FTX Trading Ltd., et al., Case No. 22–11068.

²¹ See Celsius Network LLC, et al., Case No. 22–10964.

²² See BlockFi Inc., Case No. 22–19361.

²³ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

²⁴ Pursuant to Nasdaq Rule 5720(a), the term “Trust Issued Receipt” means a security (a) that is issued by a trust which holds specified securities deposited with the trust; (b) that, when aggregated in some specified minimum number, may be surrendered to the trust by the beneficial owner to receive the securities; and (c) that pays beneficial owners dividends and other distributions on the deposited securities, if any are declared and paid to the trustee by an issuer of the deposited securities.

²⁵ Pursuant to Nasdaq Rule 5711(d)(iv), the term “Commodity-Based Trust Shares” means a security (1) that is issued by a trust that holds (a) a specified commodity deposited with the trust, or (b) a specified commodity and, in addition to such specified commodity, cash; (2) that is issued by

this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot exchange traded products ("ETPs") are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order "was based on an assumption that the currency market and the spot gold market were largely unregulated."²⁸

As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the CME ether futures ("CME Ether Futures") market, as described below, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust units (these funds are nearly identical to the Trust, but hold bitcoin and CME bitcoin futures

("CME Bitcoin Futures") instead of ether) ("Spot Bitcoin ETPs").²⁹ In considering the Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the Exchanges' comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the proposals.

Specifically, the Commission stated:

[B]ased on the record before the Commission and the improved quality of the correlation analysis in the record. . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME—a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of "significant size" related to spot bitcoin—can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.³⁰

The Exchange and Sponsor applaud the Commission for allowing the launch of Exchange Traded Funds ("ETFs") registered under the Investment Company Act of 1940, as amended (the "1940 Act") that provide exposure to ether primarily through CME Ether Futures. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

On October 2, 2023 the SEC approved nine ETH-based ETFs for trading.³¹ The ETFs hold CME Ether Futures and settle using the CME CF Ethereum Reference Rate ("ERR"), which is priced based on the spot ETH markets Coinbase, Kraken,

LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its ETH holdings. Given that the Commission has approved ETFs that offer exposure to CME Ether Futures, which themselves are priced based on the underlying spot ETH market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot ETH, like the Trust.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list spot ether ETPs, like the Trust, compared to the ETH Futures ETFs would lead to the conclusion that any concerns related to preventing fraudulent and manipulative acts and practices related to spot ether ETPs would apply equally to the spot markets underlying the CME Ether Futures held by an ETH Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of ETH Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving spot ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

The Sponsor believes that because the CME Ether Futures market is priced based on the underlying spot ETH market, any fraud or manipulation in the spot market would necessarily affect the price of CME Ether Futures, thereby affecting the net asset value of an ETP holding spot ETH or an ETF holding CME Ether Futures, as well as the price investors pay for such product's shares. Accordingly, either CME surveillance can detect spot-market fraud that affects both futures ETFs and spot ETPs, or that surveillance cannot do so for either type of product. Having approved ETH Futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and the Sponsor thus believes that it must also approve spot ETH ETPs on that basis.

In summary, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size as it relates both to the CME Ether Futures market and to the spot ETH market and that this proposal should be approved.

NYSE Arca represented that COMEX is one of the "major world gold markets," Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR–NYSEArca–2013–137) (notice of proposed rule change included NYSE Arca's representation that "COMEX is the largest gold futures and options exchange" and that NYSE Arca "may obtain trading information via the Intermarket Surveillance Group," including with respect to transactions occurring on COMEX pursuant to CME and NYMEX's membership, or from exchanges "with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement," Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR–NYSEArca–2016–84).

²⁸ See Winklevoss Order at 37592.

²⁹ See Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the "Spot Bitcoin ETP Approval Order").

³⁰ See the Spot Bitcoin ETP Approval Order at 3011–3012.

³¹ These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF (collectively, the "ETH Futures ETFs").

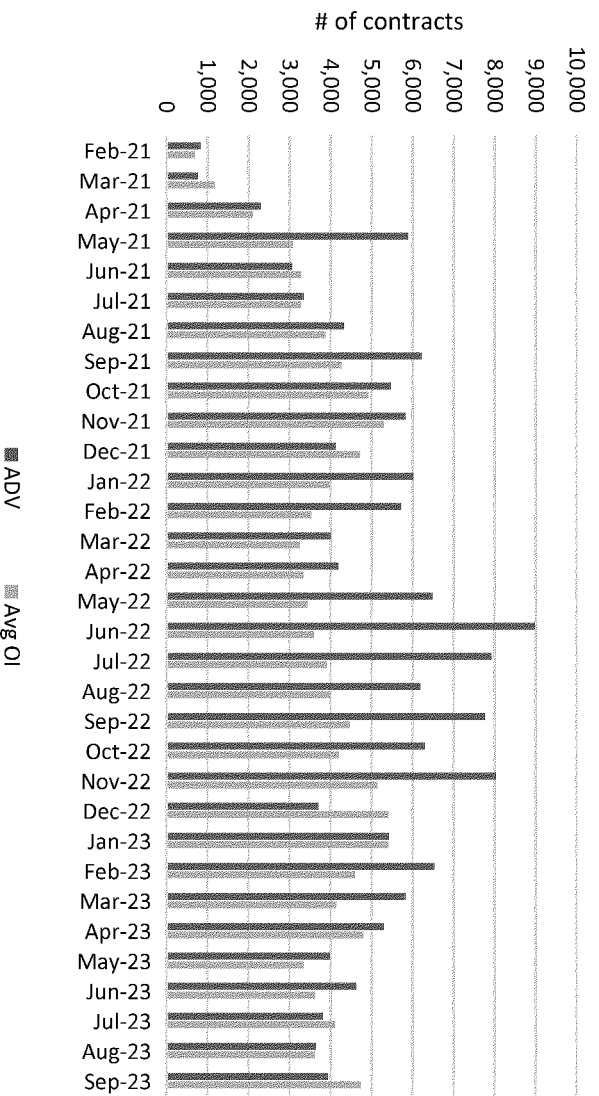
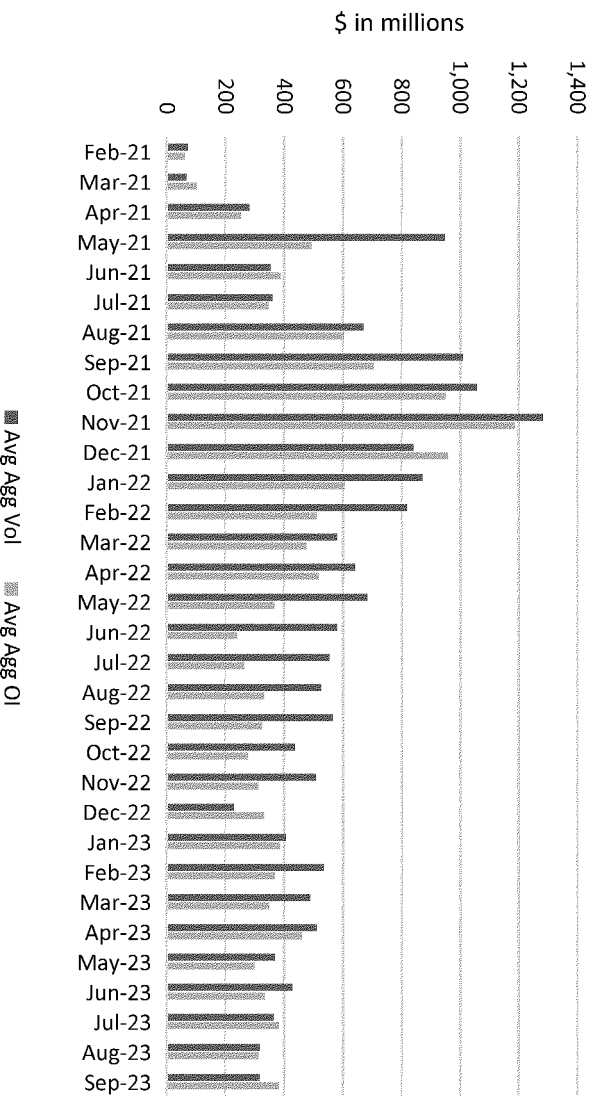
CME Ether Futures

CME began offering trading in CME Ether Futures in February 2021. Each contract represents 50 ETH and is based on the CME CF Ether-Dollar Reference Rate.³² The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures

have generally trended up since launch, although some metrics have slowed recently. For example, there were 78,571 CME Ether Futures contracts traded in September 2023 (approximately \$6.3 billion) compared to 163,114 (\$11.9 billion) and 130,546 (\$21.2 billion) contracts traded in September 2022, and September 2022

respectively.³³ The daily correlation between the spot ETH and the CME Ether Futures is 0.9993 from the period of 10/13/22 through 10/13/23.³⁴ The number of large open interest holders³⁵ and unique accounts trading CME Ether Futures have both increased, even in the face of heightened ETH price volatility.

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CME Ether Futures Average Daily Volume (ADV) & Open Interest (OI)**CME Ether Futures Aggregate Average Volume & Open Interest (OI)**

³² The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, iBit, Kraken, and LMAX Digital.

³³ Source: Bloomberg, BlackRock calculations. Data as of 10/18/2023 for period shown (2/8/2021 to 9/30/2023).

³⁴ Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot).

³⁵ A large open interest holder in CME Ether Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately \$1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than \$2.3 million in CME Ether Futures.

BILLING CODE 8011-01-C

Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;³⁶ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed to Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a

³⁶ The Exchange believes that ETH is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or Over-the Counter platform ("OTC platform"). As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

comprehensive surveillance sharing agreement in place³⁷ with a regulated market of significant size. Both the Exchange and CME are members of the Intermarket Surveillance Group ("ISG").³⁸ The only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³⁹

The Commission has also recognized that the "regulated market of significant size" standard is not the only means for satisfying Section 6(b)(5) of the Act, specifically providing that a listing exchange could demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance sharing agreement.⁴⁰

³⁷ As previously articulated by the Commission, "The standard requires such surveillance-sharing agreements since 'they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'" The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party." The Commission has historically held that joint membership in the Intermarket Surveillance Group ("ISG") constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the "Wilshire Phoenix Disapproval").

³⁸ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

³⁹ See Wilshire Phoenix Disapproval.

⁴⁰ See Winklevoss Order at 37580. The Commission has also specifically noted that it "is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the

(A) Reasonable Likelihood that a Person Attempting to Manipulate the ETP Would Also have to Trade on That Market To Manipulate the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that: . . . fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME Bitcoin Futures prices. And because the CME's surveillance can assist in detecting those impacts on CME Bitcoin Futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁴¹ The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals" makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(B) Predominant Influence on Prices in Spot and CME Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market or spot

burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met." *Id.* at 37582.

⁴¹ See the Spot Bitcoin ETP Approval Order at 3011-3012.

market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁴² The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,⁴³ with approximately \$1.7B occurring on venues whose trades are included in the Constituent Platforms.⁴⁴ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the court found in the Grayscale Decision "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and Sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME Ether Futures markets.

(C) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

As noted in the Surveillance section, the surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external

vendor that consolidates the real-time data from multiple ether platforms.

Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillances administered by Financial Industry Regulatory Authority ("FINRA"), on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange may obtain trading information regarding trading in the Shares from such markets and other entities.

Spot and Proxy Exposure to Ether

Exposure to ether through an ETP also presents certain advantages for retail investors compared to buying spot ether directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold ether through a cryptocurrency platform that lacks sufficient protections. Typically, retail platforms hold most, if not all, retail investors' ether in "hot" (internet connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot ether directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which point of failure could cause them to lose some or all of their ether holdings. Thus, with respect to custody of the Trust's ether assets, the Trust presents advantages

from an investment protection standpoint for retail investors compared to owning spot ether directly or via a digital asset platform.

Availability of Information

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior Business Day's NAV per Share; (b) the prior Business Day's Nasdaq official closing price; (c) calculation of the premium or discount of such Nasdaq official closing price against such NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The NAV per Share for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the relevant securities information processor. Also, an estimated value that reflects an estimated IIV will be disseminated. For more information on the IIV, including the calculation methodology, see "Intraday Indicative Value" above.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Index Administrator. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the platforms on which ether are traded. Depth of book information is also available from ether platforms. The normal trading hours for ether platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the

⁴² This logic is reflected by the court in Grayscale Investments, LLC v. SEC, 82 F.4th 1239 (D.C. Cir. 2023) (the "Grayscale Decision"). Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

⁴³ Source: CoinGecko.

⁴⁴ Source: CoinGecko, The Block, and BlackRock calculations.

previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV per Share will be calculated daily and will be made available to all market participants at the same time. A minimum of 80,000 Commodity-Based Trust Shares, or the equivalent of 2 Baskets, will be required to be outstanding at the time of commencement of trading on the Exchange. Upon termination of the Trust, the Shares will be removed from listing. The Delaware Trustee, will be a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the Delaware Trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(viii), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in the Shares shall trade in the underlying commodity, related futures or options on futures, or any other related derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by Nasdaq Rule 5711(d). In addition to the existing obligations under Exchange rules regarding the production of books and records, the registered Market Maker in the Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or any limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ether, CME Ether Futures contracts, options on CME Ether Futures, or any other ether derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its members, and their associated persons. The Exchange also has regulatory jurisdiction over any person or entity controlling a member, as well as a subsidiary or affiliate of a member that is in the securities business. A subsidiary or affiliate of a member organization that does business only in commodities would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. ET. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d) and will comply with the requirements of Rule 10A-3 of the Act.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and (10) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the

day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV per Share with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple ether platforms. Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillance administered by FINRA, on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and ether derivatives from such markets and other entities. The Exchange also may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an information circular (“Information Circular”) of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for creations and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV and NAV is disseminated; (4) the risks involved in trading the Shares during the pre-market and post-market sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no action and interpretive relief granted by the Commission from any rules under the Act.

The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of CME Ether Futures contracts and options on CME Ether Futures contracts.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that

information about the Shares will be publicly available on the Trust’s website.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴⁵ in general and Section 6(b)(5) of the Act⁴⁶ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴⁷ including Commodity-Based Trust Shares,⁴⁸ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange’s rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act because this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the

Exchange and CME are members of ISG.⁴⁹ As such, the only remaining issue to be addressed is whether the CME Ether Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁵⁰

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the Act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.⁵¹

(a) Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on That Market To Manipulate the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that: . . . fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME Bitcoin Futures prices. And because the CME’s surveillance can

⁴⁹ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

⁵⁰ See Wilshire Phoenix Disapproval.

⁵¹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

⁴⁵ 15 U.S.C. 78f.

⁴⁶ 15 U.S.C. 78f(b)(5).

⁴⁷ See Exchange Rule 5720.

⁴⁸ Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

assist in detecting those impacts on CME Bitcoin Futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.⁵² The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME "can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals" makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(b) Predominant Influence on Prices in Spot and CME Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in CME Ether Futures market or spot market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵³ The Sponsor notes that ETH total 24-hour spot trading volume has averaged \$9.1B over the year ending October 16, 2023,⁵⁴ with approximately \$1.7B occurring on venues whose trades are included in the sponsor's benchmark.⁵⁵ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME

Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the court found in the Grayscale Decision "Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less." The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME Ether Futures markets.

(c) Other Means to Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

As noted in the Surveillance section, the surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (e.g., spoofing, marking the close, ping, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple ether platforms.

Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange may obtain trading information regarding trading in the Shares from such markets and other entities.

Designed to Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodial spot ETH.

Commodity-Based Trust Shares—Nasdaq Rule 5711(d)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange

⁵² See the Spot Bitcoin ETP Approval Order at 3011–3012.

⁵³ This logic is reflected by the court in the Grayscale Decision. Specifically, the court found that "Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market. . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin."

⁵⁴ Source: CoinGecko.

⁵⁵ Source: CoinGecko, The Block, and BlackRock calculations.

that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the CF Benchmarks Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior Business Day's NAV per Share; (b) the prior Business Day's Nasdaq official closing price; (c) calculation of the premium or discount of such Nasdaq official closing Price against such NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Nasdaq official closing price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The NAV per Share for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the relevant securities information processor. Also, an estimated value that reflects an estimated IIV will be disseminated. For more information on the IIV, including the calculation methodology, see "Intraday Indicative Value" above.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at

the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Index Administrator. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the exchanges on which ETH is traded. Depth of book information is also available from ETH exchanges. The normal trading hours for ETH exchanges are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change rather will facilitate the listing and trading of additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. 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-2023-045 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-2023-045. 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-2023-045 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2024–11704 Filed 5–28–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 20320 and # 20321;
TEXAS Disaster Number TX–20010]

Presidential Declaration Amendment of a Major Disaster for the State of TEXAS

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of TEXAS (FEMA—4781–DR), dated 05/17/2024.

Incident: Severe Storms, Straight-line Winds, Tornadoes, and Flooding.

Incident Period: 04/26/2024 and continuing.

DATES: Issued on 05/21/2024.

Physical Loan Application Deadline Date: 07/16/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 02/18/2025.

ADDRESSES: Visit the MySBA Loan Portal at <https://lending.sba.gov> to apply for a disaster assistance loan.

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 TEXAS, dated 05/17/2024, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Eastland, Hardin, Jasper, Jones, Lamar, Waller.

Contiguous Counties (Economic Injury Loans Only):

Texas: Austin, Brown, Callahan, Comanche, Delta, Erath, Fannin, Fisher, Franklin, Haskell, Newton, Nolan, Orange, Palo Pinto, Red River, Sabine, San Augustine, Shackelford, Stephens, Stonewall, Taylor, Washington

Oklahoma: Bryan, Choctaw

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. 2024–11689 Filed 5–28–24; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[FAA–2024–1227]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: FAA Safety Team website (FSTW)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The collection involves creation of accounts, storage of training and awards history, and management of FAA Safety Team (FAASafetyTeam) volunteers. The information to be collected will be used to and/or is necessary because it allows for individual users to complete and track their individual training and awards accomplishments and allows for contact information to be available to users for FAASafetyTeam volunteers.

DATES: Written comments should be submitted by July 23, 2024.

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 60-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Bradford Wood by email at: Bradford.l.wood@faa.gov; phone: (304) 993–0819.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to

enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–XXXX.

Title: FAA Safety Team Website.

Form Numbers:

1. New Account Form—Team Member Application
2. Directory Application—Organization
3. FAA Industry Member Application
4. Application—FAA Training Provider
5. Application—Employer Enrollment
6. Representative Report
7. Directory Application—Individual
8. Course Feedback Form (Survey)
9. New Event Form—Seminar
10. New Event Form—Webinar
11. New Course Form—Internal
12. New Course Form—External
13. New Activity Form
14. Claim Reward—Wings Pins
15. Claim Reward—WIN Individual
16. Claim Reward—WIN CFI
17. Topic Suggestion Form
18. Application Course Provider (New Requirement)
19. Wright Brothers Master Pilot Award Application
20. Charles Taylor Master Mechanic Application.

Type of Review: This is a new collection.

Background: The FAA Safety Team website (FSTW) is provided by the FAA to administer safety program objectives that focus on reducing general aviation accident rates through providing information and training to the general aviation community. FSTW is the information highway and a core resource for the FAA Safety Team (FAASafetyTeam), which uses the site's automation tools to administer The Pilot Proficiency (WINGS) and Aviation Maintenance Technician (AMT) Awards Programs. The FAASafetyTeam also uses the site to send updates and notices to specific or widespread audiences about training opportunities such as courses, seminars, and webinars. The site also offers training courses for UAS certification, renewal, and knowledge training. Volunteers working with the FAA provide most of the training available on FSTW. The FAASafetyTeam collects information from users, volunteers, and FAA personnel necessary to manage the programs outlined in FAA Order 8900.1, Volume 15, FAA Advisory Circular 61–91J and FAA Advisory Circular 65–25F.

Respondents: Who (can also include how many, where, etc.) (add all respondents on each form together).

⁵⁶ 17 CFR 200.30–3(a)(12).

—The potential respondent universe is certificated and non-certificated airmen. We do not have a total/estimated total because anyone can respond.

Frequency: On occasion.

Estimated Average Burden per

Response: Minutes/Hours (add all hours and divide by total number of respondents).

—*Estimated Total Annual Burden:*

\$1,458,184.2 (Total of hours for all form × \$60).

—The average person will spend 5 minutes.

Issued in Washington DC.

Bradford L. Wood,

FAA Team Outreach Manager, ASI-AW, Automation & Systems Management Group, AFS-950, Safety Analysis and Promotion Division, AFS-900.

[FR Doc. 2024-11776 Filed 5-28-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2024-1657]

Agency Information Collection

Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Representatives of the Administrator, 14 CFR Part 183

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves the voluntary submission of application information for persons applying to become designated representatives of the FAA Administrator. The information to be collected will be used by the FAA to screen and select designees who will act as representatives of the FAA Administrator in performing various certification and examination functions on behalf of the FAA.

DATES: Written comments should be submitted by July 29, 2024.

ADDRESSES: Please send written comments:

By Electronic Docket: <https://www.regulations.gov> (enter docket number into search field).

By email: Tanya Glines, tanya.glines@faa.gov.

FOR FURTHER INFORMATION CONTACT:

Tanya Glines by email at: Tanya.glines@faa.gov; phone: 202-380-5896.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120-0033.

Title: Representatives of the Administrator, 14 CFR part 183.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: Title 49, United States Code, Section 44702 states that the Secretary of Transportation may delegate to any properly qualified private person, the examination and testing necessary for the issuance of certificates under Title VI of the Federal Aviation Act. Title 14, Code of Federal Regulations (14 CFR), part 183, Representatives of the Administrator, describes the requirements for delegating to any properly qualified private person, the examination and testing necessary for the issuance of airmen certificates.

Response to this collection of information is required to obtain a benefit, specifically, to obtain a FAA designation as a representative of the FAA Administrator. Designee applicants come from private industry. They are experts in the aviation and medical communities who are familiar with the regulations and certification requirements necessary to issue an FAA certificate. Only highly experienced aviation professionals are expected to respond to the collection. The collection is for reporting of an individual's eligibility and qualifications and occurs on an as needed basis for initial applicants. However, if an individual is not selected as a designee, their application must be updated whenever information changes (as needed) and at least every 12 calendar months (annually).

The FAA has now fully implemented the use of the Designee Management System (DMS) web-based application, located at <https://designee.faa.gov/#/>

login, for the application process for all designee types.

Respondents: Approximately 2,100 individuals applying to be a designated representative of the FAA Administrator.

Frequency: As needed, annually.

Estimated Average Burden per

Response: 4 hours.

Estimated Total Annual Burden: 8,500 hours.

Issued in Washington, DC, on May 23, 2024.

Tanya A. Glines,

Aviation Safety Inspector, FAA Office of Safety Standards, Aircraft maintenance Division, Airmen Section.

[FR Doc. 2024-11768 Filed 5-28-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0143]

Truck Leasing Task Force (TLTF); Notice of Public Meeting

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of public meetings.

SUMMARY: This notice announces two meetings of the TLTF.

DATES: The meetings will be held on Thursday, June 13 and Thursday, July 18, 2024, from 10 a.m.–4 p.m. ET. Requests for accommodations for a disability must be received by Friday, June 7 for the first meeting and by Friday, July 12 for the second meeting. Requests to submit written materials for consideration during the meeting must be received no later than Friday, June 7 and Friday, July 12, respectively.

ADDRESSES: The meetings will be virtual for their entirety. Please register in advance of the meeting at www.fmcsa.dot.gov/tltf. A copy of the agenda for each meeting will be made available at www.fmcsa.dot.gov/tltf at least 1 week in advance of each meeting. Once approved, copies of the meeting minutes will be available at the website following each meeting. You may visit the TLTF website at www.fmcsa.dot.gov/tltf for further information on the committee and its activities.

FOR FURTHER INFORMATION CONTACT: Ms. Shannon L. Watson, Deputy Designated Federal Officer, TLTF, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 360-2925, tltf@dot.gov. Any committee-related request should

be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

Section 23009 of the Bipartisan Infrastructure Law (BIL) (Pub. L. 117–58) requires the Federal Motor Carrier Safety Administration (FMCSA) to establish the TLTF, which was set up in accordance with the Federal Advisory Committee Act (FACA), Public Law 92–463 (1972). TLTF will examine the terms, conditions, and equitability of common truck leasing arrangements, particularly as they impact owner-operators and trucking businesses subject to such agreements and submit a report on the task force's identified issues and conclusions regarding truck leasing arrangements, including recommended best practices, to the Secretary, the Secretary of Labor, and the appropriate committees of Congress. TLTF will work in coordination with the United States Department of Labor.

TLTF operates in accordance with FACA under the terms of the TLTF charter, filed February 11, 2022, and amended April 28, 2023, and renewed February 9, 2024.

II. Agendas

June 13, 2024, Meeting

- TLTF will begin consideration of Task 24–3: whether truck leasing agreements properly incentivize the safe operation of vehicles, including driver compliance with the hours-of-service regulations and laws governing speed and safety generally and resources to assist CMV drivers in assessing the financial impacts of leasing agreements;

- A presentation by the Consumer Financial Protection Bureau (CFPB) on Its Findings of Submitted Leases for Commercial Motor Vehicles (CMV); and

- A public comment period that will allow drivers and lessees of CMVs to tell their personal experiences with leases and to present any supporting information they would like to share to assist TLTF in making recommendations on such agreements.

July 18, 2024, Meeting

- TLTF will begin consideration of Task 24–4: the opportunity that equitable leasing agreements provide for drivers to start or expand trucking companies and the history of motor carriers starting from single owner operators;

- A presentation by the Consumer Financial Protection Bureau (CFPB) on Its Findings of Submitted Leases for Commercial Motor Vehicles (CMV); and

- A public comment period that will allow drivers and lessees of CMVs to tell their personal experiences with leases and to present any supporting information they would like to share to assist TLTF in making recommendations on such agreements.

III. Public Participation

The meeting will be open to the public via virtual platform. Advance registration via the website (www.fmcsa.dot.gov/tltf) is required by Friday, June 7 for the first meeting and Friday, July 12, 2024, for the second meeting.

DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services due to a disability, such as sign language interpretation or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section by Friday, June 7 for the June 13 meeting and Friday, July 12, 2024, for the July 18 meeting.

Oral comments from the public will be heard during the designated comment period at the discretion of the TLTF chair and Designated Federal Officer. To accommodate as many speakers as possible, the time for each commenter will be limited to 2 minutes. Speakers are requested to submit a written copy of their remarks for inclusion in the meeting records and for circulation to TLTF members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the committee at any time.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2024–11740 Filed 5–28–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2024–0055]

Transforming Transportation Advisory Committee; Public Meeting

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: The Office of the Secretary of Transportation (OST) announces a public meeting of the Transforming Transportation Advisory Committee (TTAC) on Thursday, June 13, 2024. This notice announces the date, time, and location of the meeting, which will

be virtually open to the public. The purpose of the TTAC is to provide information, advice, and recommendations to the Secretary on matters relating to transportation innovations.

DATES: This meeting will be held on Thursday, June 13, 2024 from 11:30 a.m. to 3:30 p.m. Eastern Time (ET). A link allowing for live viewing of the meeting will be posted to <https://www.transportation.gov/ttac> ahead of the meeting start time.

ADDRESSES: The TTAC members will be meeting virtually via Zoom. The public may attend the meeting virtually, with information available on the USDOT TTAC website (<https://www.transportation.gov/ttac>) at least one week in advance of the meeting date.

FOR FURTHER INFORMATION CONTACT: TTAC Designated Federal Officer, c/o Vincent White, Jr., Senior Advisor for Innovation, Office of the Secretary, ttac@dot.gov, (202) 770–8887.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Secretary of Transportation (Secretary) established TTAC as a Federal Advisory Committee in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. ch. 10) to provide information, advice, and recommendations to the Secretary on matters relating to transportation innovations. TTAC is tasked with advice and recommendations to the Secretary about needs, objectives, plans, and approaches for transportation innovations.

Description of Duties

TTAC will undertake only tasks assigned to it by the Secretary of Transportation or designee and provide direct, first-hand information, advice, and recommendations by meeting and exchanging ideas on the tasks assigned. In addition, TTAC will respond to ad-hoc informational requests from OST.

II. Agenda

At the meeting, the agenda will cover the following topics:

1. Call to Order, Official Statement of the Designated Federal Officer, Meeting Logistics
2. Opening Remarks
3. Subcommittee Updates
4. Potential New Topics
5. Committee Business
6. Recap of Meeting Progress and Review of Next Steps

III. Public Participation

The meeting will be open to the public via livestream. Members of the public who wish to observe the virtual meeting can access the livestream accessible on the following website: <https://www.transportation.gov/ttac>.

We are committed to providing equal access to this meeting for all participants. Sign language interpretation and live-captioning will be available during the livestream. If you need alternative formats or services because of a disability, such as interpretation or other ancillary aids, or if you require translation into a language other than English, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than Thursday, June 6, 2024.

Members of the public may also submit written materials, questions, and comments to the Committee in advance to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than Thursday, June 6, 2024.

All advance submissions will be reviewed by the Designated Federal Officer. If approved, advance submissions shall be circulated to the TTAC members for review prior to the meeting. All advance submissions will become part of the official record of the meeting.

Authority: The Committee is a discretionary Committee under the authority of the U.S. Department of Transportation (DOT), established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. ch. 2.

Issued in Washington, DC, on May 23, 2024.

Vincent Gerard White Jr.,

Senior Advisor for Innovation.

[FR Doc. 2024–11782 Filed 5–28–24; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0516]

Agency Information Collection Activity: Loan Guaranty: Processing Assumptions of VA-Guaranteed Home Loans

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of a previously approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 29, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Program-Specific information: Nancy Kessinger, 202–632–8924, Nancy.Kessinger@va.gov.

VA PRA information: Maribel Aponte, 202–461–8900, vacopaperworkreduact@va.gov.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites

comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan Guaranty: Processing Assumptions of VA-Guaranteed Home Loans under 38 U.S.C. 3714.

OMB Control Number: 2900–0516. <https://www.reginfo.gov/public/do/PRAsearch>

Type of Review: Reinstatement of a previously approved collection.

Abstract: The collection of information is through electronic submission and is accomplished only once per respondent, per loan assumption transaction. This collection is necessary to identify the individual case to ensure VA has met all legal requirements concerning collection of the above-discussed credit package under 38 CFR 36.4301 and copy of the executed deed and/or assumption agreement pursuant to 38 CFR 36.4303(l)(1)(i)(A).

Affected Public: Individuals and households.

Estimated Annual Burden: 514 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 2,055.

Authority: 44 U.S.C. 3501 et seq, 38 U.S.C. 3714 et seq.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–11737 Filed 5–28–24; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

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Wednesday,

No. 104

May 29, 2024

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Coastal Distinct Population Segment of the Pacific Marten; Final Rule

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R8-ES-2020-0151;
FXES1111090FEDR-245-FF09E21000]

RIN 1018-BE33

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Coastal Distinct Population Segment of the Pacific Marten

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the coastal distinct population segment of Pacific marten (coastal marten) (*Martes caurina*), a mammal species from coastal California and Oregon, under the Endangered Species Act of 1973 (Act), as amended. In total, approximately 1,213,752 acres (491,188 hectares) in northwestern California and southwestern Oregon fall within the boundaries of the critical habitat designation. This rule extends the Act's protections to this entity's designated critical habitat.

DATES: This rule is effective June 28, 2024.

ADDRESSES: This final rule is available on the internet at <https://www.regulations.gov>. Comments and materials we received are available for public inspection at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151.

Availability of supporting materials: Supporting materials we used in preparing this rule, such as the species status assessment report, are available at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151. For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151 and on the Service's website at <https://www.fws.gov/office/arcata-fish-and-wildlife>.

FOR FURTHER INFORMATION CONTACT:

Vicky Ryan, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521; telephone 707-822-7201. 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:**Executive Summary**

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 *et seq.*), to the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species. On October 8, 2020, we published in the **Federal Register** (85 FR 63806) a final rule listing the coastal marten distinct population segment (DPS) as threatened, and on October 25, 2021, we published in the **Federal Register** (86 FR 58831) a proposed rule to designate critical habitat for the DPS. Designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This is a final rule to designate critical habitat for the coastal marten in five units totaling approximately 1,213,752 acres (ac) (491,188 hectares (ha)) in the States of Oregon and California.

The basis for our action. Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, concurrently with listing designate critical habitat for the species. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Previous Federal Actions

Please refer to the proposed rule to list the coastal marten DPS (83 FR 50574; October 9, 2018), the final rule

to list the DPS (85 FR 63806; October 8, 2020), the proposed rule to designate critical habitat for the DPS (86 FR 58831; October 25, 2021), and the document describing revisions to and reopening the comment period on the October 25, 2021, proposed rule (87 FR 59384; September 30, 2022) for detailed descriptions of the previous Federal actions concerning this DPS.

Peer Review

A species status assessment (SSA) team prepared a revised SSA report for the coastal marten (Service 2023, entire) based on both peer review and public comments. The SSA team was composed of Service biologists, in consultation with other species experts. The 2023 SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species and incorporates the results of peer review, public and agency comments, and new information that has become available since our proposed critical habitat rule was published on October 25, 2021 (86 FR 58831). The 2023 SSA report also identifies habitat needs and requirements for the coastal marten. We used information in the 2019 and 2023 SSA reports to inform our development of the physical or biological features as well as our criteria for determining and designating critical habitat for the coastal marten. The 2019 and 2023 SSA reports (Service 2019 and Service 2023) are available at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing and recovery actions under the Act, we solicited independent scientific review of the information contained in the draft coastal marten SSA report (Service 2019, entire). As discussed in the final listing rule (85 FR 63806; October 8, 2020) and the proposed critical habitat rule (86 FR 58831; October 25, 2021), we sent the 2019 SSA report to eight independent peer reviewers and received two responses. The peer reviews can be found at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151. Regarding comments applicable to this designation of critical habitat, we incorporated the comments which specifically addressed our characterization of coastal marten habitat and the DPS's use of habitat, as

appropriate, into the current SSA report (Service 2023, entire) and into this critical habitat designation.

Summary of Changes From the Proposed Rule

Our proposed critical habitat rule (86 FR 58831; October 25, 2021), contained an error in the acreage identified for Unit 1. The proposed rule identified 94,094 ac (37,673 ha) of Federal lands in Unit 1. The actual acreage of Federal land proposed for Unit 1 should have been 93,091 ac (37,673 ha). The acreages discussed for Unit 1 in this rule reflect this correction.

In addition, in preparing this final rule, we reviewed and fully considered the comments we received during the comment periods on our October 25, 2021, proposed rule (86 FR 58831) and our September 30, 2022, document describing revisions to and reopening the comment period on the October 25, 2021, proposed rule (87 FR 59384). In general, the changes from the proposed rule to this final rule fall into two main categories—the finalization of section 4(b)(2) exclusions and changes (additions and removals) to areas that are based on our consideration of comments and new information we received from land managers and updated land ownership information. These are described below as changes resulting from exclusions and from land manager comments. This final rule also reflects minor nonsubstantive changes (such as clarifications on habitat use) that were made to the SSA report (Service 2023, version 2.2, entire).

Changes as a Result of Exclusions Under Section 4(b)(2) of the Act

As identified in our October 25, 2021 (86 FR 58831), and September 30, 2022 (87 FR 59384), publications, we identified the Green Diamond Resource Company (GDRC) lands and the Yurok Tribal lands (trust lands, fee title lands, and reservation boundary adjustment lands) as being considered for exclusion under section 4(b)(2) of the Act from Unit 5 in California. Subsequent to the publication of our October 25, 2021, proposed rule, we received comments and information from both GDRC and the Yurok Tribe requesting that we exclude their lands from the critical habitat designation for the coastal marten DPS. We have finalized our exclusion analyses and are excluding approximately 49,010 ac (19,834 ha) of GDRC lands, which includes approximately 9,754 ac (3,947 ha) of GDRC lands that are within the Yurok Tribe reservation boundary; 64,979 ac (26,296 ha) of Yurok Tribal lands; and 25,791 ac (10,437 ha) of U.S. Forest

Service lands (reservation boundary adjustment lands) being managed by the Yurok Tribe from Unit 5 in California (for more information, see Consideration of Impacts under Section 4(b)(2) of the Act, below).

In addition, we received information regarding a new law that transferred 1,031 ac (417 ha) of Federal land from the Secretary of Agriculture to the Secretary of the Interior, to be held in trust for the benefit of the Karuk Tribe (Katimiin and Aamekyáaraam Sacred Lands Act, Pub. L. 117–353, January 5, 2023) (Karuk Tribal lands). The Karuk Tribal lands within the proposed critical habitat designation are located in Unit 5 in Siskiyou and Humboldt Counties, California, and total approximately 925 ac (374 ha). As a result of this legislation, we asked and the Karuk Tribe requested that we consider an exclusion of these lands from the final designation of critical habitat for the coastal marten DPS. As a result of the Tribe's request, we reviewed the best information available and conducted an exclusion analysis on the transferred lands and determined that the lands are appropriate for exclusion from the final designation (for more information, see Consideration of Impacts under Section 4(b)(2) of the Act, below).

Changes as a Result of Comments Received From Land Managers

We received comments and information from the U.S. Forest Service regarding whether certain areas within the eastern portion of Unit 1 in the Siuslaw National Forest in Oregon contain the physical or biological features (PBFs) essential to the conservation of the coastal marten and constitute areas of coastal marten habitat use (see *Federal Agency Comments*, below). As a result of our review of their comments, information they provided, subsequent meetings with the Siuslaw National Forest, and a site visit to the area in question, we have determined that the areas identified by the Siuslaw National Forest in Unit 1 do not meet our designation criteria and are not essential to the conservation of the coastal marten. We have, therefore, removed them from this final designation. This is based on information that the area in question does not contain the PBFs to the degree or extent necessary to support the coastal marten. Specifically, the environmental conditions in the more arid areas in the eastern portion of the proposed unit do not support the dense, spatially extensive shrub layer necessary for protection and cover and prey foraging. This final rule adopts a revised eastern boundary for Unit 1 and

does not include those areas that do not meet the definition of critical habitat. The overall acreage for Unit 1 now totals 22,135 ac (8,958 ha).

The Siuslaw National Forest also provided updated land ownership and habitat information for additional areas in Units 2, 3, and 4 and recommended changes to the boundaries of the designation in these units. The changes involve numerous small additions and removals based on habitat conditions, connectivity to previously proposed critical habitat, and land ownership. These changes result in a net reduction of 60 ac (24 ha) in Unit 3, and 3 ac (1.2 ha) in Unit 4. There is a net increase of 7,028 ac (2,844 ha) in Unit 2. See table 1, below, for land ownership and unit total acres for the final critical habitat designation.

As discussed in our October 25, 2021, proposed rule, we do not include areas that are managed by the Bureau of Land Management (BLM) or U.S. Forest Service (USFS) under the Oregon and California Revested Lands Sustained Yield Management Act of 1937 (43 U.S.C. 2601) (O&C lands) and currently allocated to the “harvest land base” (BLM) or “matrix” (USFS) land uses, as these lands are managed for permanent forest production and, therefore, are not likely to contain the physical or biological features essential to the conservation of the coastal marten in sufficient amounts or configuration to meet our criteria to be considered critical habitat for the DPS. However, based on the most current land use information for the entire designation which includes lands identified as O&C harvest land base lands, we identified a total of approximately 177 ac (72 ha) (121 ac (49 ha) in Unit 3 and 56 ac (23 ha) in Unit 5) of such O&C lands that were unintentionally included in the proposed designation, and we remove these lands from this final designation based on our criteria and rule set for designating critical habitat (see Conservation Strategy and Selection Criteria Used to Identify Critical Habitat, below).

Summary of Comments and Recommendations

In our October 25, 2021 (86 FR 58831), and September 30, 2022 (87 FR 59384), **Federal Register** publications, we requested that all interested parties submit written comments on the proposed designation by December 27, 2021, and October 17, 2022, respectively. We also contacted appropriate Federal and State agencies, Tribal entities, scientific experts and organizations, and other interested parties and invited them to comment on

the proposal. Newspaper notices inviting general public comment were published in the Oregonian for the areas in southwestern Oregon and the Times-Standard for areas in northwestern California. We did not receive any requests for a public hearing. All substantive information we received during comment periods has either been incorporated directly into this final determination and/or the 2023 SSA report, or is addressed below.

Peer Review Comments

As discussed in Peer Review, above, we received comments from two peer reviewers on the 2018 SSA report (Service 2018, version 1.1, entire). The peer reviewers generally concurred with our methods and conclusions, and they provided additional information and clarifications that we incorporated into the current version of the SSA report (Service 2023, version 2.2, entire) as appropriate. The SSA report forms the basis of information we used in determining the habitat needs, physical or biological features, and criteria for critical habitat for the coastal marten.

Federal Agency Comments

We reached out to all Federal agencies within the range of the coastal marten or that may be required to consult on critical habitat for the DPS under section 7 of the Act to request their comments on our proposed rule to designate critical habitat for the coastal marten. We received comments regarding the proposed designation from the USFS's Siuslaw National Forest. Their comments are summarized below and may be found at <http://www.regulations.gov> under Docket No. FWS-R8-ES-2020-0151 (Document No. FWS-R8-ES-2020-0151-0039).

(1) *Comment:* The USFS, Siuslaw National Forest requested changes to proposed Units 1, 2, 3, and 4 based on habitat conditions, occupancy, presence of the PBFs within these units, and/or land ownership information. According to their comments, areas within the eastern interior portions of proposed Unit 1 do not currently have the habitat conditions necessary to support coastal marten populations, and surveys of proposed Unit 1 found no evidence of coastal martens outside of the dunes or the dense coastal forest in the western part of proposed Unit 1. As a result, they recommended removing areas in the eastern portion of proposed Unit 1 from the final designation due to a lack of PBFs and use by the coastal marten. They also requested adjusting and including additional areas along the coastal dune habitats as well as east of Highway 101 in Units 2, 3, and 4 due

to presence of additional forested habitat not included in the October 25, 2021, proposed rule. According to the Siuslaw National Forest, these additional areas contain the PBFs and are, in some instances, occupied by the coastal marten. Further, according to the Siuslaw National Forest, including these areas would allow for expansion of currently occupied areas and assist in connectivity between and adjacent to habitat for the coastal marten.

Our response: We reviewed the information provided by the Siuslaw National Forest on potential changes to the proposed designation and considered any changes based on our strategy, criteria, and methodology for determining critical habitat for the coastal marten.

For the recommended changes to Unit 1, we met with the Siuslaw National Forest staff and conducted a site visit to review the habitat conditions of the eastern inland portions of proposed Unit 1 to determine if the PBFs are present in sufficient quantity and quality to be able to support coastal martens. After our review, we determined the areas proposed in the eastern inland portions of Unit 1 do not contain the PBFs in sufficient quantity, quality, or distribution to provide for coastal marten populations and, as a result, do not meet the definition of critical habitat for the DPS. Although some habitat features are present and may over time improve and have better distribution within the eastern inland portions of this unit in the future, we have removed the eastern portion of proposed Unit 1 from the final designation of critical habitat as these areas do not currently meet the definition of critical habitat. See Summary of Changes from the Proposed Rule, above, and the description of Unit 1 under Final Critical Habitat Designation, below, for additional information regarding Unit 1.

For the recommended changes to Units 2, 3, and 4, we reviewed information about the identified areas to determine whether the areas are owned by Federal or State agencies, are adjacent to existing identified critical habitat, contain the PBFs, and/or are occupied by coastal marten. Our review of the information provided by the Siuslaw National Forest resulted in some changes to the areas identified as critical habitat in Units 2, 3, and 4 by adding lands that meet these criteria. Other lands identified by the Siuslaw National Forest that are located on private lands and do not meet our criteria for identifying areas essential to the conservation of the coastal marten as critical habitat, are not included in this

final designation. See Summary of Changes from the Proposed Rule, above, and the descriptions of Units 2, 3, and 4 under Final Critical Habitat Designation, below, for additional information regarding changes to these units.

(2) *Comment:* The Siuslaw National Forest identified and clarified USFS land ownership information and mapping discrepancies within Units 1, 2, 3, and 4 for lands that they suggest should be removed from or included in a critical habitat designation for the coastal marten. The Forest suggested that areas not be included in the designation that are under private ownership or lands identified as critical habitat for the western snowy plover (*Charadrius nivosus nivosus*) that include beach grass (*Ammophila* sp.) or open sand, but to include areas for which the determination for inclusion in the proposed designation was based on habitat modeling. The Siuslaw National Forest provided maps of areas within Units 1, 2, 3, and 4 where they recommended adjustments.

Our response: We appreciate the information and suggestions for changes to the designation provided to us by the Siuslaw National Forest. We used the information to improve this designation for the coastal marten. In our review of the comments provided, we evaluated the suggestions and considered whether any addition or removal met or did not meet our criteria and methodology for determining critical habitat for the coastal marten (see Conservation Strategy and Selection Criteria Used to Identify Critical Habitat below) After consideration of whether the suggested changes are consistent with our criteria and methodology for designating critical habitat, we adjusted the boundaries of Units 1, 2, 3, and 4 (for more information, see Summary of Changes from the Proposed Rule, above).

Comments From States

(3) *Comment:* The Oregon Department of Fish and Wildlife (ODFW) stated that, while they concur that older forests often provide habitat elements needed by the coastal marten, they emphasize that other forest and nonforest cover types provide important habitat for the DPS in Oregon, including younger forests, coastal dune forests, and forested serpentine habitat. As a result, they recommended revisions to the descriptions of the PBFs essential to the conservation of the species to better reflect the use of younger and nontypical forested habitats.

Our response: We acknowledge that the coastal marten does occur in and uses various habitats for one or more of

its life stages. As discussed under Physical or Biological Features Essential to the Conservation of the Species, below, the PBFs we identify for the coastal marten include coastal dune, serpentine, and lower productivity forested habitat components, and the forest overstory within these areas may include highly variable conditions. We also identify forested habitats that have a structural component that supports denning or resting features such as large downed trees, rock piles with interstitial spaces, and large snags or live trees with decay elements or suitable resting structures (e.g., hollows and cavities, forked or broken tops, dead tops, brooms from mistletoe or other tree pathogens, or large platforms including abandoned nests). Younger forested habitat may be considered critical habitat if it provides such features or if it is dispersal or foraging habitat. We have updated the SSA report and this final rule to better clarify this information on the coastal marten's use of variable habitat, including younger forests, serpentine areas, and coastal dune forested habitats.

(4) *Comment:* The ODFW commented that our proposed designation may not be sufficient to provide for the conservation of the coastal marten and that they would support the designation of additional areas as critical habitat to provide for connectivity and dispersal corridors. To support this comment, ODFW developed a habitat connectivity model that identified high-value corridors between the identified critical habitat areas in Oregon. The three corridors include areas between Units 1 and 2, Units 3 and 4, and Units 4 and 5 (ODFW 2021, pp. 6–7).

Our response: We appreciate our partnership with ODFW and their significant contributions and involvement with coastal marten conservation in Oregon. In identifying critical habitat for the coastal marten, we developed a strategy for determining critical habitat that focuses on identifying areas that would assist in increasing the resiliency, representation, and redundancy of coastal marten populations by maintaining, improving, and expanding existing coastal marten populations and their habitat. Our designation focuses on the core areas that are associated with rearing or denning for the coastal marten and also includes areas of connectivity between habitats or home ranges to allow dispersal and potential establishment of new populations, such as the designated critical habitat in the relatively narrow corridor connecting areas between southern Oregon and northern California near the State border in Unit

5. Although our designation does include areas associated with opportunities for dispersal and connectivity between habitats for the coastal marten, we considered but did not identify the specific areas between the designated units as identified by the ODFW as critical habitat. This was due to the limited information on consistent use of these areas by the coastal marten and the large distances between the units which are outside the dispersal distances from home or denning sites. In addition, our removal of areas from Unit 1 because they did not contain the proper PBFs removed the connectivity of habitat between Unit 1 and 2 as identified by the ODFW. We have determined that the areas we identify as critical habitat provide connectivity and dispersal opportunities between existing coastal marten populations within each unit and make up core areas from which other conservation efforts, such as recovery actions, can expand on.

(5) *Comment:* The ODFW expressed concern with our use of habitat modeling to establish areas of critical habitat and recommended a cautious interpretation and use of model outputs when identifying critical habitat areas particularly if the modeling effort used surrogate or limited data. Specifically, ODFW stated that the available modeling (Slauson et al. 2019b, entire; Schrott and Shinn 2020, entire) may overemphasize older forested habitats and does not include younger aged forests or lower elevation areas associated with coastal dune forests. ODFW pointed to additional more recent modeling (Moriarty et al. 2021, entire) that includes use of broad-scale forest cover class variables to predict coastal marten habitat and suggested we review that model output to better identify coastal marten critical habitat.

Our response: We acknowledge ODFW's concern regarding dependence on modeling to determine critical habitat areas, but also acknowledge the need to use models when specific and detailed habitat use information may not be available as is the case for the coastal marten. However, in our development and identification of areas as critical habitat for the coastal marten, we did not solely rely on model output to create the critical habitat designation. Rather, we relied heavily on recent verifiable occupancy records, the extant population areas that are based on this occupancy, and known habitat characteristics within these areas. In identifying low-elevation coastal dune forest habitat for the coastal marten, we used the Schrott and Shinn 2020 connectivity model (Schrott and Shinn 2020, entire); however, this model

addresses the inclusion of low-elevation habitat by hand-mapping coastal dune forest for inclusion in the model. Our use of habitat modeling to assist in determining habitat extent and distribution was also informed by aerial imagery and reviewed by Service staff who are familiar with the areas and, in some cases, who have conducted site visits. We also acknowledge publication of Moriarty et al. (2021), a predictive occupancy model, and we compared its results to the areas we identify as critical habitat. Although the Moriarty model provides information on the areas potentially used by the coastal marten, its focus is on determining occupancy based on habitat conditions and not determining what occupied areas containing those features are considered essential to the conservation of the coastal marten, so could not be used as the sole source of data informing our designation. As a result, we consider the process and various sources of information we used to identify critical habitat for the coastal marten to be appropriate and based on the best scientific information available.

Comments From Tribes

(6) *Comment:* As discussed in our September 30, 2022, publication (87 FR 59384), we received comments from the Yurok Tribe regarding adjustments to land ownership information for the Tribe and a request to exclude lands from this final critical habitat designation for the coastal marten. The Yurok Tribe's request identified Tribal trust lands, Tribal fee lands, and other Tribal reservation boundary adjustment lands owned by the USFS in Unit 5 in California for exclusion from designation as critical habitat.

Our response: In this final rule, we identify 116,562 ac (47,171 ha) of lands affiliated with the Yurok Tribe (including fee, trust, and USFS lands) as critical habitat for the coastal marten, and we exclude all of those lands from this critical habitat designation. See *Tribal Lands under Exclusions Based on Other Relevant Impacts*, below, for additional information regarding Yurok Tribal land exclusions.

Public Comments

(7) *Comment:* Several commenters questioned our use of a 70 percent or greater threshold for shrub cover as a physical or biological feature for the coastal marten's home range and stated that habitat for the DPS is more variable and should include a range of shrub cover percentage rather than an absolute threshold. Other commenters disagreed with our description of canopy cover and suggested inclusion of younger

forested habitats in our PBFs. The commenters suggested looking at other coastal marten habitat modeling that includes use as habitat of less mature and more variable shrub and canopy cover by the coastal marten.

Our response: We acknowledge that the coastal marten uses a range of shrub cover as habitat especially for foraging, for seeking cover, or when traversing or dispersing to adjacent forested areas. However, because published studies on the specific habitat characteristics of home range for the coastal marten are not available rangewide, we characterize the home-range habitat used by the coastal marten at the stand scale and landscape scale, while being clear that this is a surrogate for knowledge of home-range use by the DPS. The best science available indicates that an extensive, dense, shrub layer is an important predictor of coastal marten occurrences and, most importantly, aligns with our understanding of individual and species needs (cover from predators, resting and denning features, and prey habitat). As discussed under Physical or Biological Features Essential to the Conservation of the Species, below, the identified PBFs for the coastal marten include descriptions that apply to both mature and younger forested habitats, as well as dune forests and forests within serpentine habitats. Critical habitat is not intended to include all habitat used by a species; it focuses on those specific areas occupied by a species on which are found those physical or biological features essential to the conservation of the species in an appropriate quantity and spatial arrangement for survival and reproduction. For the coastal marten, our use of the 70 percent shrub cover layer for foraging and cover and our identification of features that have the appropriate structural components for resting, denning, and reproducing will assist in conserving those areas essential to the conservation of the DPS. We clarify and update our discussion of habitat use by the coastal marten by incorporating information on younger habitat use by the DPS into our SSA report (Service 2023, section 2.5.3) and this final rule (see Background, below), as appropriate.

(8) *Comment:* Several commenters suggested we modify the description of habitat used by the coastal marten and that we deemphasize the coastal marten's use of mature or older forested habitat and not use the Old Growth Structural Index (OGSI) to determine coastal marten habitat or extrapolate habitat conditions in northern California for the rest of the DPS's range when determining critical habitat.

Our response: Our description and identification of habitat and the PBFs for the coastal marten do not specifically indicate that any particular stand age is necessary for coastal marten or that OGSI information is a component needed as a determining factor for critical habitat. OGSI is a spatial data layer developed by the USFS and Oregon State University and is an index of one to four measurable criteria (*i.e.*, density of large live trees, diversity of live-tree size classes, density of large snags, and percentage cover of downed woody material; Davis et al. 2015, p. 16). Although such features are used by and important to coastal marten, our critical habitat designation for the DPS is not completely focused on these habitat characteristics. Rather, based on habitat descriptions and PBFs, critical habitat should be structurally complex with some measure of the specified habitat characteristics of forest overstory, dense understory, and biologically complex structure that contains snags, logs, other decay elements, or other structures that support the coastal marten's denning, resting, or prey. We also identify less mature or low productive forested habitats (such as coastal dune, serpentine, or less mature habitats) as critical habitat for certain life-history functions. In determining critical habitat, we did not extrapolate the habitat information or conditions from northern California to determine the PBFs or critical habitat elsewhere in the DPS's range, but used both occupancy information and the habitat structure information discussed above. We clarify and update our description of habitat use by the coastal marten in our SSA report (Service 2023, section 2.5.3) and this final rule (see Background, below), as appropriate.

(9) *Comment:* Numerous commenters stated that the coastal marten uses numerous habitat types, including younger forests, and recommended inclusion of additional areas in the critical habitat designation associated with forested coastal dune and serpentine habitat. According to one of the commenters, the forested coastal dune habitats contain the highest known densities and populations of the coastal marten and not including such areas does not incorporate the best scientific information available.

Our response: We acknowledge that the coastal marten does occur in and uses various forested habitats for one or more of its life stages. However, although coastal martens have been detected on younger forested lands, we do not have evidence that they are using these areas as home ranges for denning

or that they remain in these areas for significant periods of time. In our development of this critical habitat designation, we included variable habitat types where the DPS is found, such as forested serpentine and coastal dune habitat. For forested coastal dune habitat, we included those areas that had recent verifiable detections of the DPS. The designation included the vast majority but not all of the records of coastal marten occupying the forested coastal dune habitat (see Final Critical Habitat Designation, Unit 2 and Unit 3, below). The designation of critical habitat does not require we identify the full extent of habitat used or available for use by a species. We acknowledge that areas outside the critical habitat designation are important for recovery of the DPS, but we point out that the designation of critical habitat is only one tool in conserving the coastal marten. Other conservation and recovery efforts outside critical habitat will be necessary, especially on non-Federal lands. We have determined that the areas currently occupied by the coastal marten that are included in this designation will provide for the resiliency, representation, and redundancy of coastal marten populations by maintaining and improving existing coastal marten populations and their suitable habitat.

(10) *Comment:* Several commenters suggested including additional areas, including unoccupied areas adjacent to or between units, to provide for connectivity or to account for the impacts to habitat resulting from the effects of climate change.

Our response: When designating critical habitat for the coastal marten, we first evaluated areas occupied by the species and reviewed these areas to determine if the areas identified provide sufficient resiliency, representation, and redundancy to conserve the species. We acknowledge the importance of connectivity between habitat for the coastal marten. In this critical habitat designation, we considered the dispersal needs of the DPS as part of our methodology for identifying areas as critical habitat. The areas we proposed and are now finalizing as critical habitat are all occupied by the DPS with recent verifiable records and provide for sufficient connectivity between populations of coastal marten. Therefore, no unoccupied areas are essential for the conservation of the species. With respect to the request that we include additional areas to anticipate the effects of climate change, the commenters did not provide information regarding the habitat changes that may occur or what

additional areas should be included for the coastal marten. However, we consider the amount, distribution, and extent of critical habitat units we are designating in this rule to be relatively resilient to the current effects of climate change, and thus this designation anticipates the effects of climate change to coastal marten habitat. As a result, we do not consider it necessary at this time to add any additional areas to this critical habitat designation to address the effects of climate change.

(11) Comment: Several commenters provided additional occurrence information and information on small, isolated, occupied areas. These commenters suggested we include these locations in our critical habitat designation for the coastal marten.

Our response: As a result of information we received since the October 25, 2021, publication of our proposed rule, including information we received during the two public comment periods, we became aware of additional detections of the coastal marten. These additional records will assist in our understanding of the distribution and range of the DPS. In reviewing the location and distribution information in these additional records, however, we could not determine if these records were actual populations or individuals dispersing to adjacent habitats. Part of our criteria for determining critical habitat for the coastal marten is to include areas that have numerous records of observed populations within the dispersal distance of known populations of the DPS. Some of the new additional records were in areas we had already considered for designation as critical habitat, and others were records of single individuals and most likely not part of a population. Smaller, isolated, occupied habitats, although they may be used by the DPS, are not considered to be critical habitat for the coastal marten due to the uncertainty as to whether these areas would provide sufficient resiliency, redundancy, and representation to maintain coastal marten populations and do not meet our criteria for determining critical habitat.

(12) Comment: One commenter questioned and requested clarification on occupancy within proposed Unit 5.

Our response: Our regulations at 50 CFR 424.02 define the “geographical area occupied by the species” as an area that may generally be delineated around species’ occurrences, as determined by the Secretary (*i.e.*, range). For coastal marten, we delineated extant population areas (EPAs) based on the DPS’s occurrences and contiguous suitable habitat that may support the DPS. We

then identified those PBFs essential to the conservation of the DPS to refine the boundaries of the EPAs and determine the critical habitat for the coastal marten in each unit. Additionally, consistent with the regulations at 50 CFR 424.12(d), when several areas, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat. Unit 5 contains multiple occurrences of coastal marten that are in close proximity to one another and are connected by contiguous forested habitat. Therefore, we include all these areas together as a single, occupied unit.

(13) Comment: Several commenters suggested we wait until better information and understanding of habitat for the coastal marten is available before finalizing the designation.

Our response: Under section 4(b)(2) of the Act and our regulations under 50 CFR 424.12, we are required to designate critical habitat concurrent with listing a species under the Act, to the maximum extent prudent and determinable. In our final listing rule, we affirmed that designation of critical habitat was not determinable at the time because information sufficient to perform a required analysis of the impacts of the designation was lacking (85 FR 63806, October 8, 2020, pp. 63829–63830). Later, in our October 25, 2021, proposed rule to designate critical habitat (86 FR 58831), we stated that designation of critical habitat for the coastal marten is both prudent and determinable. As a result, we are required to propose and finalize a designation based on the best scientific information available and not wait until new or more specific information becomes available. If new information becomes available in the future that warrants revisions to the areas we are designating as critical habitat in this rule, we may, upon our own initiative or through the petition process, revise this designation through rulemaking conducted in accordance with the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

(14) Comment: Several commenters stated that the designation of critical habitat will delay or stop timber and hazardous vegetation fuels-reduction activities that would otherwise provide for better forest health and wildfire resiliency objectives.

Our response: We recognize that land managers have a variety of forest management goals, including maintaining or improving ecological

conditions where the intent is to provide long-term benefits to forest resiliency and restore natural forest dynamic processes. Critical habitat designations do not establish specific land management standards or prescriptions, nor do designations affect land ownership or establish a refuge, wilderness, reserve, preserve, sanctuary, or any other conservation area where no active land management activities can occur.

The consultation requirements under section 7 of the Act apply to Federal agencies. Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. We have worked closely with the USFS, BLM, and National Park Service on implementation of measures to avoid adverse impacts to the physical or biological features for the coastal marten in the areas we are designating as critical habitat in this rule. We will continue to work with them to implement projects to benefit forest resiliency and natural forest dynamic processes on areas designated as critical habitat.

Activities implemented solely by non-Federal entities without Federal authorization or funding are not subject to the destruction/adverse modification standards of critical habitat under section 7 of the Act. Non-Federal activities remain subject to the Act’s prohibitions against take of listed species, such as the coastal marten, unless such take is excepted through a rule issued under section 4(d) or in accordance with an incidental take permit issued under section 10 of the Act. We note that, in our listing of the coastal marten, we issued a 4(d) rule (see 50 CFR 17.40(s)) that excepts from the Act’s section 9 prohibition against take certain forest management activities, including forest management activities for the purposes of reducing the risk or severity of wildfire and forestry management activities consistent with the conservation needs of the coastal marten. Accordingly, we do not consider this critical habitat designation to be a burden on implementation of timber and hazardous vegetation fuels-reduction activities, whether conducted by Federal agencies or non-Federal entities.

(15) Comment: Several commenters stated that the economic analysis is flawed in that it does not consider all economic impacts, including those

associated with listing of the DPS, cost to third parties due to critical habitat restrictions on recreational off-highway vehicle (OHV) use, or increased permitting requirements and costs under the California Environmental Quality Act (CEQA) for non-Federal actions.

Our response: Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. Our implementing regulations at 50 CFR 424.19(b) state that we will consider the probable economic impacts of a critical habitat designation and that we will “compare the impacts with and without the designation” (78 FR 53058; August 28, 2013). Guidelines issued by the U.S. Office of Management and Budget (OMB) for the economic analysis of regulations direct Federal agencies to measure the costs and benefits of a regulatory action against a baseline (*i.e.*, costs and benefits that are “incremental” to the baseline). The baseline includes the economic impacts of listing the species under the Act, even if the listing occurs concurrently with critical habitat designation. Impacts that are incremental to the baseline (*i.e.*, occurring over and above existing constraints) are those that are solely attributable to the designation of critical habitat. Our economic analysis focuses on the likely incremental effects of the critical habitat designation. In our incremental effects memorandum (IEM), we clarified the distinction between the recommendations that will result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards) for the coastal marten’s critical habitat. As discussed in section 3 of the screening analysis (Industrial Economics, Incorporated (IEC) 2021, pp. 7–14), we do not anticipate making any significant project modification recommendations to avoid adverse modification of coastal marten critical habitat beyond what we already would recommend to avoid impacts to the DPS and other listed species with similar habitat requirements. The economic analysis determined that the critical habitat designation was unlikely to trigger additional State or local regulations (IEC 2021, pp. 14–16). As a result, we have determined our economic analysis appropriately identifies costs associated with the designation.

(16) *Comment:* One commenter stated that the Service improperly certified that the designation will not have a significant impact on a substantial

number of small business entities and did not complete a regulatory flexibility analysis.

Our response: As stated in the proposed rule and this final rule (see *Regulatory Flexibility Act* 5 U.S.C. 601 *et seq.*) under Required Determinations, below), a regulatory flexibility analysis is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. In our October 25, 2021, proposed rule, we certified that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities (86 FR 58831, October 25, 2021, p. 58850). We reaffirm that certification in this final rule. Our basis for the certification is that Federal action agencies are the only entities directly regulated when we adopt a critical habitat designation. There is no requirement under the Regulatory Flexibility Act to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, the Service certifies that this critical habitat designation will not have a significant economic impact on a substantial number of small entities. As a result, a regulatory flexibility analysis is not required.

(17) *Comment:* One commenter suggested removing or clarifying table 2 in the October 25, 2021, proposed rule (86 FR 58831 at pp. 58837–58838) since it represents an example of vegetation characteristics at a site located within a small portion of the range.

Our response: Our intent for table 2 in the proposed rule was to provide an example of the vegetation characteristics used by the coastal marten in a portion of the DPS’s range. We described it as such in the paragraph preceding the table. However, to avoid confusion, we do not include the table in this final rule, and we include new language in this rule to highlight the importance of the multiple vegetation types used by the coastal marten throughout its range.

(18) *Comment:* Several commenters had concerns regarding the lands in Unit 5 that we identified as being considered for exclusion from the final designation under section 4(b)(2) of the Act. They stated that the coastal marten is a threatened species and that the habitat needs of the coastal marten should take priority over timber harvest activities that they stated are not adequately conserving habitat for the coastal marten. The commenters stated that our reliance on maintaining

partnerships should not be considered a benefit of exclusion and a complete weighing analysis should be completed before any exclusions are finalized.

Our response: In determining whether we exclude lands under section 4(b)(2) of the Act, we conduct a weighing analysis comparing the benefits of exclusion to the benefits of inclusion. If our analysis finds that the benefits of exclusion outweigh the benefits of designating such areas as critical habitat, the Secretary may then choose to exercise her discretion to exclude any area from critical habitat unless that exclusion would result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Currently, our exclusion decisions are governed by the regulations at 50 CFR 424.19 and our Policy Regarding Implementation of Section 4(b)(2) of the Act (hereafter, the “2016 policy”; 81 FR 7226, February 11, 2016). Under our 2016 policy, we can evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. In the *Private or Other Non-Federal Conservation Plans or Agreements and Partnerships*, in *General* and *Tribal Lands* discussions under Consideration of Impacts under Section 4(b)(2) of the Act, below, we provide our full weighing analysis and our rationale for excluding certain lands in Unit 5 from this final designation of critical habitat. We wish to emphasize that the exclusion of lands from the critical habitat designation should not be construed as a message that these lands are not important to the conservation of the coastal marten, nor should exclusion be interpreted as some indication that these lands are now somehow subject to habitat degradation or destruction because they are not included in the critical habitat designation. Lands excluded on the basis of conservation agreements and the recognition of conservation partnerships are expected to continue to make an important contribution to the conservation and recovery of the coastal marten absent the designation of critical habitat.

(19) *Comment:* One commenter stated that approximately 66,422 ac (26,880 ha) of BLM and USFS lands proposed for designation as critical habitat for the

coastal marten fall under the Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; 43 U.S.C. 2601) and that all of these O&C lands should be excluded from the final designation due to the O&C Act's requirements that these lands (O&C lands) be devoted to permanent forest production of timber and that such an exclusion would result in a significant economic benefit to local communities. The commenter further stated that the Service may not indirectly impose reserves on these O&C lands by designating them as critical habitat.

Our response: In determining critical habitat for the coastal marten, we developed specific criteria and a rule set to determine those specific areas occupied at the time of listing that contain the physical or biological features we consider essential to the conservation of the coastal marten. We did not include in the proposed designation, and do not include in this final designation, areas that are managed by the BLM or USFS under the O&C Act that are currently allocated to the "harvest land base" (BLM) or "matrix" (USFS) land uses, as these lands are managed for permanent forest production and are, therefore, not likely to contain the physical or biological features essential to the conservation of the coastal marten in sufficient amounts or configuration to be considered critical habitat for the DPS according to our criteria and rule set. Based on the most current land use information that includes lands identified as O&C harvest land base lands, we identified a total of approximately 177 ac (72 ha) (121 ac (49 ha) in Unit 3 and 56 ac (23 ha) in Unit 5) of such O&C lands that were unintentionally included in the proposed designation, and we remove these lands from this final designation based on our criteria and rule set for designating critical habitat (see Conservation Strategy and Selection Criteria Used to Identify Critical Habitat, below).

As to the commenter's request to exclude the total 66,422 ac (26,880 ha) of O&C lands managed by the BLM or USFS from this final designation, we did not include any USFS matrix lands in the designation. The makeup of BLM managed O&C lands is a mixture of both harvest base lands and other reserve lands such as late-successional reserves, riparian reserves, and other BLM district reserves. These reserve lands are areas managed by BLM to assist in conserving various aspects of the forest ecosystem to benefit not only the forest but also sensitive or other listed species. Based on our exclusion analysis (see

Consideration of Impacts under Section 4(b)(2) of the Act, below), we do not consider the requested exclusion appropriate for several reasons, including: (1) Not all O&C lands are managed as harvest land base/matrix lands; (2) BLM currently manages these lands in part for the purpose of contributing to the recovery of endangered and threatened species, providing clean water, restoring fire-adapted ecosystems, and providing for recreation opportunities (BLM 2016a, p. 20; BLM 2016b, p. 20); (3) the O&C lands that remain within the critical habitat designation are occupied by the coastal marten and contain the physical or biological features essential to conservation of the DPS; and (4) under our 2016 policy (81 FR 7226; February 11, 2016), we generally focus our exclusions on non-Federal lands, as that policy opines that the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands. The 2016 policy is based on the policy stated in the Act that all Federal departments and agencies seek to conserve endangered species and threatened species and use their authorities in furtherance of the purposes of the Act (16 U.S.C. 1531(c)(1)). Additionally, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *See Exclusion Analysis of Non-Harvest Land Base Lands (Oregon and California Lands (O&C Lands))* under Consideration of Impacts under Section 4(b)(2) of the Act, below, for our section 4(b)(2) exclusion analysis of the non-harvest land base O&C lands.

Our economic analysis did not identify significant economic impacts associated with the critical habitat designation. Because the areas we are designating as critical habitat are occupied by the coastal marten, the main costs associated with this designation are the administrative costs of determining whether an activity authorized, funded, or carried out by a Federal agency would result in the destruction or adverse modification of critical habitat for a listed species. Therefore, the exclusion of O&C lands in Unit 5 in Oregon would not be appropriate based on economic reasons.

Further, when listing the coastal marten as a threatened species, we adopted a section 4(d) rule that excepts certain forestry management activities from take prohibitions (see 50 CFR

17.40(s)). Such an exception allows land managers to continue to conduct certain timber harvest activities without needing take authorization.

Regarding the comment that the designation of critical habitat indirectly establishes reserves, critical habitat designations under the Act affect only Federal agency actions or federally funded or permitted activities. Designating areas as critical habitat does not establish a reserve, preserve, or sanctuary for a species or necessarily restrict further use of an area. Critical habitat is a tool to guide Federal agencies in fulfilling their conservation responsibilities by requiring them to consult with the Service under section 7 of the Act if their actions may destroy or adversely modify critical habitat for listed species.

Critical Habitat

Background

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. On April 5, 2024, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR 424 regarding how we add, remove, and reclassify endangered and threatened species to the lists and the criteria we consider for designating listed species' critical habitat (89 FR 24300). This final rule is now in effect and incorporated into the current regulations. Our analysis for this final decision applied our current regulations. Given that we proposed critical habitat for this species under our prior regulations (revised in 2019), we have also undertaken an analysis of whether our decision would be different if we had continued to apply the 2019 regulations and we concluded that the decision would be the same. The analyses under both the regulations currently in effect and the 2019 regulations are available on <https://www.regulations.gov>.

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are

found those physical or biological features

(a) Essential to the conservation of the species; and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

This critical habitat designation was proposed when the regulations defining "habitat" (85 FR 81411; December 16, 2020) and governing the section 4(b)(2) exclusion process for the Service (85 FR 82376; December 18, 2020) were in place and in effect. However, those two regulations have been rescinded (87 FR 37757, June 24, 2022; 87 FR 43433, July 21, 2022) and no longer apply to any designations of critical habitat. Therefore, for this final rule designating critical habitat for the coastal marten, we apply the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (81 FR 7226, February 11, 2016).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and translocation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse

modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal action agency would have already been required to consult with the Service even absent the critical habitat designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information

Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in the 4(d) rule for the coastal marten (see 50 CFR 17.40(s)). Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to

contribute to recovery of the coastal marten. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the

species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the coastal marten from studies of the DPS’ habitat, ecology, and life history as described below. Additional information can be found in the SSA report (Service 2023, entire; available on <https://www.regulations.gov> under Docket No. FWS–R8–ES–2020–0151). A more detailed discussion of the physical or biological features for the coastal marten can be found in our proposed critical habitat rule (86 FR 58831, October 25, 2021, pp. 58835–58839). We have determined that the following physical or biological features (PBFs) are essential to the conservation of the coastal marten:

*Physical or Biological Feature 1—*Habitat that supports a coastal marten home range by providing for breeding, denning, resting, or foraging. This habitat provides cover and shelter to facilitate thermoregulation and reduce predation risk, provides foraging sources for coastal marten prey, and provides structures that provide resting and denning sites. For cover and support denning, resting, and foraging, coastal martens require a dense forest overstory, dense understory development, and biologically complex structure that contains snags, logs, other decay elements, or other structures. Stands meeting the conditions for PBF 1 would also function as meeting PBF 2 (facilitating movement within and between coastal marten home ranges). Stands meeting the condition for PBF 1 contain each of the following three components:

(1) *Mature, conifer-dominated forest overstory.* Overstory canopy cover provides protection to coastal martens from aerial and terrestrial predators, as well as shelter from physical elements such as sun or storms. It also is the general source of structural features that coastal martens use for denning and resting, and provides suitable coastal

marten prey. Suitable overstory conditions vary depending on the productivity of the site as follows:

a. For areas with relatively low productivity (e.g., areas where growing conditions are harsher, such as serpentine sites or coastal shore pine forests, compared to other areas), suitable forest overstory conditions are highly variable. They may contain a sparse conifer overstory, such as in some serpentine areas, or a dense conifer overstory composed mainly of trees smaller than the typical older forest conditions described below in (1)b. (e.g., the dense shore pine overstory found in areas occupied by coastal marten along the Oregon coast) as well as those resting and denning structures necessary that are as of yet undescribed for some populations.

b. For other areas with higher productivity, coastal martens tend to favor forest stands in the old-growth or late-mature seral stages. The specific forest composition and structure conditions found in higher productivity areas will vary by plant series and site class. Structural and composition descriptions of old-growth or late-mature seral stages for local plant community series should be used where available. In general these stands exhibit high levels of canopy cover and structural diversity in the form of: (i) a wide range of tree sizes, including trees with large diameter and height; (ii) deep, dense tree canopies with multiple canopy layers and irregular tree crowns; (iii) high numbers of snags, including large-diameter snags; and (iv) abundant downed wood, including large logs, ideally in a variety of decay stages.

(2) *Dense, spatially extensive shrub layer.* The shrub layer should be greater than 70 percent of the area, comprising mainly shade-tolerant, long-lived, mast-producing species (primarily ericaceous species such as salal, huckleberry, or rhododendron, as well as shrub oaks). An extensive layer of dense shrubs provides protection and cover from coastal marten predators. In addition, ericaceous and mast-producing shrubs provide forage for coastal marten prey.

(3) *Stands with structural features.* Structural features that support denning or resting, such as large downed trees, rock piles with interstitial spaces, and large snags or live trees with decay elements or suitable resting structures (e.g., hollows and cavities, forked or broken tops, dead tops, brooms from mistletoe or other tree pathogens, or large platforms including abandoned nests). These features provide cover and thermal protection for kits and denning females, and for all animals when they are resting between foraging bouts.

Hence, these features need to be distributed throughout a coastal marten's home range. They also tend to be among the largest structures in the stand. Many of these features, such as downed trees and snags or live trees with decayed elements, also support coastal marten prey.

Physical or Biological Feature 2— Habitat that allows for movement within home ranges among stands that meet PBF 1, or supports individuals dispersing between home ranges. Habitat with PBF 2 includes: (1) stands that meet all three conditions of PBF 1; (2) forest stands that only meet the first two components of PBF 1 (mature, conifer-dominated forest overstory and a dense, spatially extensive shrub layer); or (3) habitats with some lesser amounts of shrub, canopy, forest cover, or lesser amounts of smaller structural features as described in PBF 1, and while not meeting the definition of PBF 1, still provide forage and cover from predators that allow coastal martens to traverse the landscape to areas of higher quality habitat.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the coastal marten may require special management considerations or protection to reduce the following direct or indirect threats: impacts from wildfire; timber harvest and other vegetation management or fuel reduction actions; habitat loss or fragmentation from road or highway construction. A detailed discussion of activities influencing the coastal marten and its habitat can be found in the SSA report (Service 2023, p. 37) and final listing rule (85 FR 63806; October 8, 2020). Special management considerations or protection that may be required within critical habitat areas to address these threats include, but are not limited to, the following: development of wildlife crossings on major roadways; maintaining adequate cover and connectivity of habitats to provide cover from predation; implementation of forest management practices that prevent or reduce risk of catastrophic wildfire; reducing indirect impacts to coastal marten habitat from activities adjacent to critical habitat units; and minimizing habitat disturbance, fragmentation, and

destruction through use of best management practices for vegetation management activities and providing appropriate buffers around coastal marten habitat, including denning and resting structures.

Conservation Strategy and Selection Criteria Used To Identify Critical Habitat

Conservation Strategy

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not designating any areas outside the geographical area occupied by the DPS because we have not identified any unoccupied areas that meet the definition of critical habitat. Those areas we have identified encompass the varying habitat types and distribution of the DPS and provide sufficient habitat to allow for maintaining and potentially expanding its distribution.

To determine and select appropriate occupied areas that contain the physical or biological features essential to the conservation of the DPS or areas otherwise essential for the conservation of the coastal marten, we developed a conservation strategy for the designation of critical habitat. The goal of our conservation strategy for the coastal marten is to assist in recovery of the DPS to the point where the protections of the Act are no longer necessary. The role of critical habitat in achieving this conservation goal is to identify the specific areas within the coastal marten's range that provide the essential physical or biological features without which the coastal marten's rangewide resiliency, redundancy, and representation could not be achieved. This, in turn, requires an understanding of the fundamental parameters of the species' biology and ecology based on well-accepted conservation-biology and ecological principles for conserving species and their habitats, such as those described by Carroll et al. 1996 (pp. 1–12); Shaffer and Stein 2000 (pp. 301–321); Natural Resources Conservation Service (NRCS) 2004 (entire); Tear et al. 2005 (pp. 835–849); Groom et al. 2006 (pp. 419–551); Redford et al. 2011 (pp. 39–48); and Wolf et al. 2015 (pp. 200–

207); and more specific coastal marten habitat information such as that described in Moriarty et al. 2016 (pp. 71–81); Delheimer et al. 2018 (pp. 510–517); Linnell et al. 2018 (pp. 1–21); Moriarty et al. 2019 (pp. 1–25); and Slauson et al. (2019a, entire).

In developing our conservation strategy, we focused on increasing the resiliency, representation, and redundancy of coastal marten populations by maintaining and improving extant coastal marten populations and suitable habitat. Because coastal martens occur in small and isolated populations, the primary focus of the conservation strategy is to maintain and expand extant populations and suitable habitat within those population areas. Suitable habitat includes areas for cover, resting, denning and foraging and also provides for dispersal habitat when breeding or food resources may not be optimal. To maintain redundancy of coastal marten populations, the conservation strategy also focuses on providing for areas in the diversity of habitats that coastal martens have been documented to use. This includes mesic serpentine, coastal shore pine, and late-seral coniferous forests. These habitats are spread across the species' range and typically provide the physical and biological features essential to the conservation of the species without which rangewide resiliency, redundancy, and representation of the species could not be achieved. As explained further below, this focus led to the inclusion of suitable habitat within the ecological settings where the species occurs as part of the conservation strategy.

Selection Criteria and Methodology Used To Determine Critical Habitat

As discussed above, to assist in determining which areas to identify as critical habitat for the coastal marten, we focused our selection on extant populations in the diversity of habitats represented by coastal marten. To define areas we consider occupied at the time of listing, we started with a set of detection points and grouped those detections into EPAs. The EPAs and the habitat areas adjacent to and within dispersal distance between the EPAs encompass the core areas we consider to be occupied at the time of listing. All current (since 1980) verifiable coastal marten detections were used to delineate EPAs within the historical home range. We selected this timeframe to ensure we were incorporating those records most likely to be extant based on the information available. If the total number of detections in an area was less than five or they were separated by

greater than 3 miles (mi) (5 kilometers (km)) from other verifiable detections, the combined detections were not designated as an EPA due to the insufficient level of information to suggest a likely self-sustaining population (Service 2019, pp. 75–81). EPAs were considered separate from each other if they were not within 4.6 mi (7.5 km) of each other, which is based on half of the average dispersal distance of a coastal marten. This distance assumes that animals are not regularly moving between EPAs and the EPAs are functioning as separate populations. To better focus the areas occupied at the time of listing and considered to be essential to the conservation of the coastal marten, we refined the boundaries of the EPAs using a mapping process (60 percent concave hull method) to better select and focus on those areas with a higher prevalence of coastal marten detections.

Because the EPAs are based on occurrence records and not habitat, we also used two different habitat models specific to coastal marten to incorporate the habitat used by the coastal marten detections associated with each EPA. These modeled areas are considered occupied by the species based on the continuous nature of the habitat and are within the dispersal distance and home ranges of the species. The first model we used found that coastal martens were positively associated with Old-Growth Structural Index (OGSI), precipitation, and serpentine soils, and negatively with elevation (Slauson et al. 2019b, entire). OGSI is a spatial data layer developed by the USFS and Oregon State University and is an index of one to four measurable old-growth structure elements, including (1) density of large live trees, (2) diversity of live-tree size classes, (3) density of large snags, and (4) percentage cover of downed woody material (Davis et al. 2015, p. 16). OGSI serves as a surrogate for the late-seral structural features that are important to coastal marten survival and, in conjunction with the serpentine soil layer, incorporates several of the PBFs defined above. The inclusion of precipitation in the model accounts for the association of the mesic shrub layer that coastal martens depend on for cover, resting, and foraging.

We also used a habitat connectivity model developed by the Service that incorporates OGSI data along with a minimum patch size of habitat to create ‘cores’ of suitable habitat (Schrott and Shinn 2020, entire). We used our model in conjunction with the Slauson et al. 2019b model because the Slauson model does not include low-elevation areas known to be occupied by coastal

martens. The Service model includes modeled output in lower elevation coastal regions of California and Oregon where we know coastal martens occur. Because the entire combined modeled extent of habitat overestimates the amount of habitat used by and needed for coastal marten conservation, we eliminated any modeled areas that were not adjacent to EPAs and eliminated modeled output in arid environments east of the Klamath River in California where suitable habitat is more scarce and localized to moist ravines. In addition, we trimmed the polygons where there were long tendrils displaying high edge-to-interior ratio that were generally artifacts of roads, modeled output, or misaligning of ownership projections and, thus, did not contain the PBFs considered essential to the conservation of the DPS.

We further evaluated the polygons based on the PBFs for coastal marten and current land management practices under the Northwest Forest Plan (NWFP) (USFS and BLM 1994, entire) on federally managed lands and the timber industry on privately owned lands. Large portions of the privately owned lands in Oregon within the range of the coastal marten are used for timber harvest and are clear cut on a rotational basis. This type of management does not always support the maintenance of structural diversity of habitat needed by the coastal marten, and we concluded these areas are unlikely to have the PBFs essential to the coastal marten and would not support denning or resting structures to the degree necessary for the conservation of the species. As a result, we prioritized inclusion of Federal reserve lands and State lands occupied by the species at the time of listing because these lands contribute most to the conservation of the DPS, but also included those private lands that contain the PBFs essential to coastal marten conservation and which may require special management. In Oregon, we relied on Federal and State lands to meet the conservation needs of the coastal marten. The intermingled private lands in Oregon are largely industrial timberlands managed primarily for timber harvest production. Timber harvest practices in western Oregon are generally comprised of rotational clearcut operations that harvest most trees from the clearcut site. The areas are then replanted and the resulting forest is made up of even-aged stands of single tree species composition. Because these areas are uniformly and regularly harvested, the structure and PBFs needed for resting, denning, and cover on these private

timber lands are generally lacking to the degree needed by the coastal marten.

When determining critical habitat boundaries, we used the best land use and ownership information available and made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the coastal marten. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Due to unverifiable ownership and mapping information, some small portions of private or unclassified lands may occur within the mapping of Units 1, 2, 3, and 4, but they are not intended for inclusion within the designation. These areas are extremely small artifacts of mapping discrepancies and potential overlapping data information, do not contain the PBFs considered essential to the conservation of the species, and are not intended to be included as critical habitat as defined in this rule.

Accordingly, any private lands in Units 1, 2, 3, and 4 in Oregon inadvertently included in the designation due to land ownership irregularities are not considered critical habitat because they are part of inadvertent overlap or are undeterminable and are too small to be significant for coastal marten conservation. Similarly, inadvertent inclusion of private lands covered by buildings, roads, and other structures are not included in the final designation in California, but other private lands containing the physical or biological features are part of the final designation unless otherwise excluded under section 4(b)(2) of the Act (see Consideration of Impacts under Section 4(b)(2) of the Act, below). Private land owner actions on these lands will not trigger section 7 consultation with respect to critical habitat unless their action is federally authorized, funded, or permitted.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more-detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on <https://>

www.regulations.gov at Docket No. FWS-R8-ES-2020-0151, and on our internet site at <https://www.fws.gov/office/arcata-fish-and-wildlife>.

Final Critical Habitat Designation

We are designating five units as critical habitat for the coastal marten.

The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the DPS. The five units we designate as critical habitat are: (1) Siuslaw; (2) Siltcoos; (3) Coos Bay; (4) Cape Blanco; and (5)

Klamath Mountains. Table 1 shows the land ownership and approximate areas of the designated critical habitat units for the coastal marten. All the units are occupied by the DPS.

TABLE 1—CRITICAL HABITAT UNITS FOR THE PACIFIC MARTEN (COASTAL DPS)

[Area estimates reflect all land within critical habitat unit boundaries.]

Unit No. and name	Ownership (in acres (hectares))				Total
	Federal	State	Tribal	Other	
Unit 1: OR-1 Siuslaw	20,092 (8,131)	2,043 (827)	0	0	22,135 (8,958)
Unit 2: OR-2 Siltcoos	15,610 (6,317)	249 (101)	0	0	15,859 (6,418)
Unit 3: OR-3 Coos Bay	14,806 (5,992)	595 (241)	0	0	15,402 (6,233)
Unit 4: OR-4 Cape Blanco	1,019 (412)	3,025 (1,224)	0	0	4,044 (1,636)
Unit 5: OR- CA-5 Klamath Mountains	1,125,492 (455,471)	17,812 (7,208)	0	13,008 (5,264)	1,156,312 (467,943)
Totals	1,177,020 (476,323)	23,724 (9,601)	0	13,008 (5,264)	1,213,752 (491,188)

Note: Area sizes may not sum due to rounding. “Other” represents, city, county, private, or otherwise unidentified land ownership areas.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the coastal marten, below.

Unit 1: Siuslaw Unit; Lincoln and Lane Counties, Oregon

This unit consists of approximately 22,135 ac (8,958 ha) and encompasses the northern portion of the central coastal Oregon population of coastal martens. Almost all of the unit is within Lane County, north of Oregon Highway 126, but a small portion extends north into Lincoln County, Oregon, on lands managed by the Siuslaw National Forest. The unit mostly borders the Pacific Ocean from just south of the town of Yachats, south to near Sea Lion Caves. The unit is largely in Federal ownership (20,092 ac (8,131 ha)) (91 percent), specifically the Siuslaw National Forest, with portions of the unit in Late-Successional Reserve (LSR) land use allocation under the NWFP (USFS and BLM 1994, entire). Rock Creek and Cummins Creek Wilderness Areas make up much of the rest of the Federal lands. Oregon State Park lands along the coast comprise the remainder of the unit (2,043 ac (827 ha)), including Neptune, Heceta Head, Washburne, and Ponsler State Parks. Recreation is a principal land use in this unit. Because the Federal lands are in an LSR allocation, forest management is limited to activities that are neutral or beneficial to the retention or development of late-successional forest conditions.

This unit was occupied at the time of listing (2020), is currently occupied by

coastal martens, and contains all of the physical or biological features essential to the conservation of the species. This unit represents the northernmost distribution of coastal martens in Oregon (based on contemporary detections), as well as relatively unfragmented old forest compared to other forests near the ocean within the DPS. This area may facilitate movement of coastal martens inland. This unit provides all of the features described in PBFs 1 and 2. Overstory conditions as described in PBF 1 are mostly associated with high-productivity sites across much of this unit, characteristic of the mature forests of the Sitka spruce vegetation zone as described in Franklin and Dyrness (1988, pp. 58–59).

The habitat-based threats in this unit that may require special management include removal of forest vegetation, primarily through vegetation management such as timber harvest. Portions of the Federal land within this unit are managed as LSR lands, which requires retaining or developing late-successional conditions that could be suitable for coastal martens. However, some treatments that meet LSR standards and guidelines, such as thinning to increase tree size or stand complexity, can result in loss of dense understories that are valuable to coastal martens to escape from predators and provide suitable prey habitat. This unit has been reduced by 73,083 ac (29,576 ha) from the area proposed as critical habitat based on information received from USFS that the eastern inland portions of the unit do not contain the

PBFs in sufficient quantity, quality, or distribution to provide for coastal marten populations and, as a result, do not meet the definition of critical habitat for the DPS.

Unit 2: Siltcoos Unit; Lane and Douglas Counties, Oregon

This unit consists of approximately 15,859 ac (6,418 ha) and encompasses the central portion of the central coastal Oregon population of coastal martens in coastal Lane and Douglas Counties, Oregon. The unit occurs along the coastline west of Highway 101 and extends from near the city of Florence, Oregon, south approximately 12 mi (19 km) to the vicinity of Tahkenitch Creek, west of Tahkenitch Lake. Land ownership within the unit includes approximately 15,610 ac (6,317 ha) of Federal and 249 ac (101 ha) of State land. The Federal portion is within the Oregon Dunes National Recreation Area, managed by the Siuslaw National Forest. The State portion comprises Honeyman State Park. Recreation, primarily all-terrain vehicle (ATV) use on the open dunes and forested trails within the recreation area and surrounding areas, is the principal land use in this unit.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens. Coastal martens in this unit and Unit 3 exhibit the highest densities and smallest home ranges documented in North America (Linnell et al. 2018, p. 13), indicating that the physical or biological features coastal martens require are widely available in

this unit. The unit contains all of the components described in PBFs 1 and 2. For the forest overstory component of PBF 1, this unit falls into the less productive site category, due to the harsher growing conditions along the Oregon coast. Forest vegetation in this unit generally comprises dense strands of shore pine with extremely dense shrub understories, as described in Franklin and Dyrness (1988, pp. 291–294). This unit encompasses one of four known coastal marten populations, which maintains redundancy across the DPS. Coastal martens in this unit and Unit 3 are generally isolated from coastal martens in the rest of the DPS, with limited ability to connect populations across the landscape.

The habitat-based threats in this unit that may require special management include possible loss of shore pine and understory shrub habitat in an effort to restore movement of coastal sand dunes or increase open areas for recreation vehicles. An additional threat that may require management is the invasion of nonnative shrub species (e.g., Scotch broom (*Cytisus scoparius*)) that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. In this unit, we have added approximately 7,028 ac (2,844 ha) beyond what we proposed for this unit on October 25, 2021 (86 FR 58831), based on comments we received on habitat characteristics, coastal marten occupancy of the areas, Federal land ownership information, and the proximity of the subject areas to areas proposed as coastal marten critical habitat.

Unit 3: Coos Bay Unit; Douglas and Coos Counties, Oregon

This unit consists of approximately 15,402 ac (6,233 ha) and encompasses the southern portion of the central coastal Oregon population of coastal martens in coastal Douglas and Coos Counties, Oregon. The unit extends from Winchester Bay south to the north spit of Coos Bay proper, and lies west of U.S. Highway 101. Land ownership includes 14,806 ac (5,992 ha) of Federal and 595 ac (241 ha) of State land. The majority (13,233 ac (5,351 ha)) of the Federal portion is within the Oregon Dunes National Recreation Area, managed by the Siuslaw National Forest. The BLM owns approximately 1,584 ac (641 ha). The State portion comprises Umpqua Lighthouse State Park. This unit is similar to Unit 2 in terms of primary land use, coastal marten occupancy, presence of physical or biological features, vegetation description, essentiality of conservation,

and habitat-based threats. Recreation, primarily ATV use on the open dunes and forested trails within the recreation area and surrounding areas, is the principal land use in this unit.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens. Coastal martens in this unit, along with Unit 2, exhibit the highest densities and smallest home ranges in North America (Linnell et al. 2018, p. 13). The physical or biological features coastal martens require are widely available in this unit. The unit contains all of the components described in PBFs 1 and 2. For the forest overstory component of PBF 1, this unit falls into the less productive site category, due to the harsher growing conditions along the Oregon coast. Forest vegetation in this unit generally comprises dense strands of shore pine with extremely dense shrub understories, as described in Franklin and Dyrness (1988, pp. 291–294). This unit encompasses one of four known coastal marten populations, which maintains redundancy across the DPS. Coastal martens in this unit and Unit 2 are generally isolated from coastal martens in the rest of the DPS, with limited ability to connect populations across the landscape.

The habitat-based threats in this unit that may require special management include addressing the possible loss of shore pine and understory shrub habitat in an effort to restore movement of coastal sand dunes or increase open areas for recreation vehicles. Special management may be required to address the invasion of nonnative shrub species (e.g., Scotch broom) that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. In this rule, we have reduced this unit by approximately 60 ac (24 ha) from our proposal based on comments we received on habitat characteristics, coastal marten occupancy of the area, and Federal land ownership information.

Unit 4: Cape Blanco Unit; Coos and Curry Counties, Oregon

This unit consists of approximately 4,044 ac (1,636 ha) and encompasses the immediate coastal portion of the southern coastal Oregon population of coastal martens in coastal Coos and Curry Counties, Oregon. The unit extends from just south of the Bandon State Natural Area, south to Cape Blanco State Park, and lies west of U.S. Highway 101. Land ownership includes 1,019 ac (412 ha) of Federal (BLM) and 3,025 ac (1,224 ha) of State land. The Federal portion is managed by the BLM

as a District Designated Reserve and not being considered as part of any timber harvest program. Portions of the reserve are managed for recreation, while other portions are managed as the New River Area of Critical Environmental Concern to protect and conserve natural resources. The State portion comprises Cape Blanco State Park and Floras Lake State Natural Area. Recreation is the principal land use in this unit.

This unit was occupied at the time of listing (2020) and is currently occupied by coastal martens and contains all of the physical or biological features essential to the conservation of the species. The unit is a mix of shore pine dominated forests in the lowlands near the ocean, and more mature Sitka spruce forest in the higher bluffs around Cape Blanco. This unit encompasses occupied coastal forest that is known to be suitable habitat for coastal martens.

The habitat-based threats in this unit that may require special management are the prevalence of invasive shrub species that may preclude the development of ericaceous shrubs and shore pine that are known components of suitable coastal marten habitat. In this rule, we removed approximately 3 ac (1.2 ha) from our proposal based on comments we received on habitat characteristics, coastal marten occupancy of the area, and Federal land ownership information.

Unit 5: Klamath Mountains Unit; Coos, Curry, Douglas, and Josephine Counties, Oregon, and Del Norte, Humboldt, and Siskiyou Counties, California

This unit consists of approximately 1,156,312 ac (467,943 ha) and occurs mostly within the Klamath Mountains of southwestern Oregon and northwestern California. Within Oregon, the unit occurs in the southern part of Coos County, just south of Powers, Oregon, and extends south through eastern Curry and western Josephine Counties, with the northeastern fringe of the unit extending into Douglas County. The northwestern portion of this unit consists of a non-contiguous portion that encompasses Humbug Mountain State Park. The unit extends south into California, occupying much of the eastern portion of Del Norte County, extending south into Humboldt County and east into Siskiyou County. In California, the unit lies west of U.S. Highway 96 and extends all the way to the Pacific Ocean in northern Humboldt County, encompassing Redwood National and State Parks. The unit is 97 percent federally owned (approximately 1,125,492 ac (455,471 ha)), with an additional 17,812 ac (7,208 ha) of State lands, and the remainder (13,008 ac

(5,264 ha)) owned by private or local governments. The USFS is the principal Federal land manager (Rogue River-Siskiyou, Six Rivers, and Klamath National Forests) (approximately 1,013,456 ac (410,131 ha)) with the BLM managing additional lands in Oregon (approximately 66,489 ac (26,907)) and the National Park Service managing lands in California (Redwood National Park; approximately 45,528 ac (18,425 ha)). LSRs account for approximately 45 percent of the Federal ownership. In addition, several Wilderness Areas are within this unit, including Grassy Knob, Wild Rogue, Copper Salmon, and Kalmiopsis in Oregon, and the Siskiyou Wilderness in California.

This unit was occupied at the time of listing (2020), is currently occupied by coastal martens, and contains all of the physical or biological features essential to the conservation of the species. This unit represents the southernmost distribution of critical habitat for the coastal marten and encompasses the majority of known coastal marten detections. Outside of portions of Unit 1, it also is the only source of non-shore pine habitat, and includes a variety of vegetation conditions that coastal martens use, enhancing representation. This unit contains key connectivity areas for coastal martens to move either north or south in the DPS, as well as inland or towards the coast. Overstory conditions as described in PBF 1 are associated with high productivity sites across much of the unit, but low-productivity serpentine sites also occur across this unit.

The habitat-based threats in this unit that may require special management include removal of forest vegetation, primarily through vegetation management such as timber harvest. Fuels management to reduce the risk of fire is also a regular activity throughout much of this unit. We have excluded portions of Unit 5 under section 4(b)(2) of the Act for the Green Diamond Resource Company, the Yurok Tribe, and the Karuk Tribe (see Consideration of Impacts under Section 4(b)(2) of the Act, below).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species (50 CFR 402.02).

Compliance with the requirements of section 7(a)(2) of the Act is documented through our issuance of:

- (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- (2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during formal consultation that:

- (1) Can be implemented in a manner consistent with the intended purpose of the action,
- (2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,
- (3) Are economically and technologically feasible, and
- (4) Would, in the Service Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinstate consultation. Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an

effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action. As provided in 50 CFR 402.16, the requirement to reinstate consultations for new species listings or critical habitat designation does not apply to certain agency actions (e.g., land management plans issued by the Bureau of Land Management in certain circumstances).

Destruction or Adverse Modification of Critical Habitat

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires that the **Federal Register** notice “shall, to the maximum extent practicable also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify [critical] habitat, or may be affected by such designation.” Activities that may be affected by designation of critical habitat for the coastal marten include those that may affect the physical or biological features of the coastal marten’s critical habitat (see Physical or Biological Features Essential to the Conservation of the Species).

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no DoD lands with a completed INRMP

within the final critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the 2016 policy (81 FR 7226; February 11, 2016)—both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (M–37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

The Secretary may exclude any particular area if she determines that the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

We describe below the process that we undertook for deciding whether to exclude any areas—taking into consideration each category of impacts and our analysis of the relevant impacts.

Exclusions Based on Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (Industrial Economics Inc. (IEC) 2021,

entire; Service 2021, entire). The screening analysis, dated April 15, 2021, was made available for public review from October 25, 2021, through December 27, 2021 (see 86 FR 58831), and again from September 30, 2022, through October 17, 2022 (see 87 FR 59384). The economic analysis addressed probable economic impacts of critical habitat designation for the coastal marten. Following the close of the comment periods, we reviewed and evaluated all information submitted during the comment periods that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the coastal marten is summarized below and available in the screening analysis for the DPS (IEC 2021, pp. 1–22), available at <https://www.regulations.gov>.

As identified in the screening analysis (IEC 2021, p. 2), the economic costs of the critical habitat designation for the coastal marten will likely be primarily limited to additional administrative efforts for Federal agencies to consider adverse modification in section 7 consultations. This determination is based on: (1) the areas identified as critical habitat are occupied by the coastal marten and, therefore, any conservation actions taken in order to be protective of the species would typically also provide protection for habitat used by the coastal marten; (2) a large portion (49 percent) of the areas identified are already designated as critical habitat for other listed species (*i.e.*, northern spotted owl (*Strix occidentalis caurina*), marbled murrelet (*Brachyramphus marmoratus*)) that have similar habitat requirements as coastal marten; and (3) the majority of the areas identified (97 percent) are federally managed and have ongoing baseline conservation efforts partly as a result of requirements under the Northwest Forest Plan. As a result, the screening analysis identified that the critical habitat designation for the coastal marten is unlikely to generate costs exceeding \$100 million in a single year; the annual costs to the Service and Federal action agencies are estimated to be approximately \$280,000. See the economic screening analysis (IEC 2021, entire) and our October 25, 2021, proposed rule (86 FR 58831) for additional results and background information on our process for determining the economic costs of critical habitat designation.

As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is

not exercising her discretion to exclude any areas from this designation of critical habitat for the coastal marten based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

In preparing this rule, we determined that there are no lands within the designated critical habitat for the coastal marten that are owned or managed by the DoD or Department of Homeland Security, and, therefore, we anticipate no impact on national security or homeland security. We did not receive any additional information during the public comment periods for the proposed designation regarding impacts of the designation on national security or homeland security that would support excluding any specific areas from the final critical habitat designation under the authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19, as well as the 2016 policy.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security as discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances (CCAAs), or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. In the case of the coastal marten, the benefits

of critical habitat include public awareness of the presence of the DPS and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for coastal marten due to protection from destruction or adverse modification of critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation, strengthening, or encouragement of partnerships. Additionally, continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as additional public comments we received, and the best scientific data available, we evaluated whether certain lands in proposed critical habitat Unit 5 in California are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If our analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise her discretion to exclude the lands from the final designation. In the paragraphs

below, we provide a detailed balancing analysis of the areas we evaluated for exclusion under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

We sometimes exclude specific areas from critical habitat designation based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement or in partnership with the Service.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

a. The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

b. The extent of public participation in the development of the conservation plan.

c. The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate.

d. Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance was required.

e. The demonstrated implementation and success of the chosen mechanism.

f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.

g. Whether there is a reasonable expectation that the conservation management strategies and actions contained in the conservation plan or agreement will be implemented.

h. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

During the development of this final designation, we considered additional information we received during both public comment periods on whether any specific areas should be excluded from this final critical habitat designation under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. As described above under Summary of Comments and Recommendations, we received four requests to exclude areas from the final critical habitat designation that provided sufficient information to conduct an exclusion analysis of those areas. The first two areas include lands owned and managed by the Green Diamond Resource Company and Yurok Tribal lands in Unit 5 in California. The Yurok Tribal land exclusion includes lands they own or manage, lands held in trust by the Secretary, and lands owned by the USFS that are part of a proposed reservation boundary adjustment. We also received a request from the Karuk Tribe for exclusion of lands recently transferred from USFS lands to trust status, held by the Secretary of the Interior for the benefit of the Karuk Tribe to be used for traditional and customary uses of the Tribe. Lastly, we received a request from the American Forest Resource Council to exclude all O&C lands from the final designation. Below, we provide our exclusion analysis for the Green Diamond Resource Company lands. We then provide our exclusion analysis for the Yurok Tribal owned or managed lands, Yurok Tribe reservation boundary adjustment lands, and Karuk Tribal and transferred lands separately (see *Tribal Lands*, below). We also provide our exclusion analysis for all O&C lands in Units 1, 2, 3, 4, and 5.

Green Diamond Resource Company—Unit 5: OR-CA-5 Klamath Mountains

In our October 25, 2021, proposed rule (86 FR 58831), we identified approximately 1,289,627 ac (521,913 ha) as critical habitat in proposed Unit 5 (Klamath Mountains). The unit is located in southern Oregon and northern California. GDRC owns and manages approximately 49,010 ac (19,834 ha) of land that occurs in Unit 5 in California. We have identified all the lands owned and managed by GDRC in Unit 5 in California for exclusion from the final designation of critical habitat for the coastal marten under section 4(b)(2) of the Act.

To assist in conservation of the coastal marten and its habitat and assist in protecting and conserving the PBFs for the DPS, GDRC has developed a coastal marten-focused memorandum of understanding (MOU) with the Service (GDRC-Service 2020, entire) and a State safe harbor agreement (SHA) with the California Department of Fish and Wildlife (CDFW 2018, entire). The five key habitat conservation measures identified for the coastal marten and its habitat in the MOU and State SHA are: (1) Retain older forest areas within riparian corridors and unstable slope areas that increase in age, develop resting and denning structures (PBF 1–3), and provide for connectivity of habitats across watersheds (PBF 2); (2) retain trees with specific habitat structures important for coastal marten resting and denning to accelerate development of habitat during the forest management cycle (PBF 1–3); (3) retain large woody debris existing prior to timber harvest and create slash piles within harvested areas to promote prey base and provide cover for coastal martens in regenerating forest stands (PBF 1–1a, 1–1b, and 2); (4) protect known den sites and retain habitat around those sites (PBF 1–2, 1–3; and (5) under a proposed carbon project, retain and grow mixed tree species forest stands that will increase average forest age over a 100-year time frame (PBF 1–1). In addition, a 2,098-ac (849-ha) area has been designated as a no harvest area to avoid disturbance of habitat and incidental take of coastal martens in an area known to have coastal marten occupancy over the past 20 years. Further, GDRC will monitor the coastal marten population and collaborate with agencies, other landowners, and researchers to increase understanding of coastal marten habitat use and needs, which will inform future commitments through adaptive management.

GDRC has been and continues to be a member of a multi-agency management group for conservation of the coastal marten in California and Oregon. The group has developed a conservation assessment and strategy for conserving the coastal marten in California and Oregon (Slauson et al. 2019a, entire). The strategy outlines measures to protect existing populations of the coastal marten, reestablish populations in areas currently suitable but unoccupied, restore habitat conditions in specific areas to increase population size, distribution, and connectivity between populations, and outlines next steps and research needed for coastal marten conservation. Although the

conservation strategy was developed to address coastal marten declines and synthesizes current knowledge on the DPS and identifies current threats, management goals, and outlines numerous conservation actions and information needs, the intent of the strategy is to establish an integrated regional approach to address the immediate research and conservation needs of the coastal marten. Implementation of the strategy is being completed by those Federal, State, Tribal, private, and nongovernmental organizations with an interest in conservation and management of the coastal marten. GDRC and others have implemented measures to assist in conservation of habitat for the coastal marten identified in the strategy and has committed by participation in the working group to continue to implement such measures in the future.

Additionally, in August 2023, GDRC finalized the California Timberlands Forest Management Plan (GDRC 2023, entire). The plan provides an overview of GDRC's land and resource management objectives, forest planning and operation practices, and implementation of measures and processes for conservation of the coastal marten and other listed or sensitive species and important habitat in California. The management plan provides for adaptive management and will be updated as new information becomes available or in response to changing conditions.

Benefits of Inclusion—Green Diamond Resource Company Lands

The principal benefit of including an area in a critical habitat designation is the requirement of Federal agencies to ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, which is one of the regulatory standards of section 7(a)(2) of the Act under which consultation is completed. Under section 7 of the Act, Federal agencies must also consult with the Service on actions that may affect a listed species, and refrain from actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. Thus, critical habitat designation may provide greater benefits to the recovery of a species than listing would alone.

Accordingly, a critical habitat designation may provide a regulatory

benefit for the coastal marten when there is a Federal nexus present for a project that may affect critical habitat. However, as this is private property and consultations have been and are expected to be rare, critical habitat is not anticipated to have much effect due to the lack of a Federal nexus. Given the anticipated lack of section 7 consultations, the regulatory benefit is limited and dependence on private conservation actions is more important.

Another important benefit of including lands in a critical habitat designation is that it can serve to educate landowners, agencies, Tribes, and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high value for certain species. Any information about coastal marten that reaches a wide audience, including parties engaged in conservation activities, would be considered valuable. However, the coastal marten was petitioned for listing in 2010, was a candidate species beginning in 2015, was listed by the State of California as endangered in 2018 (CDFW 2019, entire), was federally listed as a threatened species under the Act in 2020 (see 85 FR 63806; October 8, 2020), and had critical habitat proposed in 2021 (see 86 FR 58831; October 25, 2021). These actions have provided numerous opportunities for public outreach and education and have ensured that the GDRC and others are fully aware of the importance of coastal marten habitat and conservation. GDRC is also a member of a working group made up of landowners and researchers and has developed a conservation strategy for the coastal marten in California. Because the majority of lands surrounding or adjacent to GDRC lands will be designated as critical habitat, there will still be opportunities for us to raise public awareness of the conservation value of the area for the coastal marten. In addition, GDRC is already working with the Service and has a demonstrated history of implementing conservation actions for the coastal marten on their lands and for conservation of the DPS in larger scale conservation efforts and management. As a result, the educational value of the designation is also reduced.

Benefits of Exclusion—Green Diamond Resource Company Lands

The benefits of excluding GDRC land from the designation of critical habitat are substantial. The area will continue to provide conservation value to the species by: (1) Continuing and strengthening our effective working relationship with GDRC to promote

voluntary, proactive conservation and recovery of the coastal marten and its habitat on their lands; (2) fostering current and future potential collaboration with GDRC and adjacent private land owners for additional conservation of the coastal marten and its habitat as well as conservation of other federally listed species; and (3) contributing to educational benefits and public awareness through our partnership with GDRC on coastal marten conservation.

In this case, the benefits of excluding the GDRC lands include the recognition of the important role of voluntary conservation actions in the conservation of the coastal marten, facilitating cooperation with neighboring landowners, and acknowledging the good faith efforts on their part to date in conserving the coastal marten. GDRC has demonstrated a partnership with the Service and others to promote coastal marten conservation through the development of the conservation assessment and strategy for conserving the coastal marten.

The success of GDRC's management is demonstrated in the development and implementation of the MOU and State SHA. In addition, GDRC has finalized their California Timberlands Forest Management Plan (management plan) (GDRC 2023, entire). The plan identifies measures that provide for conservation of the coastal marten that GDRC include in their timber harvest plans (THPs) that are required by the State of California prior to commencement of timber harvest activities. Additional evidence of the partnership between the Service and GDRC is shown by GDRC's commitment in the MOU to provide for adaptive management, where mutually agreed-upon changes to the MOU's conservation commitments in response to changing conditions or new information would avoid or minimize take and conserve habitat of the coastal marten to the maximum extent practicable. Conservation measures identified in the SHA and MOU are included in GDRC's management plan and are implemented through their THPs. Exclusion of this area from designation will maintain and strengthen the partnership between the Service and GDRC and provide a conservation benefit for the coastal marten.

Our collaborative relationship with GDRC also makes a difference in our partnership with the numerous stakeholders involved in coastal marten management and recovery and influences our ability to form partnerships with others. Concerns over perceived added regulation potentially

imposed by critical habitat could harm this or other future collaborative relationships.

Because important areas with coastal marten habitat occur on private lands, collaborative relationships with private landowners will be essential in order to recover coastal marten. The coastal marten and its habitat are expected to benefit substantially from voluntary landowner management actions that implement appropriate and effective conservation strategies. It is beneficial to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove et al. 1996, entire; Bean 2002, pp. 1–7). Thus, it is essential for coastal marten recovery to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but who have concerns about incurring incidental regulatory or economic impacts.

Because GDRC-owned lands in Unit 5 are occupied by the coastal marten, conservation measures that may be implemented to protect or conserve coastal marten habitat would occur regardless of the critical habitat designation due to the requirements of protecting a listed species and its habitat under both section 7 and section 10 of the Act and as a result of the GDRC MOU with the Service and State SHA with CDFW. As a result, the benefits of a critical habitat designation are lessened for GDRC lands that are occupied. Also, because this portion of the unit is privately owned, we do not anticipate future Federal actions to impact the area. Because of the lack of past section 7 consultations within this portion of Unit 5, the reduced likelihood of future Federal actions altering the current management of this portion of Unit 5, the presence of coastal marten, and the commitment to continue implementing land management actions that maintain coastal marten habitat, the benefits of a critical habitat designation on this portion of Unit 5 (Klamath Mountains) are minimal.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Green Diamond Resource Company Lands

We have determined that the benefits of exclusion of private lands owned by GDRC in Unit 5 (Klamath Mountains), with the implementation of measures identified in the coastal marten conservation strategy, GDRC's

management plan, MOU, and State SHA, outweigh the benefits of inclusion because the current management efforts maintain the physical or biological features necessary to develop, maintain, and protect habitat essential to coastal marten conservation. These actions serve to manage and protect habitat needed for the coastal marten above those conservation measures that may be required if the area were designated as critical habitat. In making this finding, we have weighed the benefits of exclusion against the benefits of including these lands as critical habitat.

Past, present, and future coordination with GDRC has provided and will continue to provide sufficient education regarding coastal marten habitat conservation needs on these lands, such that there would be minimal additional educational benefit from designation of critical habitat. The incremental conservation benefit of designated critical habitat on GDRC-owned lands would largely be redundant with the benefits of the existing management. Therefore, the incremental conservation and regulatory benefits of designating critical habitat on GDRC lands in Unit 5 (Klamath Mountains) are minimal.

The benefits of designating critical habitat for coastal marten on GDRC lands in Unit 5 (Klamath Mountains) are relatively low in comparison with the benefits of exclusion. Based on our 2016 policy, we find that GDRC's implementation of the conservation strategy, management plan, MOU, and State SHA meets several factors for exclusion, including: (1) the conservation strategy, MOU, and SHA documents have been developed in conjunction with resource agency review, and we have received required determinations (e.g., State regulatory requirements), as necessary and appropriate; (2) the measures identified in the documents have been implemented and have demonstrated success (such as establishment of specific protected areas for coastal marten conservation); (3) the documents identify measures that provide for the conservation of the physical or biological features essential for the coastal marten; (4) the conservation management strategies and actions contained in the documents have been and will continue to be implemented; and (5) the documents contain monitoring program and adaptive management components to ensure that the conservation measures are effective and can be modified in the future in response to new information.

The implementation of the conservation strategy, management plan, MOU, and State SHA is focused

on long-term land management commitments and continued conservation of the coastal marten and has solidified our partnership with GDRC to help foster the maintenance and development of future coastal marten habitat conservation. We anticipate that greater coastal marten conservation can be achieved through these management actions and relationships than through consultation regarding impacts to designated critical habitat on a project-by-project basis on private land where such consultations are expected to be rare.

The benefits of excluding GDRC-owned lands in Unit 5 from critical habitat are considerable and greater than inclusion for the reasons that follow. GDRC's implementation of the conservation strategy, management plan, MOU, and State SHA establish frameworks for cooperation and coordination with the Service and the State in connection with resource management activities for the coastal marten and its habitat based on adaptive management principles. Most importantly, the participation of GDRC in development and implementation of measures identified in these documents indicates GDRC's continuing commitment to ongoing management and conservation actions that has resulted in benefits to the coastal marten and its habitat. Exclusion of these lands from critical habitat designation will help preserve and strengthen the conservation partnership we have developed with GDRC, reinforce those we are building with other entities, and foster future partnerships and development of management plans. Conversely, inclusion of these lands in the designation would negatively impact our relationships with GDRC and other existing and future partners. We are committed to working in partnership with GDRC to further conservation of coastal marten and other endangered and threatened species. GDRC has agreed to continue to implement their management plans and play an active role to protect the coastal marten and its habitat. Thus, we find that our partnership with and actions taken by GDRC provide significant benefits to coastal marten conservation and outweigh the small regulatory benefits of including the GDRC lands in the final critical habitat designation.

Therefore, after weighing the benefits of inclusion in the coastal marten critical habitat designation against the benefits of exclusion, we determined that the benefits of excluding the approximately 49,010 ac (19,834 ha) of GDRC lands within Unit 5 with long-term GDRC management commitments

outweigh the benefits of including the area in a designation of critical habitat.

Exclusion Will Not Result in Extinction of the Species—Green Diamond Resource Company Lands

We have determined that the exclusion of GDRC lands within the boundaries of Unit 5 (Klamath Mountains) will not result in extinction of the coastal marten. The protections and conservation measures afforded the coastal marten and its habitat by the MOU and State SHA, as well as our partnership with GDRC on managing for coastal marten, provide assurances that the DPS will not go extinct as a result of excluding these lands from the critical habitat designation. In addition to the conservation actions being implemented on the areas being excluded, the areas remaining as critical habitat in Unit 5 for the coastal marten total 1,156,312 ac (467,943 ha). These remaining areas are occupied and will continue to provide support to and conserve the DPS throughout the area. Further, for any projects having a Federal nexus and potentially affecting the coastal marten, the jeopardy standard of the Act will provide a level of assurance that the DPS will not go extinct as a result of excluding GDRC lands from the critical habitat designation. As a result, the Secretary is excluding 49,010 ac (19,834 ha) of GDRC land under section 4(b)(2) of the Act from the final designation of critical habitat for the coastal marten in Unit 5 (Klamath Mountains).

Tribal Lands

Several Executive Orders, Secretary's Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretary's Order that applies to both the Service and the National Marine Fisheries Service (NMFS)—Secretary's Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the appendix to S.O. 3206 explicitly recognizes the right of

Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(B)(4) of the Appendix requires us to consult with affected Tribes "when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-owned fee lands, or the exercise of Tribal rights." That provision also instructs the Service to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Service to "evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands."

Our implementing regulations at 50 CFR 424.19 and the 2016 policy are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, Tribally-owned fee lands, or Tribal rights may be affected by including any particular areas in the designation, and we evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas. When we undertake a discretionary section 4(b)(2) exclusion analysis, we always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not override the Act's statutory requirement of designation of critical habitat. As stated above, we must consult with any Tribe when a designation of critical habitat may affect Tribal lands or resources. The Act requires us to identify areas that meet the definition of "critical habitat" (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential for the conservation of a species), without regard to land ownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority under the Act or other statutes.

Yurok Tribe-Owned or -Managed Lands—Unit 5: OR-CA-5 Klamath Mountains

In our October 25, 2021, proposed rule (86 FR 58831), we identified approximately 1,289,627 ac (521,913 ha) as critical habitat in Unit 5 (Klamath Mountains). The unit is located in southern Oregon and northern California. Approximately 64,979 ac (26,296 ha) of the critical habitat is

owned or managed by the Yurok Tribe. We have identified all lands owned and managed by the Yurok Tribe in Unit 5 in California (64,979 ac (26,296 ha)) for exclusion from the final designation of critical habitat for the coastal marten under section 4(b)(2) of the Act. This includes Yurok Tribe Reservation lands, fee lands owned by the Yurok Tribe, and lands held in trust for the Yurok Tribe, which we characterize here as Yurok Tribe-owned or -managed Lands.

Throughout the development of critical habitat for the coastal marten, we have been in contact and coordinated with the Yurok Tribe on implementing numerous conservation efforts and management strategies for the coastal marten and other listed species. The Yurok Tribe has a demonstrated record of maintaining its lands for natural resources through implementation of several binding agreements including the following: the Yurok Tribe Sustained-Yield Unit (SYU) Cooperative Agreement, the Yurok Forest Management Plan (FMP) (Yurok 2012, entire), the Blue Creek Interim Management Plan (BCMP) (Yurok Tribe and Western Rivers Conservancy 2018, entire), and the Pacific marten memorandum of understanding (MOU) with the Service (Yurok Tribe-Service 2021, entire). These agreements are described in more detail below.

The SYU cooperative agreement with the BIA was executed in October 2013 pursuant to 25 U.S.C. 3115(a)(1), under which the BIA may enter into a cooperative agreement with an Indian tribe regarding forestry and natural resource management, and to 16 U.S.C. 583a, the Sustained-Yield Management Act (SYMA), under which the BIA may enter into a cooperative agreement with a private owner of forest land for coordinated management of private and federally administered forest land. This binding agreement covers Phase I lands, lands known as Cook/Koppala and Gerber/Gleason, as well as all lands recorded as restricted within the SYU boundary, and is designed to encompass lands that the Yurok Tribe may so designate in the future, but over which they currently have no management authority. This agreement establishes that these lands are managed under the jurisdiction of the BIA in a Trust relationship in accordance with SYMA, with the purpose, in part, to protect, restore, and enhance water quality and improve fish habitat, improve forest structure and increase natural biodiversity, protect and restore Tribal cultural resources (including those species of cultural importance to the Yurok Tribe, such as the Pacific marten), and implement and maintain a

functionally integrated wildfire protection system.

The FMP pertains to lands identified in the SYU cooperative agreement described above. It describes management of the Tribe's forest resources, elucidating that they should be managed to provide for multiple use, sustained yield, and maximum benefit, and should protect non-timber resources such as cultural features, wildlife, water qualities, aesthetics, and soil. It is explicit that the preferred approach to forest management is one that is both adaptive and mainly provides for uneven-age timber management. The goals identified in the FMP include limiting the use of clear cutting, eliminating the use of herbicides, protecting and enhancing areas considered culturally significant, and protecting and enhancing fisheries. It also provides for wildfire suppression, creation of fuel breaks, fuels reductions, use of prescribed fire, and implementation of stand improvement projects in order to safeguard forest structures and forest stands against wildfire. The FMP includes limitations on harvest of old growth forests specifically to reduce the chance for impacts to habitat for traditional species and to avoid direct take of endangered and threatened species. It also requires intensive surveys for such species and subsequent dedication of no-cut areas around such species' sensitive sites, including nesting and den sites. Further, it includes a requirement to consider preservation of trees with significant wildlife uses, such as denning and resting sites.

The BCMP is a co-management agreement established between the Yurok Tribe and Western Rivers Conservancy (WRC) for those Phase II lands currently within WRC ownership, and approved by the State Coastal Conservancy, Wildlife Conservation Board, and the Yurok Tribal Council. It establishes the Blue Creek Salmon Sanctuary, land set aside specifically for biological and cultural restoration. The primary goal of the BCMP is to protect and restore the area to a healthy ecosystem, rich in biodiversity and resilient to resource threats such as drought and climate change, and to reestablish the traditional Yurok role in the management and stewardship of their ancestral territory. The BCMP includes specific conservation measures for special status species including: advanced surveys if there is proposed ground disturbance, retention of potential nest or den trees or other suitable habitat components during forest restoration activities, assumption of stand occupancy until appropriate

surveys are conducted and retention of stands with known activity areas, and prohibition of use of mechanized equipment within 0.25 mi (0.4 km) of stands occupied by endangered or threatened species in coordination with the Service. It also allows for designation of special management areas (SMAs), which guide proactive restoration and enhancement of critical forest structure and species habitat within the Sanctuary. Conservation measures within SMAs of particular importance to coastal marten include that the SMAs are designated for late-seral forest reestablishment; focused on coastal marten habitat and connectivity restoration, including creation of surrogate structures to meet key life-history needs; and managed to conserve and restore aquatic and riparian habitat.

The Tribe has also developed and executed a MOU in collaboration with the Service to promote cooperation and coordination in the conservation, management, and recovery of the coastal marten population that resides on portions of Yurok Tribe forest lands (Yurok Tribe-Service 2021, entire). Within the MOU, the Yurok Tribe and the Service formally recognize that the coastal marten is a species of significant management concern throughout its historical range, and that a proactive conservation approach to evaluating and implementing conservation actions based on sound science will benefit the species. The MOU is designed on an adaptive management principle to support coastal marten connectivity, and overall forest health. The MOU further outlines actions that will allow the Yurok Tribe to continue restoration and use of lands occupied by the coastal marten while remaining consistent with the Yurok Tribe's land use management plans and existing agreements with State and other Federal agencies, including strategies that support Yurok Tribal goals stated in the Yurok Community Forest and Blue Creek Salmon Sanctuary management plans. For habitat-related conservation, the MOU calls for implementation of thinning and removal of overly dense understory vegetation to restore unhealthy and fire-prone forests with poor coastal marten habitat by implementing uneven age stand management and retention of at least 40 percent overstory cover. In combination, these measures are intended to reestablish late-seral forest characteristics beneficial to the coastal marten on an accelerated timeline. The MOU also includes deliberate retention of known coastal marten denning and rest structure and creation of

supplementary artificial structures. It further commits to completing pre-treatment surveys within proposed treatment areas, as well as post-treatment surveys to monitor the results of restoration whenever possible. Finally, the MOU formalizes the Tribe's prohibition on the use of pesticides on these lands, which can harm coastal martens.

The Yurok Tribe has also been and continues to be a member of a multi-agency management group for the conservation of the coastal marten in California and Oregon. The group has developed a conservation strategy and management plan for conserving the coastal marten in California (Slauson et al. 2019a, entire). The document provides guidance and recommended conservation measures for protecting habitat and resource needs for the coastal marten in California.

Benefits of Inclusion—Yurok Tribe-Owned or -Managed Lands

The principal benefit of including an area in a critical habitat designation is the requirement of Federal agencies to ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, which is one of the regulatory standards of section 7(a)(2) of the Act under which consultation is completed. Although the Yurok Tribe is not a Federal agency, some actions taken by the Tribe may fall under the jurisdiction of the BIA due to Federal funding or authorization or because actions are occurring on lands held in trust for the Tribe. As a result, the BIA may be the Federal nexus for some activities implemented by the Tribe. Under section 7 of the Act, Federal agencies must also consult with the Service on actions that may affect a listed species, and refrain from actions that are likely to jeopardize the continued existence of such species. The analysis of the effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. Thus, critical habitat designation may provide greater benefits to the recovery of a species than listing would alone.

We have provided the Yurok Tribe and the BIA with technical assistance on project implementation and conducted informal consultations with agencies implementing actions on Tribal lands. However, since the listing of the coastal marten as threatened in 2020, no actions determined to likely adversely affect the coastal marten and require

formal section 7 consultations have occurred within lands owned or managed by the Yurok Tribe. Because of the Tribe's practice of implementing conservation measures and management actions for the coastal marten and the lack of actions requiring formal section 7 consultation, we do not anticipate an increase in section 7 consultations in the future and, as a result, the regulatory benefit of critical habitat would be minimal.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to inform and educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the coastal marten that reaches a wide audience, including parties engaged in conservation activities, is valuable. However, the coastal marten was petitioned for listing in 2010, was a candidate species beginning in 2015, was listed by the State of California as endangered in 2018 (CDFW 2019, entire), was federally listed as a threatened species under the Act in 2020 (see 85 FR 63806; October 8, 2020), and had critical habitat proposed in 2021 (see 86 FR 58831; October 25, 2021). These actions have provided numerous opportunities for public outreach and education and have ensured that the Yurok Tribe and others are fully aware of the importance of coastal marten habitat and conservation. The Yurok Tribe has been and is currently working with the Service to conserve the coastal marten and its habitat, participating in working groups, and exchanging management and resource information regarding the DPS. In addition, because the majority of lands surrounding or adjacent to the Yurok Tribe Lands are included in this critical habitat designation for the coastal marten, there will still be opportunities for us to raise public awareness of the conservation value of the area for the coastal marten. Given that the listing of the coastal marten has already informed the public about the value of these areas and helped to focus potential conservation actions, the educational benefits from designating critical habitat on Yurok Tribe-owned or -managed Lands would be small.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement actions in areas designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes often seek additional sources of funding in order to

conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving section 6 or other recovery funding for coastal marten habitat-related projects. However, areas where coastal marten occur, as is the case here, may also benefit from funding for projects based on the presence of the species.

Therefore, because of the development and implementation of management plans, habitat conservation, lack of additional section 7 conservation measures, occurrence of breeding and dispersing coastal martens on Tribal lands, and overall coordination with the Yurok Tribe on coastal marten-related issues, it is expected that there may be limited benefits from including these Tribal lands in a coastal marten critical habitat designation. The principal benefit of any designated critical habitat is that federally authorized or funded activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat.

Benefits of Exclusion—Yurok Tribe-Owned or -Managed Lands

The benefits of excluding the Yurok Tribe Lands from designated critical habitat include: (1) Our deference to the Tribe and recognition of their sovereignty to develop and implement their own conservation and natural resource management plans for their lands and resources, which includes benefits to the coastal marten and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationship with the Tribe to promote the conservation of the coastal marten and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote conservation of coastal marten and its habitat, as well as conservation for other listed or sensitive species.

During the development of the proposed rule to designate critical habitat for the coastal marten (86 FR 58831; October 25, 2021) and the development of the MOU for coastal marten, as well as coordination for other endangered or threatened species actions, we have communicated and coordinated with the Yurok Tribe on how they might be affected by listed species regulations in general and those associated with listing and designating critical habitat for the coastal marten. As such, we have established a beneficial relationship to support coastal marten

conservation. As part of our relationship, we have provided technical assistance to the Yurok Tribe to develop measures to conserve the coastal marten and its habitat on their lands. These measures are contained within the extensive management plans developed by the Yurok Tribe. During our coordination efforts with the Yurok Tribe, we recognized and endorsed their fundamental right to provide for Tribal resource management activities, including those relating to forested habitat.

As stated above, the Yurok Tribe has developed and implemented multiple management plans that benefit the coastal marten and its habitat. The Yurok Tribe has expressed that their lands, and specifically forest habitat, are connected to their cultural and religious beliefs, and as a result they have a strong commitment and reverence toward their stewardship and conservation and have common goals with the Service on species and habitat conservation. The management plans identify actions to maintain, improve, and preserve forest habitat, including those physical or biological features identified as essential for the coastal marten, such as managing for late-seral forest; establishing specific coastal marten management areas; implementing harvest restriction near water courses; conducting wildfire and fuels management actions; and implementing monitoring, assessment, and adaptive management actions. Overall, the commitments toward management of coastal marten habitat by the Yurok Tribe likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

The designation of critical habitat on lands owned and managed by the Yurok Tribe could have an adverse impact on our working relationship with the Tribe. The designation of critical habitat could be viewed as an intrusion and perceived as infringing on the Tribe's sovereign ability to manage natural resources in accordance with their own policies, customs, and laws. Critical habitat could be seen as potentially: (1) Interfering with the sovereign and constitutional rights of the Yurok Tribe to protect and control its own resources on the Reservation; (2) undermining the positive and effective relationship that has been built between the Tribe and the Service—a relationship that serves to protect federally listed species and their habitats; and (3) hampering or confusing the Tribe's own long-standing protections for the Klamath Mountains. The perceived restrictions of a critical

habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the coastal marten and other species. For these reasons, we have determined that our working relationship with the Tribe would be better maintained if we exclude their lands from the designation of critical habitat for the coastal marten. We view this as a substantial benefit since we have developed a trusting, cooperative working relationship with the Yurok Tribe for the mutual benefit of the coastal marten and other endangered and threatened species that has resulted in substantial conservation commitments by the Tribe.

In addition, we anticipate future management plans addressing conservation efforts for other listed species and their habitats may be hampered if critical habitat is designated on Tribal lands that are already being managed for sensitive species conservation. We have determined that other Tribes are willing to work cooperatively with us and others to benefit other listed and sensitive species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species may be compromised if these Tribal lands are designated as critical habitat for the coastal marten. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed or sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Yurok Tribe-Owned or -Managed Lands

The benefits of including Yurok Tribal Lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement for Federal agencies (*i.e.*, BIA) to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations within the Yurok Tribal Lands, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures that may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the coastal marten and its habitat from implementation of the Yurok Tribe

management plans, and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the coastal marten and its habitat.

Based on our 2016 policy for exclusions, we find that the Yurok Tribe's management of their lands through their management plans meet several factors for exclusion including: (1) The measures identified in the Yurok Tribe management plans have been implemented and have demonstrated success; (2) the documents identify measures that provide for the conservation of the physical or biological features essential for the coastal marten; (3) the conservation management strategies and actions contained in Yurok Tribe management plans have been and will continue to be implemented; and (4) the Yurok Tribe management plans contain monitoring program and adaptive management components to ensure that the conservation measures are effective and can be modified in the future in response to new information.

Because the Yurok Tribe has developed specific management plans, has been involved with the critical habitat designation process, and is aware of the value of their lands for coastal marten conservation, the educational benefits of a coastal marten critical habitat designation are minimized.

Allowing the Yurok Tribe to implement its own resource conservation programs gives the Tribe the opportunity to manage their natural resources to benefit forest habitat for the coastal marten, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the coastal marten and other listed species that would not otherwise be available without a cooperative working relationship between the Service and the Yurok Tribe. The actions taken by the Tribe to manage and protect habitat needed for the coastal marten would most likely provide a greater benefit than those conservation measures that may be required if the area were designated as critical habitat. As a result, we have determined that the benefits of excluding these Tribal lands from critical habitat designation outweigh the benefits of including these areas.

After weighing the benefits of including Yurok Tribe-owned or -managed Lands in the critical habitat designation for the coastal marten

against the benefits of excluding them from the designation, we have concluded that the benefits of excluding the approximately 64,979 ac (26,296 ha) of Unit 5 (Klamath Mountains) owned and managed by the Yurok Tribe outweigh the benefits that would result from designating this area as critical habitat.

Exclusion Will Not Result in Extinction of the Species—Yurok Tribe-Owned or -Managed Lands

We have determined that exclusion of land owned and managed by the Yurok Tribe from the critical habitat designation will not result in the extinction of the coastal marten. We base this determination on several points. First, the amount of critical habitat within Unit 5 (Klamath Mountains) remaining within the designation for the coastal marten totals 1,156,312 ac (467,943 ha). Complimentary to the excluded area, this remaining area is occupied and will continue to provide support to and conserve the coastal marten and its habitat. Second, for any projects having a Federal nexus and potentially affecting the coastal marten, the jeopardy standard of the Act will provide a level of assurance that the DPS will not go extinct as a result of excluding the Yurok Tribe's Lands from the critical habitat designation. Third, the Yurok Tribe has a long-term record of conserving species and habitat and is committed to protecting and managing coastal marten habitat according to their cultural history, management plans, and natural resource management objectives.

We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of conservation measures, which are based upon strategies developed in the management plans, as well as significant areas remaining as critical habitat and assurances of consultation with the Service for Federal actions that may likely adversely affect the species, we have concluded that the coastal marten will not become extinct as a result of this exclusion of Yurok Tribe-owned or managed Lands from the critical habitat designation.

Accordingly, we have determined that the benefits of excluding the Yurok Tribe-owned or managed Lands outweigh the benefits of their inclusion, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, the Secretary is excluding 64,979 ac (26,296

ha) of Yurok Tribe-owned or managed Land under section 4(b)(2) of the Act from the final designation of critical habitat in Unit 5 for the coastal marten.

Yurok Tribe Reservation Boundary Adjustment Lands—Unit 5: OR-CA-5 Klamath Mountains

We have identified approximately 25,791 ac (10,437 ha) within Unit 5 (Klamath Mountains) in California for exclusion from this final critical habitat designation. The area is part of the Yurok Tribe ancestral territory currently owned and managed by the USFS, Six Rivers National Forest. The Yurok Tribe is currently working with Congress to introduce legislation to revise the boundaries of the Yurok Tribe's Reservation. The proposed legislation would include an adjustment of the Tribe's reservation boundaries, place the identified USFS land into trust for the Tribe, transfer the resource management responsibilities to the Tribe, and affirm the Tribal-Federal partnership for the Federal lands.

The Yurok Tribe has shown a commitment to managing forest and sensitive species habitat on their lands or lands held in trust for the Tribe and has shown to be an effective partner in conservation of the coastal marten as discussed above. The Tribe has also been working with the USFS on coordinated management of the Federal lands within the reservation boundary adjustment lands and the USFS is supportive of a coordinated management approach. On October 19, 2023, the USFS Regional Office (Region 5) authorized the Six Rivers National Forest to work closely with the Yurok Tribe on developing forest management plans for the area under the Tribal Forest Protection Act of 2004, and to identify co-stewardship and conservation responsibilities (USFS 2023, entire). Should legislation transferring management responsibilities or land ownership or trust responsibilities to the Tribe be delayed or not occur, we are confident that the Yurok Tribe and USFS would coordinate management of the area and continue to provide for conservation of the coastal marten based on their past and current implementation of conservation and management of forest and sensitive habitats, include those measures identified for the coastal marten and its habitat. As a result, even if legislation transferring management responsibilities is delayed or does not occur, we expect that the management of the area by the Yurok Tribe and/or the Forest Service would provide for conservation of the area equal to if not

better than designating the area as critical habitat.

Benefits of Inclusion—Yurok Tribe Reservation Boundary Adjustment Lands

The principal benefit of including an area in a critical habitat designation is the requirement for Federal agencies to ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, which is one of the regulatory standards of section 7(a)(2) of the Act under which consultation is completed. Under section 7 of the Act, Federal agencies must also consult with the Service on actions that may affect a listed species, and refrain from actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some cases, the outcome of these analyses will be similar, because effects to habitat will often result in effects to the species. In this case, given the absence of a binding agreement focused on coastal marten conservation, section 7 consultations are the primary mechanism in which take is avoided and conservation measures are implemented.

Our section 7 consultation history within the USFS lands considered for this boundary adjustment shows that since the coastal marten's listing in 2020, no formal consultations and four informal consultations have been completed for actions conducted on those lands. Other coastal marten consultations are in progress, including conferencing on areas proposed as critical habitat for the coastal marten. We anticipate that the USFS actions will likely increase in the future given that numerous salvage, hazard tree abatement, fuels management, infrastructure management, and other projects associated with recent catastrophic wildfires are in the planning stages. However, this may not be the case if the lands are transferred to the Tribe in the future. Coastal marten conservation measures, reasonable and prudent measures, and other management practices would still continue to be developed and implemented on these lands whether they remain with USFS or are transferred to the Tribe, as informal or formal section 7 consultation will still be necessary to address impacts to coastal marten for actions associated

with any Federal nexus with the USFS or BIA.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the coastal marten that reaches a wide audience, including parties engaged in conservation activities, is valuable.

Finally, there is the possible benefit that additional Tribal funding could be generated for habitat improvement actions in areas designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for coastal marten habitat-related projects.

Benefits of Exclusion—Yurok Tribe Reservation Boundary Adjustment Lands

The benefits of excluding the Yurok Tribe Reservation Boundary Adjustment Lands from designated critical habitat include: (1) Our deference to the Tribe and recognition of their sovereignty to develop and implement their own conservation and natural resource management plans for their lands and resources, which includes benefits to the coastal marten and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationship with the Tribe to promote the conservation of the coastal marten and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote conservation of coastal marten and its habitat, as well as conservation for other listed or sensitive species. As stated above, the Yurok Tribe has developed and implemented multiple management plans that benefit the coastal marten and its habitat; however, these binding agreements are not currently extended to Yurok Tribe Reservation Boundary Adjustment Lands that are at present owned and managed by the USFS, Six Rivers National Forest. However, the USFS is currently in the process of working and developing an agreement with the Yurok Tribe to conduct forest management and habitat restoration activities on the Yurok Tribe Reservation Boundary Adjustment Lands under the Tribal Forest Protection Act of 2004 (Pub. L. 108–278).

During the development of the proposed rule to designate critical habitat for the coastal marten (86 FR 58831; October 25, 2021), development of the MOU for coastal marten, and coordination on other endangered or threatened species actions, we have communicated and coordinated with the Yurok Tribe on how they might be affected by listed species regulations in general and those associated with listing and designating critical habitat for the coastal marten. As such, we have established a beneficial relationship to support coastal marten conservation. As part of our relationship, we have provided technical assistance to the Yurok Tribe to develop measures to conserve the coastal marten and its habitat on their lands. These measures are contained within the extensive management plans developed by the Yurok Tribe. During our coordination efforts with the Yurok Tribe, we recognized and endorsed their fundamental right to provide for Tribal resource management activities, including those relating to forested habitat.

As stated above, the Yurok Tribe has developed and implemented multiple management plans that benefit the coastal marten and its habitat. The Yurok Tribe has expressed that forested habitats are intimately connected to their cultural and religious beliefs, and as a result they have a strong commitment and reverence toward their stewardship and conservation and the Tribe has common goals with the Service on species and habitat conservation. We expect that Yurok Tribe's land management practices on the Yurok Tribe Reservation Boundary Adjustment Lands would be similar to those on lands directly owned or held in trust for the Tribe. Because the Tribe has an excellent record of performance and commitment toward management of the coastal marten and its habitat, we have determined that the Yurok Tribe will likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

If critical habitat were designated on these lands, we would expect that the designation could have an adverse impact on our working relationship with the Tribe. The designation of critical habitat could be viewed as an intrusion and perceived as infringing on the Tribe's sovereign ability to manage these future Tribal natural resources in accordance with the Tribe's own policies, customs, and laws. These perceived impacts include, but are not limited to: (1) Interfering with the

sovereign and constitutional rights of the Tribe to protect and control its own resources, once these lands are transferred to the Tribe; (2) undermining the positive and effective relationship between the Tribe and the Service—a relationship that serves to protect federally listed species and their habitats; and (3) hampering or confusing the Tribe's own long-standing protections for the Klamath Mountains, which the Tribe has indicated as its intent for management of these lands upon transfer. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the coastal marten and other species. For these reasons, we have determined that our working relationship with the Tribe would be better maintained if we exclude these lands from the critical habitat designation for the coastal marten. We view this as a substantial benefit since we have developed a productive and cooperative working relationship with the Yurok Tribe for the mutual benefit of the coastal marten and other endangered and threatened species that has resulted in substantial conservation commitments by the Tribe.

In addition, we anticipate that development of future management plans by the Tribe that could include additional conservation efforts for other listed species and their habitats may be hampered if critical habitat is designated on these lands. We have determined that other Tribes are willing to work cooperatively with us and others to benefit other listed and sensitive species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species may be compromised if these potential Tribal lands are designated as critical habitat for the coastal marten. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed or sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Yurok Tribe Reservation Boundary Adjustment Lands

The benefits of including the Yurok Tribe Reservation Boundary Adjustment Lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement for Federal agencies (*i.e.*, BIA) to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness,

potential additional grant funding, and the implementation of other law and regulations. In addition, any conservation measures that may result from future consultations are already expected to be implemented by the Tribe due to their MOU with the Service and implementation of the Tribal Forest Protection Act authorization with the USFS, which the Tribe has indicated will be applicable to these lands upon transfer. We have determined that our working relationship with the Tribe will provide for and promote the conservation of the coastal marten and its habitat, based on the maintenance of our effective collaboration and cooperation to date.

Because the Yurok Tribe has developed specific management plans for actions on their lands, has been involved with the critical habitat designation process, and is aware of the value of their lands for coastal marten conservation, the educational benefits of a coastal marten critical habitat designation are minimized.

By excluding critical habitat, the Tribe will have more flexibility to manage natural resources that benefit forest habitat for the coastal marten without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the coastal marten and other listed species that would not otherwise be available should the designation impair the cooperative working relationship between the Service and the Yurok Tribe. The actions taken by the Tribe to manage and protect habitat needed for coastal marten are above those conservation measures that may be required if the area were designated as critical habitat. As a result, we have determined that the benefits of excluding the Yurok Tribe Reservation Boundary Adjustment Lands from the critical habitat designation for the coastal marten outweigh the benefits of including these areas in the designation.

After weighing the benefits of including Yurok Tribe Reservation Boundary Adjustment Lands in the coastal marten critical habitat designation against the benefits of excluding them from the designation, we have concluded that the benefits of excluding the approximately 25,791 ac (10,437 ha) of Unit 5 located on Yurok Tribe Reservation Boundary Adjustment Lands outweigh those that would result from designating this area as critical habitat.

Exclusion Will Not Result in Extinction of the Species—Yurok Tribe Reservation Boundary Adjustment Lands

We have determined that exclusion of Yurok Tribe Reservation Boundary Adjustment Lands from the critical habitat designation will not result in the extinction of the coastal marten. We base this determination on several points. First, the amount of critical habitat within Unit 5 (Klamath Mountains) remaining as critical habitat for the coastal marten totals 1,156,312 ac (467,943 ha). Complimentary to the area excluded, this remaining area is occupied and will continue to provide support to and conserve the coastal marten and its habitat. Second, the area is anticipated to be transferred to be held in trust for the Yurok Tribe and any actions requiring Federal authorization or funding will require section 7 consultation under the jeopardy standard of the Act, which will provide a level of assurance that the DPS will not go extinct as a result of excluding these lands from the critical habitat designation.

We have determined that our relationship with the Tribe and their commitments to sensitive species and habitat management will provide greater opportunities to accomplish conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the USFS and Tribe as partners in implementation of the conservation strategy for the coastal marten in California and the Act's requirement for consultation under the jeopardy standard, as well as the occupancy by and management of these lands for the benefit of coastal martens, we have concluded that the coastal marten will not become extinct as a result of the exclusion of this area from the critical habitat designation for the coastal marten.

Accordingly, we have determined that the benefits of excluding the Yurok Tribe Reservation Boundary Adjustment Lands from the critical habitat designation for the coastal marten outweigh the benefits of their inclusion in the designation, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, the Secretary is excluding 25,791 ac (10,437 ha) of Yurok Tribe Reservation Boundary Adjustment Lands under section 4(b)(2) of the Act from Unit 5 of this designation of critical habitat for the coastal marten.

Karuk Tribe Managed Lands—Unit 5: OR-CA-5 Klamath Mountains

On January 5, 2023, legislation was signed by the President of the United States to transfer management and resource responsibilities of approximately 1,031 ac (417 ha) of land from the USFS, Six Rivers National Forest, to be held in trust by the Secretary of the Interior for the Karuk Tribe under the Katimiin and Aameekyaaraam Sacred Lands Act (Pub. L. 117–353). The legislation takes certain Federal land located in Siskiyou County and Humboldt County, California, into trust for the benefit of the Karuk Tribe, and for other purposes. The trust lands include approximately 925 ac (374 ha) of land that overlaps with the proposed designation of critical habitat for the coastal marten in Unit 5 (Klamath Mountains) near the intersection of the Klamath River and Salmon River in California. We have identified these Karuk Tribe Trust Lands for exclusion from this final critical habitat designation.

The Karuk Tribe has a demonstrated record of maintaining and managing its lands for natural resources and sensitive species through implementation of its Eco-Cultural Resources Management Plan (Karuk Tribe 2010, entire), and through its partnership with the USFS to restore healthy forests in the region through the Western Klamath Restoration Partnership Project (USFS 2014, entire). The Eco-Cultural Resources Management Plan and the Tribe's partnership with the USFS on forest management are discussed below.

The Karuk Tribe Department of Natural Resources has developed the Eco-Cultural Resources Management Plan to serve as a long-term adaptive management strategy for the protection, enhancement, and utilization of cultural and natural resources. The plan outlines cultural environmental management practices through the use of traditional ecological knowledge (TEK) and existing western scientific information. The plan provides measures and guidance for environmental education, wildfire suppression and fuels reduction activities, fisheries management and enhancement, forestry management, watershed and water quality restoration, and wildlife resource conservation and protection. Measures in the plan to conserve and restore wildlife including the coastal marten and its habitat (PBFs) include: (1) Coordinating efforts to conserve and monitor wildlife species and their habitats with Tribal, Federal, State, and county governments, nongovernmental organizations, and local community

groups; (2) managing wildlife through forest, shrub, and grassland habitat restoration activities, including utilizing hand and mechanical treatments in conjunction with identifiable prescribed fire ignition strategies (PBF 1–3); (3) implementing landscape-level planning to support holistic ecosystem management (PBF 1–1, 1–2); (4) reestablishing interconnectivity between various habitat types across the landscape to foster wildlife movement and dispersal (PBF 2); and (5) where appropriate, managing for single/indicator species in an effort to prevent further habitat loss or degradation (PBF 1–1, 1–2, 1–3), species endangerment, and local extirpations of the species, as well as to allow for potential reintroductions.

The Karuk Tribe has also been working with the USFS and others since 2007 as a member of a multi-partner management group for the management and conservation of forested habitat in the western Klamath River region known as the Western Klamath Restoration Partnership (WKRP). The WKRP works collaboratively among all stakeholders and across all landscapes, integrating TEK and western science to achieve three goals: (1) resilient landscapes; (2) fire-adapted communities; and (3) safe and effective wildfire response. These goals will be partly accomplished by restoring the landscape through measures such as forest thinning and prescribed burns to help preclude severe, catastrophic wildfire; restore native plant communities; improve terrestrial and aquatic habitats; and provide monitoring and adaptive management.

In our October 25, 2021, proposed rule (86 FR 58831) and September 30, 2022, publication (87 FR 59384), we stated that our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and that the exclusion will not result in the extinction of the species. Our balancing analysis for these Karuk Tribe Trust Lands, concerning whether the benefits of exclusion of these lands from the critical habitat designation outweigh the benefits of their inclusion in the designation and whether such an exclusion will result in the extinction of the coastal marten, is discussed below.

Benefits of Inclusion—Karuk Tribe Trust Lands

The principal benefit of including an area in a critical habitat designation is the requirement of Federal agencies to

ensure that actions that they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, which is one of the regulatory standards of section 7(a)(2) of the Act under which consultation is completed. Although the Karuk Tribe is not a Federal agency, the ownership of the lands in question is now held by the Secretary of the Interior in trust for the Tribe. As a result, actions requiring Federal authorization or funding on the Karuk Tribal Trust Lands require consultation under section 7 of the Act if the action may affect a listed species, and such consultation regarding an adverse effect to the species would consider whether the action is likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. Thus, critical habitat designation may provide greater benefits to the conservation of a species than listing would alone.

We have provided the Karuk Tribe and the BIA with technical assistance on project implementation and conducted informal consultations with the Federal agencies implementing actions on Tribal lands. However, since the listing of the coastal marten as threatened in 2020, no actions determined to likely adversely affect the species and require formal section 7 consultations for the coastal marten have occurred within the areas that are now part of the Karuk Tribe Trust Lands. Because of the Karuk Tribe's practice of implementing conservation measures and management actions for the coastal marten and its habitat or designing projects that result in insignificant, discountable, or wholly beneficial effects to the DPS and its habitat, we do not anticipate a significant increase in section 7 consultations in the future, and, as a result, the regulatory benefit of critical habitat will be minimal.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to inform and educate landowners and the public regarding the potential conservation value of an area, and it may help focus management efforts on areas of high value for certain species. Any information about the coastal marten that reaches a wide audience, including parties engaged in conservation activities, is valuable. However, the coastal marten was petitioned for listing in 2010, was a

candidate species beginning in 2015, was listed by the State of California as endangered in 2018 (CDFW 2019, entire), was federally listed as a threatened species under the Act in 2020 (see 85 FR 63806; October 8, 2020), and had critical habitat proposed in 2021 (see 86 FR 58831; October 25, 2021). These actions have provided numerous opportunities for public outreach and education and have ensured that the Karuk Tribe and others are fully aware of the importance of coastal marten habitat and conservation. The Karuk Tribe has been and is currently working with the Service to conserve the coastal marten and its habitat, participate in working groups, and exchange management and resource information regarding the species. In addition, because the majority of lands surrounding or adjacent to the Karuk Tribe Trust Lands will be designated as critical habitat, there will still be opportunities for us to raise public awareness of the conservation value of the area for the coastal marten. Given that the listing of the coastal marten has already informed the public about the value of these areas and helped to focus potential conservation actions, the educational benefits from including the Karuk Tribe Trust Lands in the critical habitat designation would be small.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement actions in areas designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving section 6 or other recovery funding for coastal marten habitat-related projects. However, the occurrence of coastal martens on the Karuk Tribe Trust Lands may also promote the evaluation of projects within this area for funding, regardless of whether the lands are designated as critical habitat.

Therefore, because of the development and implementation of management plans, the Tribe's commitment to habitat conservation, the unlikelihood that a critical habitat designation would prompt more section 7 consultations than those that would occur due to the presence of breeding and dispersing coastal martens on these Tribal lands, and overall coordination with the Karuk Tribe on coastal marten-related issues, it is expected that there may be limited benefits from including the Karuk Tribe Trust Lands in a coastal marten critical habitat designation. The

principal benefit of any designated critical habitat is that federally authorized or funded activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat.

Benefits of Exclusion—Karuk Tribe Trust Lands

The benefits of excluding the Karuk Tribe Trust Lands from designated critical habitat include: (1) Our deference to the Tribe and recognition of their sovereignty to develop and implement their own conservation and natural resource management plans for their lands and resources, which includes benefits to the coastal marten and its habitat that might not otherwise occur; (2) the continuance and strengthening of our effective working relationship with the Tribe to promote the conservation of the coastal marten and its habitat; and (3) the maintenance of effective partnerships with the Tribe and working in collaboration and cooperation to promote conservation of the coastal marten and its habitat, as well as conservation for other listed or sensitive species.

During the development of our October 25, 2021, proposed rule (86 FR 58831), as well as during coordination for other endangered species or land management actions, we have communicated and coordinated with the Karuk Tribe on how they might be affected by listed species regulations in general and those associated with listing and designating critical habitat for the coastal marten. As such, we have established a beneficial relationship to support the Karuk Tribe's coastal marten conservation efforts. As part of our relationship, we have provided technical assistance to the Karuk Tribe to develop measures to conserve the coastal marten and its habitat on their lands. These measures are contained within the extensive management actions developed by the Karuk Tribe. During our coordination efforts with the Karuk Tribe, we recognized and endorsed their fundamental right to provide for Tribal resource management activities, including those relating to forested habitat.

As stated above, the Karuk Tribe has developed and implemented their Eco-Cultural Resources Management Plan that benefits the coastal marten and its habitat. The Karuk Tribe has expressed that their lands, and specifically forest habitat, are connected to their cultural and religious beliefs, and, as a result, they have a strong commitment to and

reverence for their lands' stewardship and conservation and have common goals with the Service on species and habitat conservation. The management plan identifies actions to maintain, improve, and preserve forest habitat, including those physical or biological features essential to the coastal marten. We have determined that the measures identified in the Karuk Tribe's Eco-Cultural Resources Management Plan meet several factors for exclusion under our 2016 policy including the: (1) Coordination of efforts to conserve wildlife species and their habitats with Tribal, Federal, State, and county governments, nongovernmental organizations, and local community groups; (2) management of wildlife through forests, shrub, and grassland habitat restoration activities, including utilizing hand and mechanical treatments in conjunction with identifiable prescribed fire ignition strategies; (3) implementation of landscape-level planning to support holistic ecosystem management; (4) reestablishment of interconnectivity between various habitat types across the landscape to foster wildlife movement and dispersal; (5) management for single/indicator species to prevent further habitat loss or degradation, species endangerment, and local extirpations of the species, as well as to allow for potential reintroductions; and (6) implementation of a monitoring program and adaptive management components to ensure that the conservation measures are effective and can be modified in the future in response to new information. The Karuk Tribe has identified that the measures identified above would be applied to the newly acquired Karuk Tribe Trust Lands.

Overall, the commitments toward management of coastal marten habitat by the Karuk Tribe likely accomplish greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis.

Because of the above-mentioned and established conservation efforts and coordination, the designation of critical habitat on the Karuk Tribe Trust Lands could have an adverse impact on our working relationship with the Karuk Tribe. The designation of critical habitat could be viewed as an intrusion and perceived as infringing on the Tribe's sovereign ability to manage natural resources in accordance with their own policies, customs, and laws. These perceived impacts include, but are not limited to: (1) Interfering with the sovereign and constitutional rights of the Karuk Tribe to protect and control its own resources within the Karuk

Tribe Trust Lands; and (2) undermining the positive and effective relationship between the Karuk Tribe and the Service—a relationship that serves to protect federally listed species and their habitats. The perceived restrictions of a critical habitat designation could have a damaging effect on coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the coastal marten and other species. For these reasons, we have determined that our working relationship with the Karuk Tribe would be better maintained if we exclude the Karuk Tribe Trust Lands from the critical habitat designation for the coastal marten. We view this as a substantial benefit since we have developed a trusting cooperative working relationship with the Karuk Tribe for the mutual benefit of the coastal marten and other endangered, threatened, and at-risk species that has resulted in substantial conservation commitments by the Karuk Tribe, such as development and implementation of resource management plans and continued partnerships and coordination with the Service and others.

In addition, we anticipate that future management plans addressing conservation efforts for other listed species and their habitats may be hampered if critical habitat is designated on Karuk Tribe Trust Lands. The Tribal Trust Lands have been managed for sensitive species conservation under the WKRP and the Tribe has committed to continuing this management, and to bring these lands within its ERMP. We have determined that other Tribes are willing to work cooperatively with us and others to benefit other listed and sensitive species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species may be compromised if these Karuk Tribe Trust Lands are designated as critical habitat for the coastal marten. Thus a benefit of excluding these lands would be future conservation efforts that would benefit other listed or sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Karuk Tribe Trust Lands

The benefits of including the Karuk Tribe Trust Lands in the critical habitat designation for the coastal marten are limited to the incremental benefits gained through the regulatory requirement for Federal agencies (*i.e.*, BIA) to consult under section 7 and consideration of the requirement to avoid adverse modification or

destruction of critical habitat, agency and educational awareness, potential additional grant funding, and the implementation of other law and regulations. However, due to the rarity of Federal actions resulting in formal section 7 consultations, the benefits of a critical habitat designation are minimized. In addition, the benefits of consultation are further minimized because any conservation measures that may have resulted from consultation are already provided through other mechanisms, such as (1) the conservation benefits to the coastal marten and its habitat from application to and implementation of the Karuk Tribe management plans to Karuk Tribe Trust Lands; and (2) the maintenance of effective collaboration and cooperation to promote the conservation of the coastal marten and its habitat.

Because the Karuk Tribe has developed specific management plans applicable to the Karuk Tribe Trust Lands, has been involved with the critical habitat designation process, and is aware of the value of their lands for coastal marten conservation, the educational benefits of a coastal marten critical habitat designation are minimized.

Allowing the Karuk Tribe to implement its own resource conservation programs gives the Tribe the opportunity to manage their natural resources to benefit forest habitat for the coastal marten without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the coastal marten and other listed species that would not otherwise be available through maintenance of a cooperative working relationship between the Service and the Karuk Tribe. The actions taken by the Tribe to manage and protect habitat needed for coastal marten and that the Tribe has committed will be applied to the Karuk Tribe Trust Lands are above those conservation measures that may be required if the area were designated as critical habitat. As a result, we have determined that the benefits of excluding the Karuk Tribe Trust Lands from critical habitat designation outweigh the benefits of including these areas in the designation.

After weighing the benefits of including the Karuk Tribe Trust Lands in the coastal marten critical habitat designation against the benefits of excluding them from the designation, we have concluded that the benefits of excluding the approximately 925 ac

(374 ha) of Karuk Tribe Trust Lands from Unit 5 (Klamath Mountains) outweigh those that would result from designating this area as critical habitat.

Exclusion Will Not Result in Extinction of the Species—Karuk Tribe Trust Lands

We have determined that exclusion of the Karuk Tribe Trust Lands from this critical habitat designation will not result in the extinction of the coastal marten. We base this determination on several points. First, the amount of critical habitat designated for the coastal marten within Unit 5 (Klamath Mountains) surrounding the trust lands is large, totaling 1,156,312 ac (467,943 ha). This remaining area is occupied and will continue to provide support to and conserve the coastal marten and its habitat. Second, for any projects having a Federal nexus and potentially affecting the coastal marten, the jeopardy standard of the Act will provide a level of assurance that the DPS will not go extinct as a result of excluding the Karuk Tribe Trust Lands from the critical habitat designation. Third, the Karuk Tribe has a long-term record of conserving species and habitat and is committed to protecting and managing coastal marten habitat according to their cultural history, management plans, and natural resource management objectives.

We have determined that this commitment accomplishes greater conservation than would be available through the implementation of a designation of critical habitat on a project-by-project basis. With the implementation of these conservation measures, which are based upon strategies developed in the Karuk Tribe's Eco-Cultural Resources Management Plan, as well as significant areas remaining as critical habitat and assurances of consultation with the Service for Federal actions that may likely adversely affect the species, we have concluded that the coastal marten will not become extinct as a result of this exclusion of Karuk Tribe Trust Lands from the critical habitat designation.

Accordingly, we have determined that the benefits of excluding the Karuk Tribe Trust Lands from the critical habitat designation outweigh the benefits of including them in the designation, and the exclusion of these lands from the designation will not result in the extinction of the species. As a result, the Secretary is excluding 925 ac (374 ha) of Karuk Tribe Trust Lands under section 4(b)(2) of the Act from the final designation of critical habitat in Unit 5 for the coastal marten.

Exclusion Analysis of Non-Harvest Land Base Lands (Oregon and California Lands (O&C Lands))

In our October 25, 2021, proposed rule (86 FR 58831), we did not include existing “harvest land base” lands (O&C lands) as critical habitat. We did include other O&C lands in Units 2, 3, 4, and 5 that are currently identified as either congressionally reserved, late-successional reserves, riparian reserve, or otherwise reserve lands. During the public comment period on the October 25, 2021, proposed rule, we received a request to exclude all O&C lands from the critical habitat designation for the coastal marten. O&C lands occur in western Oregon in a checkerboard pattern intermingled with private land across 18 counties. All O&C lands were reverted to the Federal Government under the Chamberlain-Ferris Act of 1916 (39 Stat. 218, June 9, 1916). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; 43 U.S.C. 2601) addresses the management of O&C lands. Most of these lands (82 percent) are administered by BLM. The remaining lands are administered by the USFS. The O&C Act identifies the primary use of revested timberlands for permanent forest production. The O&C Act provides that these lands are to be managed for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities (43 U.S.C. 2601).

The counties where the O&C lands are located participate in a revenue-sharing program with the Federal Government wherein the counties receive 50 percent of the revenues based on commercial receipts (e.g., income from commercial timber harvest) generated on these Federal lands (43 U.S.C. 2605(a)).

The majority of O&C lands within the areas we proposed as critical habitat for the coastal marten occur in Unit 5 in Oregon and are managed by the BLM. No O&C lands in California or managed by the USFS are within the areas proposed as critical habitat. In 2016, BLM revised its resource management plans for western Oregon, resulting in two separate plans. These two BLM plans, the Northwestern Oregon and Coastal Oregon Record of Decision and Resource Management Plan (BLM 2016a) and the Southwestern Oregon Record of Decision and Resource

Management Plan (BLM 2016b), address all or part of six BLM districts across western Oregon, including the management of O&C lands.

Benefits of Inclusion—Non-Harvest Land Base O&C Lands

The lands included in the designation that are managed by BLM under the O&C Act as reserves and not as “harvest land base” lands total approximately 69,094 ac (27,961 ha) of land in units 2, 3, 4, and 5 in Oregon. These areas are occupied by the coastal marten, contain the physical or biological features essential to the conservation of the DPS, and are composed primarily of late-successional reserve on BLM lands. These lands provide important habitat for reproduction, connectivity, and survival for the coastal marten and provide connectivity to more northerly habitat in Oregon as well as extensive habitat farther south into northwestern California.

A significant effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat designation, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species’ continued existence. The critical habitat designation benefits the coastal marten and identifies areas as part of a rangewide conservation strategy and network that connects large blocks of habitat that are able to support multiple home ranges and populations of the coastal marten in the variable habitats where the DPS occurs. The non-harvest land base O&C lands and other lands included in the designation provide connectivity and habitat areas in a spatial configuration that is essential to the conservation of the coastal marten.

The critical habitat designation also identifies areas on the landscape on which are found the physical or biological features that may require special management considerations or protection. Through the critical habitat designation and the section 7 consultation process, the Service is able to work collaboratively with the BLM, and other Federal agencies to help design how timber harvest can occur in these areas while minimizing impacts to coastal marten recovery. Conserving extant, high-quality habitat and addressing the threat from severe wildfire are key management actions

that can be undertaken by the BLM and are components of the special management considerations for conserving the PBFs within the areas identified as critical habitat for the coastal marten.

Because the threat of wildfire is present throughout the range of the coastal marten, special management considerations or protection may be required in all of the critical habitat units to ensure the coastal marten has sufficient habitat available to withstand large-scale, landscape-altering wildfire events. Based on the small population size of the DPS, its limited distribution, and its relatively unknown specific habitat requirements, the protection of high-quality habitat such as that found on non-harvest land base O&C lands is extremely important. The types of management or protection that may be required to achieve these goals and maintain the physical or biological features essential to the conservation of the coastal marten in occupied areas vary across the range of the DPS. Some areas of coastal marten habitat, particularly in wetter forest types, are unlikely to be enhanced by active management activities, but instead need protection of the essential features. Other forest areas would likely benefit from more proactive forestry management, especially when considering the effects of large-scale wildfire.

The designation of non-harvest land base O&C lands as critical habitat benefits the DPS by ensuring that the impact of actions identified in the Special Management Considerations or Protection section in this rule are considered in the design and implementation of timber harvest projects and avoiding or minimizing impacts to PBFs in these areas. The additional analysis required for critical habitat in a section 7 consultation requires action agencies to evaluate the effects on the physical or biological features that are essential to the conservation of the coastal marten that provide for denning, resting, foraging, and dispersal. In our consultations, the Service evaluates how those actions affect the conservation value of a critical habitat subunit and its essential physical or biological features, and then the analysis is scaled up to evaluate those effects at the critical habitat unit scale and the critical habitat designation as a whole. Evaluating habitat at multiple scales in consultations on timber harvest actions in designated critical habitat ensures the landscape continues to support the habitat network locally, regionally, and rangewide.

Another benefit of including lands in a critical habitat designation is that it generally serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. Identifying areas of high conservation value for the coastal marten can help focus and promote conservation efforts by other parties. Any additional information about the needs of the coastal marten or its habitat that reaches a wider audience can be of benefit to future conservation efforts. There is a benefit to communicating to the public and land managers that habitat found on O&C lands is essential to the conservation of the coastal marten. We work closely with the BLM in our coordinated section 7 consultation processes, and we have a keen understanding of the agency’s missions and mandates. Our local biologists meet regularly to discuss upcoming and ongoing Federal projects and their effects to both listed species and their critical habitats, and to address any concerns about the section 7 consultation process. Additionally, we meet regularly with local and regional forest managers to advise and coordinate management and conservation of forested lands. This process and partnership, established under the NWFP (USFS and BLM 1994, entire), has been effective for many years. We conclude that this collaborative approach, which includes reviewing projects and discussing how they may affect the physical and biological features of critical habitat for the coastal marten, is a substantial benefit of including these lands in the critical habitat designation.

Benefits of Exclusion—Non-Harvest Land Base O&C Lands

There would be benefits realized by excluding all non-harvest land base O&C lands managed by the BLM from critical habitat. Executive Order 12866 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. Excluding non-harvest land base O&C lands from the coastal marten critical habitat designation would reduce the burden of additional section 7 consultation beyond any requirements to consult because the DPS occurs on these lands. However, that burden reduction would be minor, as it would only reduce the administrative costs associated with conducting an adverse modification analysis.

Our economic analysis for the proposed designation found that there would be some additional administrative costs associated with the designation of critical habitat. These costs would be associated with the determination by the Federal agency of whether an action they conduct, fund, or authorize would adversely modify or destroy critical habitat. However, the economic analysis of the proposed critical habitat found the incremental effects of the designation to be relatively small due to the extensive conservation measures already in place for the DPS because of its listed status under the Act and because of the measures provided under the NWFP (USFS and BLM 1994, entire), BLM resource management plans for western Oregon (BLM 2016a, entire; BLM 2016b, entire), and those measures identified for other listed species such as the northern spotted owl and marbled murrelet (IEC 2021, p. 2).

In addition, we find value in consulting programmatically and at the project level under section 7 of the Act on Federal projects on O&C lands outside of those lands allocated by BLM to the harvest land base. The benefits derived in these section 7 consultations include avoiding or minimizing impacts to the PBFs and providing an opportunity to evaluate the effects those timber harvest projects have on the functionality of the overall critical habitat designation. The consultations allow the Service to evaluate the effects on the functionality of the critical habitat network and ensure that functionality is not significantly impaired. We find that focusing our consultation and administrative capacity on section 7 consultations in the O&C lands outside of the BLM's harvest land base lands is a priority given that the majority of this area is designated as late-successional reserve and riparian reserve and contributes to conservation of habitat for the coastal marten. Additionally, as stated above, the O&C lands outside of the BLM harvest land base allocation provide areas of higher quality habitat that coastal martens prefer for denning, resting, and foraging behavior and lower quality habitat that coastal martens use for dispersal. Therefore, the benefits of excluding the O&C lands outside of the

BLM harvest land base from this critical habitat designation are reduced.

Benefits of Inclusion Outweigh the Benefits of Exclusion—Non-Harvest Base O&C Lands

When weighing the benefits of inclusion and the benefits of exclusion of areas, the Secretary has broad discretion as to what factors to consider as benefits of inclusion and benefits of exclusion, and what weight to assign to each factor. We have determined that the benefits of including non-harvest land base O&C lands in units 2, 3, 4, and 5 in this critical habitat designation outweigh the benefits of excluding them because the habitat on these lands are of a high conservation value for the coastal marten and exclusion of these areas would most likely reduce the current management efforts being implemented to maintain the physical or biological features necessary to develop, maintain, and protect habitat essential to coastal marten conservation. These efforts, therefore, serve to manage and protect habitat needed for the coastal marten. In making this finding, we have weighed the benefits of excluding these lands from the critical habitat designation against the benefits of including these lands in the designation. We acknowledge that many counties depend on timber harvest production; however, our economic analysis (IEC 2021, entire) did not identify significant economic impacts due to the designation itself. The disruptions noted by the commenters in Federal timber production are caused by a range of factors, including the listing of species, timber sale design factors unrelated to listed species, market conditions, and a number of other factors that are not attributable to critical habitat designation.

Even assuming the high end of the economic impacts identified in our economic analysis, ultimately, we give greater weight to the conservation value of the O&C lands outside of the BLM harvest land base than to the potential economic benefits of excluding these lands from the designation, for several reasons. First, these areas are of significant conservation value to the coastal marten given the geographical location and the essential habitat features they provide for the DPS. Second, the section 7 consultation

requirements (*i.e.*, the USFS and BLM must consult with the Service on proposed impacts to designated critical habitat from Federal projects) that will apply to the O&C lands outside of the BLM's harvest land base/USFS matrix lands provide for meaningful coordination between the Service and the agencies regarding actions they are proposing and the needs of the coastal marten, which, in turn, provides a conservation benefit to the DPS in Oregon and California. The benefits derived in these section 7 consultations include avoiding or minimizing impacts to the PBFs and providing an opportunity to evaluate the effects those projects have on the functionality of the overall critical habitat designation. In sum, we find that the benefits of including the areas of O&C lands outside of BLM's harvest land base (*i.e.*, non-harvest land base lands) in this critical habitat designation outweigh the benefits of excluding them from the designation. As a result, we are not excluding the O&C lands outside of BLM's harvest land base (*i.e.*, non-harvest land base lands) as allocated under the 2016 RMPs from this final designation.

Because we are not excluding the O&C lands outside of BLM's harvest land base (*i.e.*, non-harvest land base lands) from this final designation, we are not required to conduct an extinction analysis for any exclusion.

Summary of Exclusions

As discussed above, based on the information provided to us by entities seeking exclusion, as well as additional public comments and other information we received, we evaluated whether certain lands in the proposed critical habitat designation were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. We are excluding the following areas from Unit 5 of the critical habitat designation for the coastal marten: (1) areas in California owned and managed by the GDRC; (2) areas owned or managed by the Yurok Tribe; (3) areas identified by the Yurok Tribe as reservation boundary adjustment lands; and (4) lands held in trust for the Karuk Tribe as part of recent legislation. Table 2, below, presents a summary of these exclusions.

TABLE 2—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION IN UNIT 5
[Klamath Mountains]

Unit	Specific area	Areas meeting the definition of critical habitat	Areas excluded from critical habitat	Final critical habitat in Unit 5
Unit 5: OR—CA—5 Klamath Mountains.	Green Diamond Resource Company lands ... Yurok Tribe-owned or -managed lands. Yurok Tribe Reservation boundary adjustment lands (USFS-owned). Karuk Tribe trust lands.	1,289,627 ac (521,913 ha).	49,010 ac (19,834 ha) 64,979 ac (26,296 ha). 25,791 ac (10,437 ha). 925 ac (374 ha).	1,156,312 ac (467,943 ha)*.

* Unit total represents exclusions plus any minor adjustments based on habitat features or land designations.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 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. E.O. 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. We have developed this rule in a manner consistent with these requirements.

Executive Order 12866, as reaffirmed by E.O. 13563 and E.O. 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 this rule is not significant.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 et seq.), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will

not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Under the RFA, as amended, as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the

Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the two comment periods on October 25, 2021, proposed rule (86 FR 58831), and the September 30, 2022, document that describes revisions to and reopened the comment period on the October 25, 2021, proposed rule (87 FR 59384) that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects “to the extent permitted by law” when undertaking actions identified as significant energy actions (66 FR 28355;

May 22, 2001). E.O. 13211 defines a “significant energy action” as an action that (i) is a significant regulatory action under E.O. 12866 or E.O. 14094 (88 FR 21879; Apr. 11, 2023)); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule is not a significant regulatory action under E.O. 12866 or 14094. We are currently unaware of and do not expect any planned activities to occur in the areas identified as critical habitat for the coastal marten that would significantly affect energy supply, distribution, or use. In our economic analysis, we did not find that this critical habitat designation will significantly affect energy supplies, distribution, or use. The economic costs of the critical habitat designation for the coastal marten are likely to be minor and primarily limited to administrative efforts that consider adverse modification during consultation. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following finding:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or Tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational

Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The economic analysis concludes that the majority of incremental impacts would most likely occur as a result of Federal agency actions and primarily limited to administrative efforts that consider adverse modification during consultation. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the coastal marten in a takings implications assessment. The Act does not authorize us to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any

closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for the coastal marten does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this final rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities

that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this rule identifies the physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We 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 (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (e.g., *Douglas County v.*

Babbitt, 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951, May 4, 1994), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), the President's memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation; 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes and Alaska Native Corporations (ANCs) on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

In our development of the proposed critical habitat designation and again after our proposed rule published, we reached out to all federally recognized Tribes in southern Oregon and northern California including the Yurok and Karuk Tribes, and provided them with information on our processes for designating critical habitat and met with them to discuss the management of lands under their control, their concerns, and their request for potential exclusion of lands under section 4(b)(2) of the Act. As a result of our coordination with the Yurok Tribe, we developed a MOU regarding their activities and conservation of coastal marten habitat. We used the MOU as part of our rationale for excluding Yurok Tribe-owned or managed Lands under section 4(b)(2) of the Act, and we are excluding the lands identified by the Yurok Tribe, including Yurok Tribe Reservation Boundary Adjustment Lands from this final designation. We also excluded lands recently transferred

from the USFS to be held in trust by the Secretary of the Interior for the benefit of the Karuk Tribe (for more information, see *Tribal Lands* under Consideration of Impacts under Section 4(b)(2) of the Act, above).

References Cited

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov> and upon request from the Arcata Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team, the Arcata Fish and Wildlife Office in California, and the Service's Roseburg Field Office in Oregon.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Signing Authority

Martha Williams, Director of the U.S. Fish and Wildlife Service, approved this action on April 3, 2024, for publication. On May 17, 2024, Martha Williams authorized the undersigned to sign the document electronically and submit it to the Office of the Federal Register for publication as an official document of the U.S. Fish and Wildlife Service.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by revising the entry for “Marten, Pacific [Coastal DPS]” under MAMMALS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
Mammals				
* Marten, Pacific [Coastal DPS].	* <i>Martes caurina</i>	* U.S.A. (CA (north- western), OR (south- western)).	* T	* 85 FR 63806, 10/8/2020; 50 CFR 17.40(s); ^{4d} 50 CFR 17.95(a). ^{CH}
*	*	*	*	*

■ 3. In § 17.95, amend paragraph (a) by adding an entry for “Pacific Marten (*Martes caurina*), Coastal Distinct Population Segment (DPS)” after the entry for “Florida Manatee (*Trichechus manatus*)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.
(a) *Mammals.*

* * * * *
Pacific Marten (*Martes caurina*), Coastal Distinct Population Segment (DPS)

(1) Critical habitat units are depicted for California and Oregon on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of Coastal DPS of the Pacific marten consist of the following components:

(i) Habitat that supports a coastal marten home range by providing for breeding, denning, resting, or foraging. This habitat provides cover and shelter to facilitate thermoregulation and reduce predation risk, provides foraging sources for coastal marten prey, and provides structures that provide resting and denning sites. For cover and support denning, resting, and foraging, coastal martens require a dense forest overstory, dense understory development, and biologically complex structure that contains snags, logs, other decay elements, or other structures. Stands meeting the conditions for this physical or biological feature would also function as meeting the physical or biological feature described in paragraph (2)(ii) of this entry. Stands meeting the condition for this physical or biological feature contain each of the following three components:

(A) *Mature, conifer-dominated forest overstory.* Overstory canopy cover provides protection to coastal martens from aerial and terrestrial predators, as well as shelter from physical elements such as sun or storms. It also is the general source of structural features that coastal martens use for denning and resting, and provides suitable coastal marten prey. Suitable overstory conditions vary depending on the productivity of the site as follows:

(1) For areas with relatively low productivity (e.g., areas where growing conditions are harsher, such as serpentine sites or coastal shore pine forests, compared to other areas), suitable forest overstory conditions are highly variable. They may contain a sparse conifer overstory, such as in some serpentine areas, or a dense conifer overstory composed mainly of trees smaller than the typical older forest conditions described in paragraph (2)(i)(A)(2) of this entry (e.g., the dense shore pine overstory found in areas occupied by coastal marten along the Oregon coast) as well as those resting and denning structures necessary that are as of yet undescribed for some populations.

(2) For other areas with higher productivity, coastal martens tend to favor forest stands in the old-growth or late-mature seral stages. The specific forest composition and structure conditions found in higher productivity areas will vary by plant series and site class. Structural and composition descriptions of old-growth or late-mature seral stages for local plant community series should be used where available. In general, these stands exhibit high levels of canopy cover and structural diversity in the form of:

- (i) A wide range of tree sizes, including trees with large diameter and height;
- (ii) Deep, dense tree canopies with multiple canopy layers and irregular tree crowns;
- (iii) High numbers of snags, including large-diameter snags; and
- (iv) Abundant downed wood, including large logs, ideally in a variety of decay stages.

(B) *Dense, spatially extensive shrub layer.* The shrub layer should be greater than 70 percent of the area, comprising mainly shade-tolerant, long-lived, mast-producing species (primarily ericaceous species such as salal, huckleberry, or rhododendron, as well as shrub oaks). An extensive layer of dense shrubs provides protection and cover from coastal marten predators. In addition, ericaceous and mast-producing shrubs provide forage for coastal marten prey.

(C) *Stands with structural features.* Structural features that support denning or resting, such as large downed trees, rock piles with interstitial spaces, and large snags or live trees with decay elements or suitable resting structures (e.g., hollows and cavities, forked or broken tops, dead tops, brooms from mistletoe or other tree pathogens, or large platforms including abandoned nests). These features provide cover and thermal protection for kits and denning females, and for all animals when they are resting between foraging bouts. Hence, these features need to be distributed throughout a coastal marten’s home range. They also tend to be among the largest structures in the stand. Many of these features, such as downed trees and snags or live trees with decayed elements, also support coastal marten prey.

(ii) Habitat that allows for movement within home ranges among stands that meet the conditions of the physical or biological feature described in paragraph (2)(i) of this entry or that supports individuals dispersing between home ranges. Habitat with this physical or biological feature includes:

- (A) Stands that meet all three conditions of the physical or biological feature described in paragraph (2)(i) of this entry;
- (B) Forest stands that meet only the conditions of paragraphs (2)(i)(A) and (B) of this entry; or
- (C) Habitats with lesser amounts of shrub, canopy, or forest cover, or lesser amounts of smaller structural features as described in paragraph (2)(i) of this entry, and while not meeting all of the conditions of the physical or biological feature described in paragraph (2)(i) of this entry, still provide forage and cover from predators that allow a coastal marten to traverse the landscape to areas of higher quality habitat.

(3) Critical habitat does not include humanmade structures (such as buildings, aqueducts, runways, roads, and other paved or hardened areas as a result of development) and the land on which they are located existing within the legal boundaries on June 28, 2024. Due to the scale on which the critical

habitat boundaries are developed, some areas within the legal boundaries may not contain the physical or biological features and, therefore, are not considered critical habitat.

(4) Data layers defining map units were created using ArcGIS Pro 2.5.2 (Environmental Systems Research Institute, Inc. (ESRI)), a Geographic Information Systems (GIS) program. ESRI base maps of world topographic, world imagery, and the program's world imagery U.S. Geological Survey (USGS)

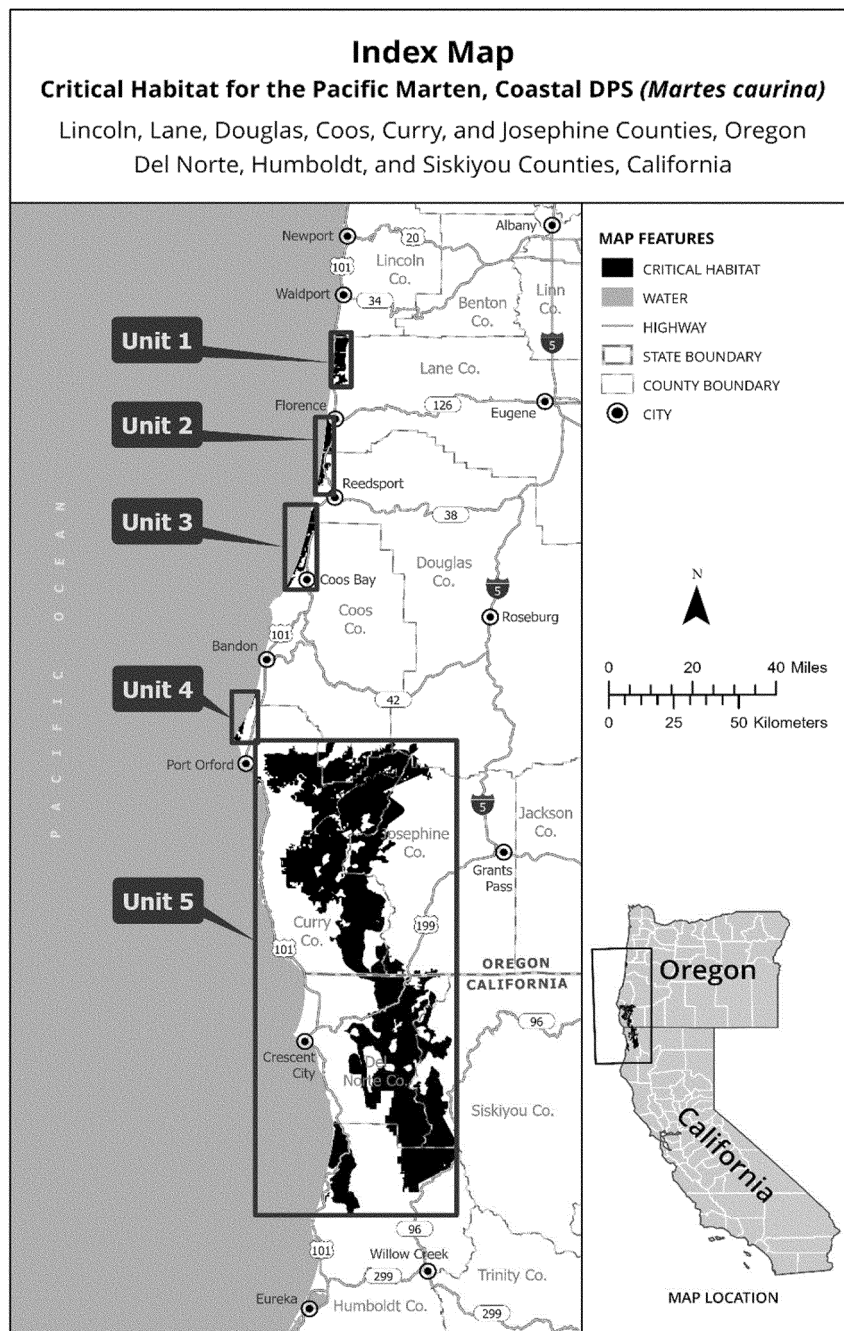
Imagery were used. Critical habitat units were then mapped using North American Datum (NAD) 1983, Albers. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Arcata Fish and Wildlife Office's internet site at <https://www.fws.gov/office/arcata-fish-and-wildlife>.

wildlife, or on <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0151. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of critical habitat follows:

Figure 1 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (5)

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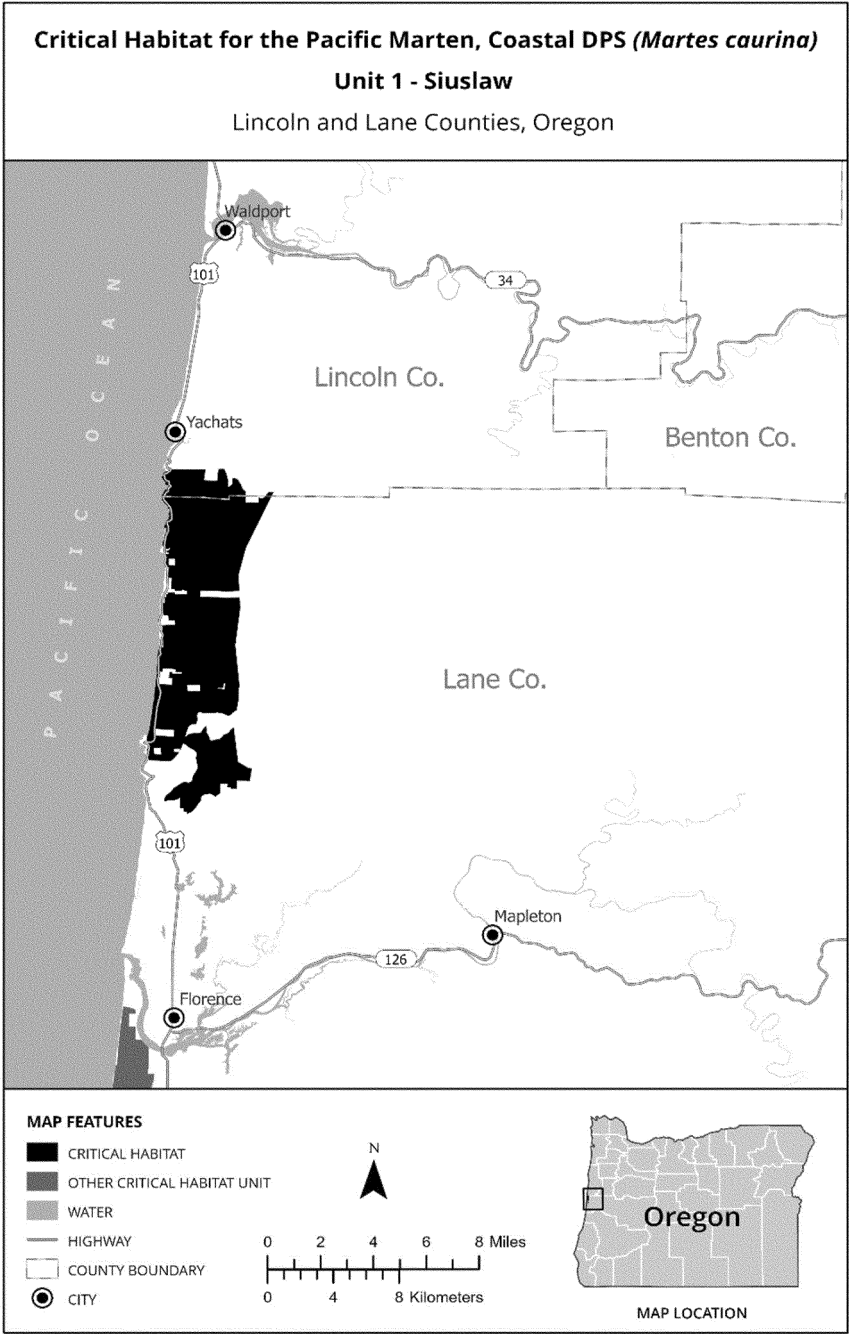
(6) Unit 1: Siuslaw Unit; Lincoln and Lane Counties, Oregon.

(i) Unit 1 consists of 22,135 acres (ac) (8,958 hectares (ha)) and is composed of

Federal (20,092 ac (8,131 ha)) and State (2,043 ac (827 ha)) lands.

(ii) Map of Unit 1 follows:

Figure 2 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (6)(ii)

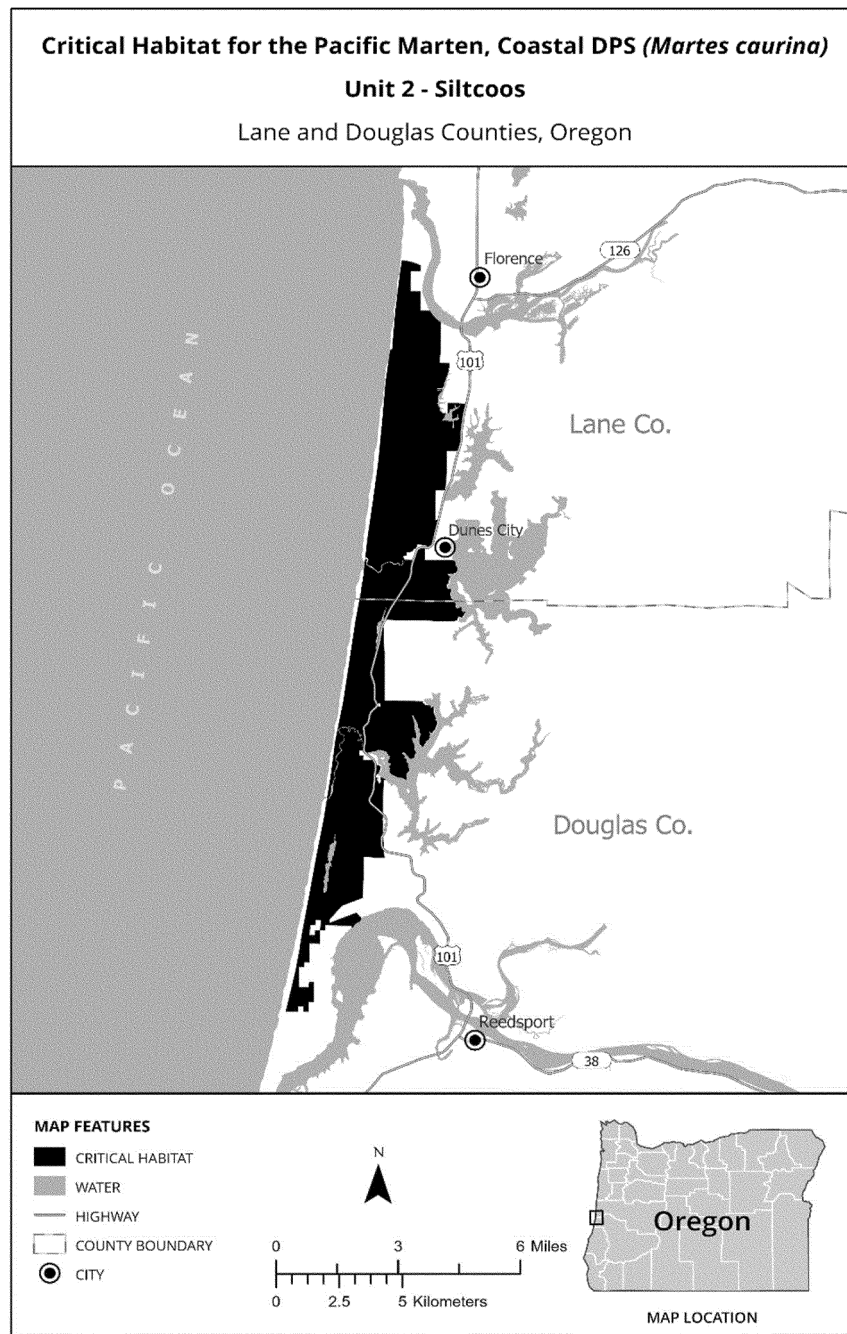


(7) Unit 2: Siltcoos Unit; Lane and Douglas Counties, Oregon.

(i) Unit 2 consists of 15,859 ac (6,418 ha) and is composed of Federal (15,610 ac (6,317 ha)) and State (249 ac (101 ha)) lands.

(ii) Map of Unit 2 follows:

Figure 3 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (7)(ii)



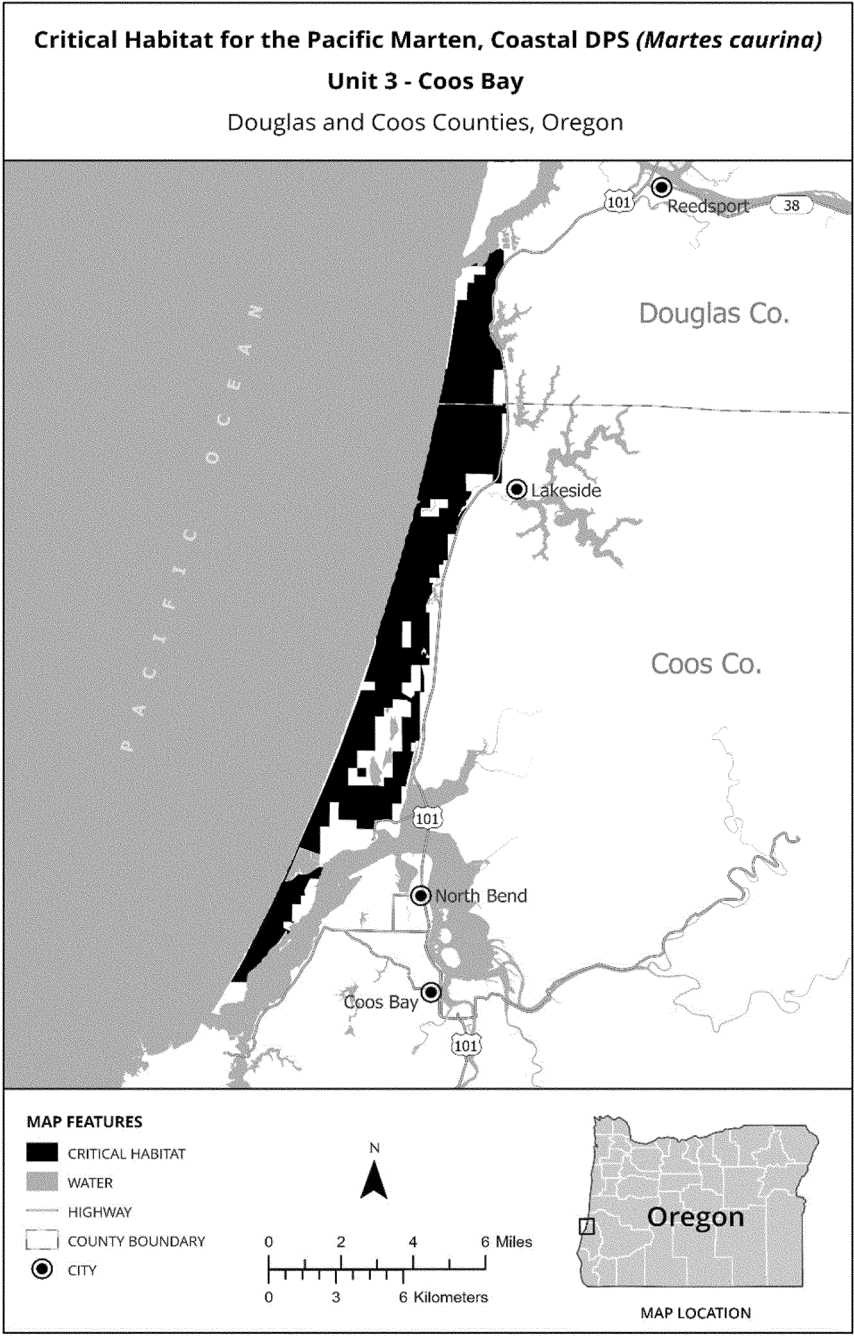
(8) Unit 3: Coos Bay Unit; Douglas and Coos Counties, Oregon.

(i) Unit 3 consists of 15,402 ac (6,233 ha) and is composed of Federal (14,806

ac (5,992 ha)) and State (595 ac (241 ha)) lands.

(ii) Map of Unit 3 follows:

Figure 4 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (8)(ii)



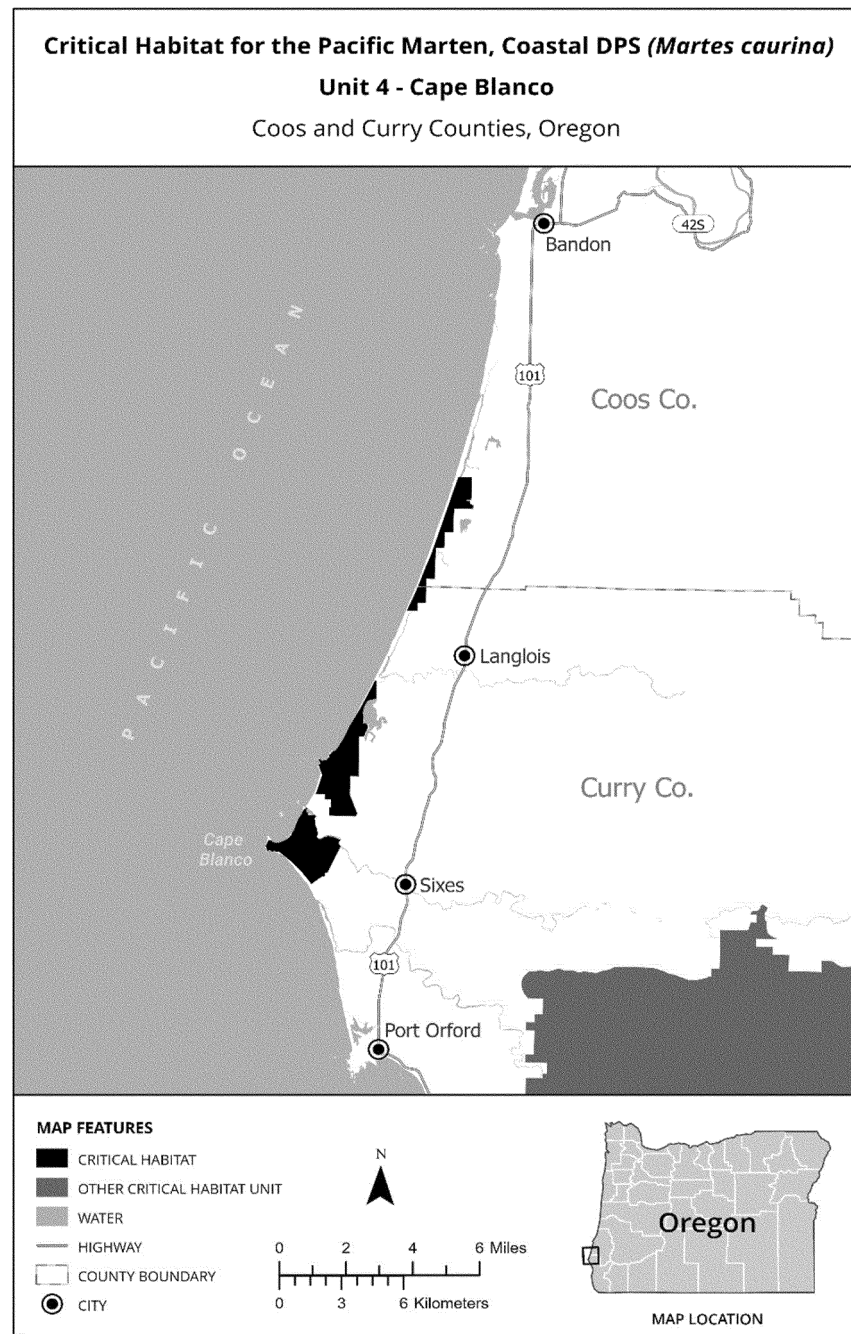
(9) Unit 4: Cape Blanco Unit; Coos and Curry Counties, Oregon.

(i) Unit 4 consists of 4,044 ac (1,636 ha) and is composed of Federal (1,019

ac (412 ha)) and State (3,025 ac (1,224 ha)) lands.

(ii) Map of Unit 4 follows:

Figure 5 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (9)(ii)



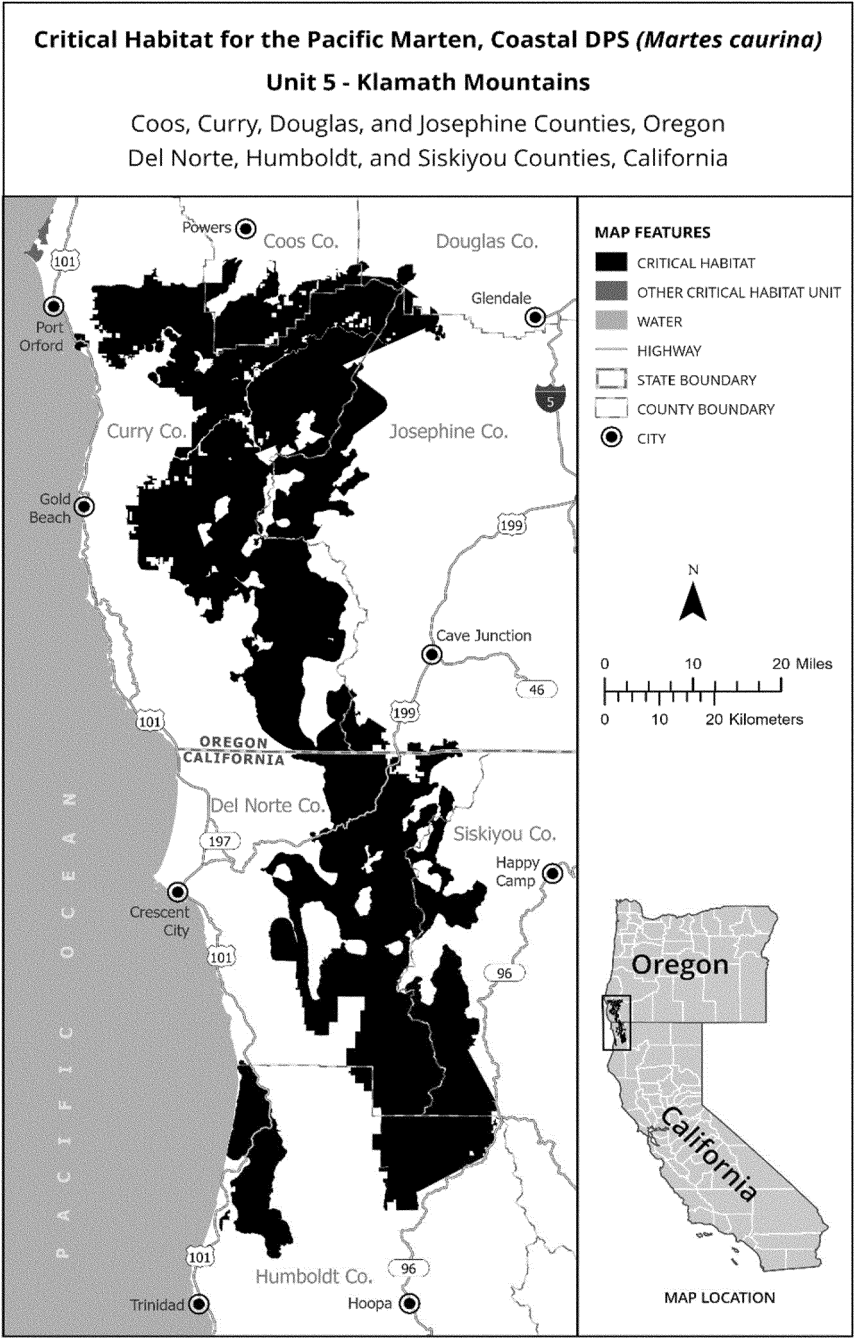
(10) Unit 5: Klamath Mountains Unit; Coos, Curry, Douglas, and Josephine

Humboldt, and Siskiyou Counties, Oregon, and Del Norte, California.

(i) Unit 5 consists of 1,156,312 ac (467,943 ha) and is composed of Federal (1,125,492 ac (455,471 ha)), State (17,812 ac (7,208 ha)), and private or undefined (13,008 ac (5,264 ha)) lands.

(ii) Map of Unit 5 follows:

Figure 6 to Pacific Marten (*Martes caurina*), Coastal DPS paragraph (10)(ii)



* * * * *

Madonna Baucum,
*Regulations and Policy Chief, Division of
Policy, Economics, Risk Management, and
Analytics of the Joint Administrative
Operations, U.S. Fish and Wildlife Service.*
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Part III

Department of Housing and Urban Development

24 CFR Parts 91, 92, 570, et al.

HOME Investment Partnerships Program: Program Updates and
Streamlining; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91, 92, 570, and 982

[Docket No. FR-6144-P-01]

RIN 2506-AC50

HOME Investment Partnerships Program: Program Updates and Streamlining

AGENCY: Office of the Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development, HUD.

ACTION: Proposed rule.

SUMMARY: HUD's HOME Investment Partnerships Program (HOME program or HOME) provides formula grants to States and units of general local government to fund a wide range of activities to produce and maintain affordable rental and homeownership housing and provides tenant-based rental assistance for low-income and very low-income households. This proposed rule would revise the current HOME regulations to update, simplify, or streamline requirements, better align the program with other Federal housing programs, and implement recent amendments to the HOME statute. This rule also includes minor revisions to the regulations for the Community Development Block Grant and Section 8 Housing Choice Voucher (HCV) Programs consistent with the implementation of proposed changes to the HOME program.

DATES: *Comment Due Date:* July 29, 2024.

ADDRESSES: There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Electronic Submission of Comments.* Comments may be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through www.regulations.gov can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that website to submit comments electronically.

2. *Submission of Comments by Mail.* Comments may be submitted by mail to

the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

Note: To receive consideration as a public comment, comments must be submitted through one of the two methods specified above.

Public Inspection of Public Comments. HUD will make all properly submitted comments and communications available for public inspection and copying during regular business hours at the above address. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the public comments by calling the Regulations Division at 202-708-3055 (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 all comments submitted are available for inspection and downloading at www.regulations.gov.

In accordance with 5 U.S.C. 553(b)(4), a summary of this proposed rule may be found at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW, Room 7160, Washington, DC 20410; telephone number (202) 708-2684 (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>.

SUPPLEMENTARY INFORMATION:

I. Background—The HOME Program

The HOME program is authorized by title II of the Cranston-Gonzalez National Affordable Housing Act¹ ("NAHA") and has been in operation since 1992. The HOME program provides grants to States, local jurisdictions, and consortia of local jurisdictions (collectively, participating jurisdictions or PJs) and is used, often in partnership with local nonprofit

groups, to fund a wide range of activities to build, buy, or rehabilitate affordable housing for rent or homeownership or to fund direct rental assistance to low-income people.² HOME program funds are awarded annually as formula grants to participating jurisdictions. After the Department obligates funds to a participating jurisdiction, the Department establishes a HOME Investment Trust Fund³ for each participating jurisdiction, providing a line of credit that a participating jurisdiction may draw upon as needed.

The HOME program is the largest Federal block grant to States and local governments designed exclusively to create affordable housing for low-income households. Each year, the program allocates approximately \$1.5 billion among States and approximately 600 localities nationwide. In fiscal year 2023, participating jurisdictions completed 6,848 rental housing units and 4,051 homebuyer units, assisted 2,717 low-income homeowners to repair their homes, and provided tenant-based rental assistance to 13,016 low-income households. HOME funds are most often used as gap financing for rental projects, particularly for projects that have been awarded Low-Income Housing Credits (26 U.S.C. 42) ("LIHTC"). Currently, there are 245,122 HOME-assisted rental units operating in their periods of affordability (*i.e.*, subject to ongoing HOME income and rent requirements). The HOME program is designed to reinforce several important values and principles of community development. First, the HOME program's flexibility empowers people and communities to design and implement strategies tailored to their own needs and priorities. Second, the HOME program's emphasis on consolidated planning expands and strengthens partnerships among all levels of government and the relationship with the private sector in the development of affordable housing. Third, the HOME program's technical assistance activities and set-aside for qualified community housing development organizations help to build the capacity of and partnerships with these community-based nonprofit organizations. Fourth, the HOME program's requirement that participating jurisdictions match 25 cents of every dollar in program funds helps to mobilize community resources in support of affordable housing.

² See HUD's HOME Investment Partnerships Program web page at https://www.hud.gov/program_offices/comm_planning/home.

³ HUD's regulations for the HOME Investment Trust Fund can be found at 24 CFR 92.500.

¹ 42 U.S.C. 12721 *et seq.*

While participating jurisdictions may undertake housing development activities directly, they also may provide HOME funds to for-profit developers, public agencies, or private non-profit organizations to develop affordable housing for rent or sale to income-eligible households. Participating jurisdictions may provide HOME funds for affordable housing as grants, direct loans, loan guarantees, or other forms of credit enhancement, or for rental assistance or security deposits. Non-development activities such as tenant-based rental assistance or downpayment assistance for homeownership are generally administered by the participating jurisdiction, another public agency, or a non-profit organization as subrecipients acting on behalf of the participating jurisdiction.

The participating jurisdiction ensures compliance with HOME affordability requirements during the required period of affordability through the execution and recording of regulatory agreements on HOME-assisted housing and other enforceable measures such as deed restrictions or similar instruments. All HOME-assisted units must be occupied by income-eligible households. HOME-assisted rental units must have their rents approved by the participating jurisdiction and require owners to restrict the rent paid by tenants to amounts at or below the HUD-published maximum HOME rent limits. Owners of HOME-assisted rental housing must follow their adopted written tenant selection policies and criteria and select tenants from a written waiting list in chronological order of their application, insofar as practicable. Owners of HOME-assisted rental housing must also affirmatively market the availability of units in a manner likely to reach eligible tenants. Generally, participating jurisdictions maintain information on HOME-assisted rental housing (e.g., websites, brochures, fliers) that prospective tenants may access to identify housing opportunities. HOME-assisted housing for homebuyers is also subject to a period of affordability. If the HOME-assisted homeownership housing is sold during the period of affordability, either the property must be sold at an affordable price to another low-income homebuyer or all or a portion of any purchase assistance provided to the seller must be recaptured from the net proceeds of the sale.

The HOME program regulations are codified in 24 CFR part 92 and were last substantively revised on July 24, 2013

(the 2013 HOME Final Rule).⁴ The 2013 HOME Final Rule focused on improving a participating jurisdiction's performance and accountability to HOME grant funds and addressing a participating jurisdiction's operational challenges as it adopted more complex program designs and its portfolio of existing projects grew. In 2016, the Department issued an interim regulation,⁵ finalized on September 22, 2022 ("the 2022 HOME Final Rule"),⁶ that implemented a grant-specific method for determining compliance with the 24-month commitment and CHDO set-aside commitment deadlines. The 2022 HOME Final Rule also eliminated the use of first-in-first-out accounting for fiscal year 2015 and later HOME grants.

The HOME program provisions contained in title II of NAHA are prescriptive and the statute has not been significantly revised since the HOME program was last reauthorized by Congress in 1992. The constraints of prescriptive statutory authority that have not been significantly revised in over 30 years limits the scope of changes that the Department can propose to the HOME program regulations. Working within these limitations, the Department conducted a comprehensive review of title II of NAHA and current HOME program regulations to determine whether previously unrecognized opportunities might exist to revise current regulatory provisions. In creating this proposed rule, the Department focused on its commitment to equity and wealth-building and considered input from stakeholders throughout the years on the most challenging aspects of administering and using HOME funds to provide affordable housing. Through this proposed rule, the Department seeks to reduce burden and increase flexibility for participating jurisdictions and other program participants, while adhering to statutory intent and requiring responsible management of State and local HOME programs.

II. This Proposed Rule

HUD proposes to make multiple changes to 24 CFR part 92. The proposed changes include significant revisions to the community housing development organization (CHDO) requirements, a change in the approach to HOME rents, simplified requirements for small-scale rental projects, enhanced flexibility in HOME tenant-based rental assistance ("TBRA") programs, and

simplified provisions and new flexibilities for community land trusts (CLTs). The proposed rule would significantly strengthen and expand tenant protections by requiring that a HOME tenancy addendum with a set of uniform tenant protections be appended to the leases of all tenants of HOME-assisted rental housing units. HUD also proposes requiring that a HOME tenancy addendum with a streamlined set of uniform tenant protections be appended to the leases of all tenants receiving TBRA. Additionally, HUD proposes to create incentives for meeting a more advanced property standard that incorporates green building standards, higher levels of energy efficiency, and innovative building techniques in new construction, reconstruction, and rehabilitation of housing. The proposed rule would also clarify the resale requirements for homeownership housing and would make technical amendments and simplifications to conform provisions to certain changes made in the 2013 HOME Final Rule. HUD's proposed changes are described more fully in each of the sections below.

This proposed rule incorporates changes made by the Housing Opportunity Through Modernization Act of 2016 (HOTMA), published in the **Federal Register** on February 14, 2023 (88 FR 9600) ("HOTMA Final Rule"), Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE), published in the **Federal Register** on May 11, 2023 (88 FR 30442) ("NSPIRE Final Rule"). This proposed rule also updates citations, in paragraphs where other changes are being made, to citations to conform with recent changes to the Office of Management and Budget (OMB) regulations at 2 CFR part 200. HUD intends to publish a future rulemaking to ensure that all citations throughout HUD's regulations are consistent with these changes. This proposed rule also proposes further revisions to the changes made to 24 CFR part 92 by the HOTMA Final Rule, and the NSPIRE Final Rule.

A. Changes to the HOME Program Regulations (24 CFR Part 92)

1. Definitions (24 CFR 92.2)

Removal of definitions related to 24 CFR part 92, subpart M. HUD proposes to remove the definition of "ADDI Funds," "Displaced homemaker," and "First-Time Homebuyer" because the Department proposes to delete 24 CFR part 92, subpart M, which implemented

⁴ 78 FR 44627.

⁵ 81 FR 86947 (Dec. 2, 2016).

⁶ 87 FR 57821.

the American Dream Downpayment Initiative (ADDI) and associated definitions.

Commitment. HUD proposes to make two minor changes to the definition of “commitment.” This term is currently defined to generally mean that a participating jurisdiction has executed a legally binding agreement with a State recipient, a subrecipient, or a contractor to use a specific amount of HOME funds for a specified use or for a specified local project. The proposed rule would make a technical correction in paragraph (1) of the definition to change the word “official” to “officials” in the description of an agreement between the participating jurisdiction and a subrecipient that is controlled by the participating jurisdiction. The proposed rule would also replace the term “downpayment assistance” with “homeownership assistance.” The use of the term “downpayment assistance” was a drafting error which unintentionally implied that written agreements with State recipients or subrecipients to provide other forms of homeownership assistance (*i.e.*, direct financial assistance to homebuyers or rehabilitation assistance to low-income homeowners) do not constitute commitments. The proposed rule would also remove “or subrecipient” from paragraph (2)(ii)(A) of the definition because a subrecipient, unlike a State recipient, is not permitted to acquire or assist standard housing with HOME funds it administers. This change would conform to proposed clarifications in the definitions of “State recipient” and “subrecipient.”

Community housing development organization. HUD proposes to revise paragraph (4) of the “community housing development organization” (CHDO) definition to clarify the three options for meeting the requirement that the CHDO be a private nonprofit organization that is tax exempt. The proposed rule would insert the language “Is tax exempt as follows:” and add paragraphs (i), (ii), and (iii) to paragraph (4) to distinguish the three options to meet the tax exempt requirement. The first option is a tax exemption ruling from the Internal Revenue Service (IRS) under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 and would be paragraph (4)(i). The second option’s current language “is classified as a subordinate of a central organization non-profit under section 905 of the Internal Revenue Code of 1986” reflects the Department’s decision in the 2013 HOME Final Rule to accommodate the IRS’s recognition of a group of subordinate organizations as tax exempt if they are affiliated with a

central organization.⁷ To avoid the need for each of the subordinate organizations to apply for an exemption individually, the IRS provides the central organization with a group exemption letter which is a ruling or determination issued to the central organization (generally, a State, regional, or national organization) which holds that one or more subordinate organizations (usually a post, unit, chapter, or local) are exempt from Federal income tax by virtue of being subordinate organizations of the central organization. In order to benefit from a group exemption letter, the subordinate organization must be listed in the 501(c)(3) or (4) central organization’s group exemption letter. Rather than the general reference to section 905 of the Internal Revenue Code (IRC) in the current language, the proposed language in paragraph (4)(ii) of the CHDO definition would describe the applicable IRS requirement. The third option in paragraph (4) has also been revised in proposed paragraph (4)(iii) to clarify that a private nonprofit organization is tax exempt if it is wholly owned by a community housing development organization that meets the requirement of the definition in § 92.2, including either paragraph (4)(i) or (ii), and is disregarded as an entity separate from its owner organization for federal tax purposes. The 2013 HOME Final Rule included this option to permit private nonprofit organizations that were wholly owned by a CHDO to meet the tax exempt requirement in paragraph (4). However, the language for this third option in the 2013 HOME Final Rule was confusing. The proposed paragraph (4)(iii) would clarify that a private nonprofit organization may also meet the tax exempt requirement because its owner organization (that qualifies as a CHDO) has a 501(c)(3) or (4) ruling or is a subordinate organization included in a 501(c)(3) or (4) central organization’s group exemption letter by the IRS.

As part of the Department’s effort to provide more community-based nonprofit organizations access to the HOME CHDO set-aside within the constraints of NAHA, the proposed rule would revise several provisions of the CHDO definition to make it easier for these organizations to meet the low-income board representation and staff capacity requirements in § 92.2. These proposed changes, when combined with the proposed revisions to the required role of the CHDO as owner, developer,

or sponsor of housing at § 92.300, would enable more community-based housing organizations to qualify as CHDOs and access the CHDO set-aside.

The first proposed change would revise paragraph (5) of the CHDO definition to make the limitation on public officials and employees of a governmental entity on the CHDO governing board less restrictive. The regulations currently require an individual who is an employee or public official of any governmental entity to be limited to one-third of the CHDO board members. The proposed rule would revise paragraph (5) of the definition to apply this requirement only to officials and employees of the participating jurisdiction designating the CHDO and, if the CHDO was created by a governmental entity (*e.g.*, public housing agency), to officials and employees of the governmental entity. This change would mean that officials or employees of other governmental entities besides the participating jurisdiction designating the CHDO or governmental entity that created the CHDO (*e.g.*, employees of other units of general local government, public school teachers, university professors) would not be required to be counted toward the one-third board membership limitation on officials or employees. The proposed requirements would also clarify that no governmental entity (which includes the participating jurisdiction) may appoint more than one-third of the organization’s board members and that those board members are not permitted to appoint any of the remaining members of the board.

In addition, paragraph (8)(i) of the current definition of CHDO requires a CHDO to reserve at least one-third of the membership of its governing board for residents of low-income neighborhood organizations, other low-income community residents, or elected representatives of low-income neighborhood organizations. The proposed rule would broaden eligible low-income representatives required in paragraph (8)(i) by permitting (1) an individual designated by a low-income neighborhood organization to qualify as a low-income representative, rather than only elected leadership of these organizations and (2) an authorized representative of a nonprofit organizations in the community that addresses the housing or supportive service needs of residents of low-income neighborhoods to qualify as a low-income representative. Examples of “nonprofit organizations in the community” include homeless providers, Community Action Agencies, Fair Housing Initiatives Program

⁷ See 26 CFR 1.6033-2(a)(2)(ii)(I); Rev. Proc. 80-27, 1980-1 C.B. 677, available at <https://www.irs.gov/pub/irs-tege/rp1980-27.pdf>.

providers, Legal Aid, disability rights organizations, and victim service providers. These proposed changes would facilitate State and local participating jurisdiction efforts to identify more organizations that can undertake activities using CHDO set-aside funds.

Further, State and consortia participating jurisdictions located in rural areas face unique challenges in identifying organizations that can meet the governing board and capacity requirements to become CHDOs. To help address these challenges, the Department also proposes to revise the provision in paragraph 8(i) of the CHDO definition that defines the term “community” for rural areas as “a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire State)” to remove the text in parentheses. This change would permit CHDOs operating in rural areas to count qualified low-income representatives from anywhere in the State toward the low-income board representation requirement. This change to the definition of “community” for rural areas would also apply to paragraph (10) of the CHDO definition, effectively permitting an organization that wishes to operate as a CHDO in a rural area to meet the requirement that it have at least a one-year history serving the community with a service history anywhere in the State. This change would make it possible for nonprofits with statewide service areas to qualify as CHDOs and increase the use of CHDO set-aside funds in rural areas.

HUD proposes to make numerous revisions to paragraph (9) of the CHDO definition, which includes the statutory requirement that an organization have demonstrated staff capacity to qualify as a CHDO. The proposed rule would broaden the requirement that an organization have demonstrated capacity for carrying out projects assisted with HOME funds to also include housing projects assisted with other Federal funds, LIHTC, or local and State affordable housing funds. In addition, the proposed rule would improve the clarity of paragraph (9) by adding paragraphs (i), (ii), and (iii) to separately address the requirements for developer, owner, and sponsor.

The proposed rule would ease the current prohibition in paragraph (9) of the CHDO definition against using the capacity or experience of volunteers to meet the demonstrated capacity requirement. The Department made this prohibition more explicit in the 2013 HOME Final Rule to implement the staff capacity provision contained in the

Consolidated and Further Continuing Appropriations Act of 2012 (Pub. L. 112–55) and the Consolidated and Further Continuing Appropriations Act of 2013 (Pub. L. 113–6), which required CHDOs to have staff with demonstrated development experience. Because the connection of volunteers to an organization may be tenuous or temporary, using the capacity of volunteers to meet demonstrated staff capacity is inconsistent with both NAHA and with the provisions in the Consolidated and Further Continuing Appropriations Acts. The proposed rule would, however, permit participating jurisdictions to consider the capacity and experience of volunteers who are board members or officers of the organization in determining whether an organization meets the CHDO capacity requirements, provided that the volunteer is not compensated by or their services are not donated by another organization.

Specific solicitation of comment #1. The Department specifically solicits public comment about any additional changes it should consider, within statutory constraints, that will improve CHDO availability and capacity in rural areas.

Community land trust. HUD proposes to add the definition of “community land trust” (CLT) to § 92.2. Section 233(f) of NAHA (42 U.S.C. 12773(f)) contains a definition of community land trust which the statute expressly states is only for the purposes of establishing the specific characteristics of CLTs that qualify to receive CHDO technical assistance funding. This statutory definition in section 233(f) of NAHA, which was developed in 1990, is not reflective of actual CLTs operating in participating jurisdictions. However, in the absence of a separate regulatory definition or any other definition of CLT in another Federal program, the Department applied the statutory definition in section 233(f) in the implementation of the amendment to NAHA in the Consolidated Appropriations Act, 2016 (Pub. L. 114–113). The amendment permitted CLTs to hold and exercise purchase options, rights of first refusal, or other preemptive rights to preserve the affordability of the housing developed by the CLT.

Recognizing the problems in applying a CLT definition for HOME that the statute expressly states is only for the purpose of allowing qualifying CLTs to receive CHDO technical assistance funding, the Department proposes a regulatory definition of CLT that encompasses the purposes for which CLTs are formed and which would

generally apply in the HOME program, except where stated otherwise in the proposed rule. The proposed regulatory definition would require a community land trust to be a nonprofit organization that has the development and maintenance of housing that is permanently affordable to low and moderate-income persons as its primary purposes, uses enforceable mechanisms to require housing and related improvements on land held by the CLT to be affordable to low- and moderate-income persons for at least 30 years, and retains a right of first refusal or preemptive right to purchase the affordable housing on land held by the CLT to maintain long-term affordability. Adoption of the proposed regulatory definition for CLT would allow the Department to discontinue application of the CLT definition expressly specified only for CHDO technical assistance in all other uses of HOME funds.

Homeownership. The proposed rule would make a technical correction to the definition of “homeownership” in § 92.2, striking the words “in a” from the phrase “1- to 4-unit dwelling or in a condominium unit” The proposed rule would also revise paragraph (4) of the definition by deleting “Tax” from the referenced term “Low-Income Housing Tax Credits” and adding the IRC statutory citation for the term. The changed term “Low-Income Housing Credits” would match the title of section 42 of the IRC.

Period of Affordability. HUD proposes to add the definition of “period of affordability,” which is used throughout 24 CFR part 92. The definition would (1) clarify that the term means the required period specified in § 92.252 and § 92.254 during which the requirements of part 92 apply to HOME-assisted housing and (2) distinguish the required period specified in § 92.252 and § 92.254 from an extended period of affordability or additional compliance period that a participating jurisdiction may impose on HOME-assisted housing. The proposed rule would also make technical corrections in numerous sections of part 92 by replacing “affordability period” with “period of affordability.”

Program Income. HUD proposes to make minor changes to the definition of “program income.” First, the phrase “at any time” is added to the definition to clarify that program income is gross income received by the participating jurisdiction, State recipient, or a subrecipient directly generated from the use of HOME funds or matching contributions “at any time” and is not bound by a specific timeframe such as

the period of affordability or closeout of the HOME grant.

The proposed rule would also remove the term “subrecipient” from the beginning of paragraph (2) of the “program income” definition that refers to ownership of rental property. This change would clarify that a subrecipient, by definition, is a governmental entity or nonprofit organization selected by the participating jurisdiction to administer all or some of the participating jurisdiction’s HOME program to produce affordable housing, provide homeownership assistance, or provide TBRA and cannot, in that capacity, also receive HOME funds to be an owner or developer of affordable housing. The proposed rule would also remove “sponsor” from the parenthetical in paragraph (2) of the “program income” definition because only a CHDO may be a “sponsor” and, pursuant to § 92.300(a)(4), a “sponsor” must be a project “owner” or “developer.” Therefore, the inclusion of “sponsor” in paragraph (2) of the definition is duplicative and would be deleted in the definition for clarity. The proposed definition of “program income” would also clarify that the amount of gross income from the use, rental, or sale of real property received by the project owner or developer that must be paid to the participating jurisdiction, subrecipient or State recipient is program income. Finally, the proposed rule would further clarify in paragraph (3) that program income includes payments and repayments of grants, loans, or investments made using HOME funds or matching contributions, including such payments and repayments made after the period of affordability, and is not limited to the payment of loans made using HOME funds or matching contributions.

Reconstruction. HUD proposes to revise the definition of “reconstruction” to clarify that, although reconstruction is considered rehabilitation for purposes of the HOME program, the property standards for new construction in § 92.251 apply to all HOME-assisted reconstruction projects.

Single family housing. HUD proposes to revise the definition of “single family housing” to improve the clarity of the term. The current definition states that single family housing is a one-to-four family residence, condominium unit, combination of manufactured housing unit and lot, or manufactured housing lot. The proposed change would revise “family” to “unit” to reflect current program practice and guidance, changing the definition to a one-to-four “unit” residence, condominium unit,

cooperative unit, combination of manufactured housing and lot, or manufactured housing lot. The proposed change would clarify that the defined term is based on units and not occupancy.

Small-scale housing. HUD proposes to add the definition of “small-scale housing,” which would be defined as a rental housing project containing no more than four units or a homeownership project with no more than three rental units on the same site. HUD is proposing this definition to permit these types of projects to follow streamlined procedures for income determinations, ongoing physical inspections, and written tenant waiting lists. The definition and the streamlined provisions would facilitate participation of owners of small rental properties (e.g., accessory dwelling units, duplexes, triplexes, or other small rental projects) in the HOME program.

State recipient. The current definition of “State recipient” consists of a cross reference to § 92.201(b)(2). The proposed rule would eliminate the cross reference and instead list the definition directly in § 92.2. States are not required to use State recipients, but if a State distributes HOME funds to one or more unit(s) of general local government to carry out HOME programs, the unit(s) of general local government is a “State recipient.” The proposed definition would also clarify that, unlike a “subrecipient,” a “State recipient” is permitted to own or develop affordable housing as well as administer all or some of the participating jurisdiction’s HOME programs, provide homeownership assistance, or provide TBRA. This change further distinguishes a “State recipient” from a “subrecipient.”

Subrecipient. HUD proposes to make changes to the definition of “subrecipient.” To be consistent with the proposed change to the definition of “commitment,” the term “downpayment assistance” as it is used in the current definition of “subrecipient” would be revised to “homeownership assistance.” Also, the term “public agency” as it is used in the current definition of “subrecipient” would be revised to “governmental entity” because “governmental entity” is used throughout part 92, whereas “public agency” is only used in the current “subrecipient” definition. These proposed changes would also reflect the current practice to permit entities such as a public housing authority, housing finance agency, or redevelopment authority to be subrecipients.

The proposed rule would also remove the word “solely” to clarify that a

governmental entity or nonprofit organization that receives HOME funds as a developer or owner of a housing project is not acting as a “subrecipient,” even if it also receives funds from the participating jurisdiction to administer other HOME-funded activities as a “subrecipient.” Subject to the requirements of part 92, a governmental entity or nonprofit organization may be an owner or developer of a housing project under a written agreement to acquire, rehabilitate, or construct the housing, while also operating as a “subrecipient” of other HOME programs or activities (i.e., not the housing program in which it is an owner or developer) under a separate written agreement with the participating jurisdiction.

Tenant-based rental assistance. The proposed rule would revise the definition of “tenant-based rental assistance” to replace the use of the term “dwelling” with “housing” to align with the requirements for TBRA in § 92.209 which applies to “housing.”

2. Formula Allocation (24 CFR 92.50)

The proposed rule would remove the use of the term “poor household” in the formula allocation section and replace it with “households below the poverty line.” The proposed term reflects the actual data that HUD uses for this formula factor when determining annual HOME allocations.

3. Consortia (24 CFR 92.101)

The proposed rule would revise § 92.101(a) to permit, under certain conditions, a unit of general local government that is separated by a body of water from the other units of general local government belonging to a consortium and only accessible to the public through a permanent means other than a connecting road, bridge, railway, or highway to be considered geographically contiguous for purposes of inclusion in a HOME consortium. The consortium would be required to demonstrate that the unit of general local government separated by the body of water is part of the same housing market and local commuting area as one or more members of the consortium. This change would allow a unit of general local government that is separated from one or more other consortium members by a body of water but that is accessible by ferry, for example, to become a member of the consortium. In the past, the Department had no regulatory basis for approving these units of general local government to be consortium members. HUD anticipates this change would allow

some consortia to increase members or new consortia to form.

The proposed rule would add language to § 92.101(d) to clarify the relationship between a representative unit of general local government (frequently referred to as the lead entity) and member units of general local government in a consortium. The proposed revision explains that, while member units of general local government in a consortium are not subrecipients, the requirements for subrecipients, including the written agreement requirements at § 92.504(c)(2), apply when the representative unit of general local government distributes HOME funds to member units of general local government in a consortium. This change would not affect the requirement in § 92.101(a)(2)(ii) for a legally binding cooperation agreement between all members of a consortium.

The proposed rule would add language that describes the effect of a change to the representative unit of general local government of a consortium. If a consortium changes the representative unit of general local government but the membership of the consortium does not change, the consortium is considered to be the same unit of general local government. However, the proposed rule states that if a representative unit of general local government of a consortium changes, and the composition of the consortium also changes because one or more members have been added or removed from the consortium, then the consortium is considered a new unit of general local government and must comply with all applicable consolidated plan requirements in 24 CFR part 91. The Department already treats a consortium as the same unit of general local government if only the representative unit of general local government changes. With this proposed rule change, HUD would codify this approach. This change is proposed to help consortia that are contemplating a change to the representative unit of general local government or other membership to understand the programmatic consequences of those decisions.

4. Distribution of Assistance (24 CFR 92.201)

The proposed rule would add a sentence to the end of § 92.201(a)(2) clarifying that a participating jurisdiction may not commit funds to a project within the boundaries of a contiguous local jurisdiction until it has secured the required financial contribution of the jurisdiction in which

the project is located. The sentence would clarify the necessary preconditions for using HOME funds outside of a participating jurisdiction's geographic boundaries and would prevent a participating jurisdiction from providing HOME funds to a project that does not have the support of the jurisdiction or community where it is located.

The proposed rule would also remove the definition of State recipient from § 92.201(b)(2) and add it to the definitions section of § 92.2 where it will be easier for practitioners to locate. Other proposed changes to clarify the definition are discussed in the preamble for § 92.2.

5. Income Determinations (24 CFR 92.203)

In the HOTMA Final Rule, published on February 14, 2023,⁸ the Department revised the income regulations for the Public Housing, Section 8, Community Development Block Grant (CDBG), HOME, Housing Trust Fund, Housing Opportunities for Persons With AIDS, Supportive Housing for the Elderly, and Supportive Housing for Persons with Disabilities programs. The effective date of the regulatory changes made through the HOTMA Final Rule is January 1, 2024.⁹

As part of the HOTMA Final Rule, the Department comprehensively revised the HOME regulation (effective January 1, 2024) at § 92.203 to align the HOME income regulations with income regulations from other HUD and Federal programs that HOME funds were most likely to be used with, most notably the Section 8 program. To that end, the Department required that participating jurisdictions use income determinations made by owners and program administrators in section 8 project-based voucher and rental assistance programs instead of requiring the participating jurisdiction to engage in a separate, duplicative income review. The Department also allowed participating jurisdictions to use income determinations made by public housing agencies or other providers of Federal tenant-based rental assistance instead of requiring the participating jurisdiction to engage in a separate, duplicative income review.

As the Department was preparing guidance and training participating jurisdictions and others on how to implement the requirements of the HOTMA Final Rule, the Department

determined there were still ways to be clearer about a participating jurisdiction's responsibilities regarding income determinations, including when HOME funds are used in a project with either Federal project-based or tenant-based rental assistance or subsidy programs.

HUD is proposing to revise the paragraph heading of § 92.203(a) to read "Income eligibility" to more closely align with the purpose of the paragraph. The Department is also proposing to remove the first sentence of § 92.203(a) because it is confusing and is not necessary to the requirements in § 92.203. The first sentence of the current § 92.203(a) states that income targeting requirements apply to both a participating jurisdiction's HOME program and to its HOME projects. While the statement is true, § 92.203 does not establish the HOME income targeting requirements which are contained in § 92.216. By removing the first sentence of the current § 92.203(a), the second sentence of the current § 92.203(a) would be revised to make it the lead-in sentence to the three options of determining income eligibility for HOME under § 92.203(a). HUD believes this elimination of unnecessary and confusing verbiage would better allow participating jurisdictions to understand HOME income requirements.

The proposed rule would revise the paragraph heading of § 92.203(b) from "Required documentation for annual income calculations" to "Determining and documenting annual income" and the paragraph heading of § 92.203(c) from "Defining income for eligibility" to "Definitions of annual income" to reflect the requirements more accurately in each paragraph. The citation to § 92.252 in § 92.203(b)(1) would also be revised to conform to the renumbering of paragraph (h) to (g) in § 92.252 and the citation to § 92.252(b)(2)(i) in § 92.203(f)(1)(ii) would also be revised to "§ 92.252(a)(2)(ii) or (iii)" to conform to the revisions in § 92.252. The proposed rule would also revise the second sentence of § 92.203(b)(1)(ii) to add "by the participating jurisdiction or owner" at the end. The proposed rule would also add the requirement currently in § 92.252(g) to the end of paragraph (ii) of § 92.203(b)(1) that if there is evidence that a tenant's statement and certification failed to completely and accurately state information about the family's size or income, a tenant's income must be re-examined in accordance with § 92.203(b)(1)(i).

The proposed rule would revise § 92.203(b)(1)(iii) to clarify that the method requires the government

⁸ 88 FR 9600.

⁹ For clarity, the revisions HUD is proposing in this section of this proposed rule are revisions to the regulations as they will exist after the effective date of the HOTMA Final Rule on January 1, 2024.

program to examine the annual income of the family each year and to be a program that provides government benefits to the family. The proposed rule would also revise § 92.203(d) to clarify when the participating jurisdiction is permitted to use the definitions of “annual income” in § 92.203(c). Specifically, the proposed rule would further clarify that when the participating jurisdiction is accepting a public housing agency, owner, or rental assistance provider’s determination of annual and adjusted income for units assisted by a Federal or State project-based rental subsidy program or tenants receiving Federal tenant-based rental assistance in a rental housing project, the participating jurisdiction must calculate annual income in accordance with § 92.203(c)(1) for the rental housing project so there is consistency in the definition of annual income throughout the project.

The proposed rule would revise the heading of paragraph (d) of this section from “Using income definitions” to “Use of income definitions” and would remove the third sentence of paragraph (d) because it may be read to either conflict with or duplicate requirements in paragraph (c) of this section. In addition, the proposed rule would make other minor revisions to paragraph (d) for clarity. The proposed rule would also make several technical corrections to § 92.203(d). The last sentence of paragraph (d) cites to “paragraph (c)(i) of this section.” This is a drafting error, and the citation should be corrected to “paragraph (c)(1) of this section.”

The citations to 24 CFR part 5 requirements in the section would also be revised for consistency with the format of citations to 24 CFR part 5 in other sections of the current regulation.

6. Eligible Activities: General (24 CFR 92.205)

The proposed rule would revise § 92.205(a)(2) to clarify that acquisition of vacant land or demolition may only be undertaken for a project that will provide affordable housing and meets the requirements for a specific local project in paragraph (2)(i) of the definition of “commitment” in § 92.2. Commitment of HOME funds to a specific local project can only occur for an identifiable project for which all necessary financing has been secured, a budget and schedule have been established, and underwriting has been completed and under which construction is scheduled to start within 12 months of the execution date of the written agreement. Although the provision at § 92.205(a)(2) has been in the HOME regulations since inception

of the HOME program, some participating jurisdictions continue to mistakenly believe that HOME funds can be used to acquire land without the development of affordable housing (*e.g.*, “land banking”) or to demolish buildings with no intention to build new affordable housing (*e.g.*, elimination of slums or blight). This provision would be revised to further clarify the requirement that an affordable housing project must be completed when HOME funds are used for the acquisition of vacant land or demolition.

The Department proposes to move the text at the end of paragraph (b)(1) that states that a participating jurisdiction establishes the terms of HOME assistance (*e.g.*, loan terms) subject to the requirements of the regulation to a new paragraph (b)(3) and would revise the language to better emphasize and clarify that the terms of assistance are established by the participating jurisdiction, subject to the requirements of this part.

HUD is proposing to revise § 92.205(e)(2) to clarify that if project completion, as defined in § 92.2, does not occur within 4 years from the date that the participating jurisdiction committed funds to a specific local project, then the project is terminated and the participating jurisdiction must repay all funds invested in the project. There remains a great deal of confusion surrounding the 4-year deadline, and the Department is again clarifying that a project must meet the requirements of part 92 in order to be considered complete. HUD already has a clear definition of project completion and hopes that using the same terminology will better enable participating jurisdictions to comply with the regulations.

7. Eligible Project Costs (24 CFR 92.206)

The proposed rule would make several technical corrections to § 92.206. These corrections would update the citation in § 92.206(a)(1) regarding new construction standards to § 92.251(a), update the citation in § 92.206(a)(2) regarding rehabilitation standards to § 92.251(b), and revise § 92.206(b) to change “affordability period” to “period of affordability.”

The proposed rule would revise § 92.206(b)(2)(ii) to change “over an extended affordability period” to “over the minimum period of affordability of 15 years.” The proposed rule would also revise paragraph (c) to clarify that the costs of securing a long-term ground lease are eligible acquisition costs and permitted in the development of HOME-assisted housing. HUD also proposes to

revise paragraph (d)(1) to add the costs of conducting environmental assessments and reviews to the list of permissible development costs that could be reimbursed with HOME funds if the cost is incurred not more than 24 months before the date that HOME funds are committed to the project and the participating jurisdiction expressly permits HOME funds to be used to pay the costs in the written agreement committing the funds. Lack of funding for necessary environmental studies of sites proposed for development can be an obstacle to the provision of affordable housing. The proposed rule would also remove the current § 92.206(d)(8) because the costs of environment reviews and assessments have been added to paragraph (d)(1) and replace it with the cost of property insurance during development as one of the eligible related soft costs in paragraph (d).

8. Eligible Administrative and Planning Costs (24 CFR 92.207)

The Department proposes to revise § 92.207(e) to remove the term “under a cost allocation plan prepared” from the regulation. This is an oversimplification of the underlying requirements in 24 CFR part 200, subpart E and HUD is proposing the removal of the language to reduce confusion and improve clarity.

9. Eligible Community Housing Development Organization (CHDO) Operating Expense and Capacity Building Costs (24 CFR 92.208)

Through this proposed rule, the Department seeks to correct a drafting error made in the 2013 HOME Final Rule that created an unintended barrier to using CHDO operating expense and capacity building funding provided through HOME to assist organizations to meet the requirements for CHDO designation. Paragraph (9) of the definition of CHDO in § 92.2 requires that a CHDO have demonstrated capacity to be designated as a CHDO, while the current § 92.208 limits operating and capacity building assistance to organizations that are CHDOs. These provisions inadvertently prohibit the use of CHDO operating or capacity building funds to assist an organization that meets all other provisions of the CHDO definition except the demonstrated capacity requirement. The proposed rule would add a new paragraph (c) to § 92.208 stating that an organization that meets the definition of “community housing development organization” in § 92.2 except for the capacity requirement in paragraph (9) may receive HOME funds

for operating expenses and capacity building costs in order to develop demonstrated capacity and qualify as a CHDO. This change would make it possible for a nonprofit organization to receive the necessary financial assistance to attain CHDO designation. Pursuant to § 92.300(e), a participating jurisdiction may only provide operating or capacity building funds to an organization to which it expects to commit CHDO set-aside funds for a project within 24 months.

10. Tenant-Based Rental Assistance: Eligible Costs and Requirements (24 CFR 92.209)

The proposed rule would revise § 92.209(c)(1) to eliminate the requirement that adjusted income be determined annually for families receiving TBRA. Because TBRA contracts are limited by statute to two years and must be executed every time a tenant enters into a new lease, the proposed rule would permit a participating jurisdiction to provide TBRA to a family and not redetermine adjusted income during the contract's period of assistance. Rather, proposed § 92.209(c)(1) would only require the participating jurisdiction to determine adjusted income before execution of a new contract or renewal of an existing rental assistance contract. A family receiving TBRA whose income decreases during the term of the contract is still permitted to request an income redetermination by the participating jurisdiction during the term of the rental assistance contract so the family's subsidy can be recalculated. However, as is the case under the current regulations, the choice to redetermine adjusted income of a family that experienced a change in income during the term of the contract is a participating jurisdiction's program design decision and would be based upon the participating jurisdiction's policies and procedures. This means that unless the participating jurisdiction has a written policy and a rental assistance contract that requires a family's subsidy be redetermined based upon changes in income during the period of assistance, the family's payment toward rent will not change due to changes in income during the contract term.

Consistent with HUD's Plan for Bridging the Wealth Gap: An Agenda for Economic Justice and Asset Building for Renters,¹⁰ biennial income redeterminations would facilitate family savings and improve housing stability

by facilitating longer stays in housing and avoiding evictions or economic displacement from housing. Reducing the frequency of income determinations would also significantly reduce administrative burden on participating jurisdiction staff and on participating landlords, potentially expanding units available to families receiving TBRA.

The proposed rule would revise the first sentence of § 92.209(c)(2)(iv) by adding the word "assistance" to "rental payments" to further clarify that this is describing TBRA payments. The proposed rule also clarifies that when all or a portion of the homebuyer-tenant's monthly contribution toward rent is set aside for closing costs or a downpayment, it must be set aside in accordance with the lease-purchase agreement. These clarifications are required because the Department determined that some participating jurisdictions were not explicitly stating that all or a portion of a tenant's contribution to rent was being set aside for closing costs or a downpayment on the housing in the lease-purchase agreement or providing for how the set aside would occur.

The proposed rule would revise § 92.209(c)(3) to clarify that a participating jurisdiction may select and provide TBRA to low-income families currently residing in housing units that will be rehabilitated or acquired with HOME funds. The low-income family may choose to use the TBRA in a unit rehabilitated or acquired with HOME funds or in other qualified housing. Using TBRA funds in this manner may reduce displacement or assist in decreasing the cost of compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. 4601 *et seq.*) (URA), which applies to the use of HOME funds for a project involving acquisition, rehabilitation, or demolition.

The proposed rule would revise § 92.209(g) to update the reference to § 92.253 to specify § 92.253(a)–(c) and (d)(2). The proposed rule would revise § 92.209(h)(2) to permit participating jurisdictions to establish hardship policies that provide exceptions to the requirement that families receiving TBRA contribute a minimum amount toward rent. Some families receiving TBRA have little or no income. Due to this, some families may be unable to comply with the requirement for a minimum tenant contribution toward rent or compliance with the requirement may be detrimental to the family (e.g., use limited financial resources that are needed for medical care and other necessities). This revision would align HOME with other Federal tenant-based

rental assistance programs in permitting a participating jurisdiction to provide relief to a family from a minimum tenant contribution in its TBRA program by increasing the assistance in accordance with the participating jurisdiction's written policies.

The Department proposes to further clarify the basis of the rent standard that a participating jurisdiction may use for its TBRA program by adding the specific regulatory citation of 24 CFR 982.503 for the Section 8 HCV payment standard to § 92.209(h)(3)(ii). With the inclusion of the specific regulatory citation, a participating jurisdiction that chooses to use the Section 8 HCV program payment standard as its TBRA payment standard will be able to quickly locate the referenced requirements.

The proposed rule would revise § 92.209(i) to clarify the requirement that the participating jurisdiction must inspect the housing initially to mean that the participating jurisdiction must determine compliance with the property standards at § 92.251 at the time of entering into a rental assistance contract. The proposed rule would require that initially and annually thereafter, the participating jurisdiction must determine that the housing complies with its property standards and is decent, safe, sanitary, and in good repair in accordance with § 92.251(f).

Currently, program participants are required to inspect housing annually. Under § 92.251(f)(4)(ii) of this proposed rule, HUD would allow program participants to forego their own inspection and instead rely on an inspection conducted for another HUD program under 24 CFR part 5, subpart G. Section 92.251(f)(4)(ii) would also allow HUD to identify other alternative inspection standards through **Federal Register** notice which may count for the annual inspection. This proposed change would reduce administrative burden on the participating jurisdiction for performing inspections and the burden on property owners from undergoing multiple inspections by multiple parties using the same inspection standards, while posing minimal risk of substandard units being occupied by tenants assisted with TBRA. The requirement that the participating jurisdiction must reinspect annually for compliance with the property standards at § 92.251 after determining initial compliance is not proposed to be changed. The participating jurisdiction may determine compliance with the property standards at § 92.251 annually, under the same methods available to the participating jurisdiction in the initial determination.

¹⁰ See https://www.hud.gov/sites/dfiles/PIH/documents/Bridging_Wealth_Gap.pdf.

The proposed rule would make several revisions to § 92.209(j). First, the use of “dwelling” would be replaced with “housing” in paragraph (j)(1) to specify that the use of TBRA is for housing and not “dwelling units” which part 92 does not define. Second, § 92.209(j)(5) would be revised to remove “Housing Quality Standard” to align with the proposed changes in § 92.209(i). Third, as further discussed below, the proposed rule would also add a new § 92.209(j)(6) to prohibit the use of surety bonds or security deposit insurance as a form of security deposit in units occupied by families receiving TBRA.

Some participating jurisdictions have asked about the use of surety bonds and security deposit insurance in their TBRA programs while others have requested that the Department provide them with an interpretation that surety bonds or security deposit insurance constituted a security deposit. In response, the Department investigated the nature of surety bonds and security deposit insurance and determined as a matter of law that they are not security deposits within the meaning of NAHA nor are they treated as such under state statutes. Moreover, surety bonds or security deposit insurance may disadvantage tenants without necessarily benefitting landlords. Generally, tenants pay the cost of purchasing the surety bond or security deposit insurance in lieu of a security deposit. The surety bond obligates the bond issuer to repair all covered damage to the unit attributed to the tenant but may have coverage limits and is dependent upon the financial sufficiency of the issuer's fund. For security deposit insurance, a tenant pays a premium to purchase a policy from an insurance company that provides coverage to the landlord, as insured party, for most claims for damages to a unit. Even if there is no damage to the unit, the premium for the surety bond or security deposit insurance is not refundable to the tenant. However, if the bond issuer or the insurance company refuses to cover the damages, the landlord may be forced to litigate against both the bond issuer or insurer and the tenant for damages under the terms of the lease and may be left with little or no recourse beyond obtaining judgment liens against each, potentially damaging the tenant's credit and forcing a tenant to obtain legal counsel. The proposed prohibition on the use of surety bonds and security deposit insurance as a form of security deposit is a change made throughout the proposed rule. HUD does not believe

that prohibiting the use of surety bonds and security deposit insurance will impact a family's access to the rental housing market. Section 92.209 continues to allow participating jurisdictions to use HOME funds as loans or grants for security deposits.

The proposed rule would also remove § 92.209(l) because paragraph (l) implements section 212(a)(3)(D) of NAHA which is an outdated provision that applies only when the participating jurisdiction receives Federal assistance under section 1437f of the U.S. Housing Act of 1937 (the “1937 Act”) (42 U.S.C. 1437f) (*i.e.*, section 8 program) to be used for TBRA.

11. Troubled HOME-Assisted Rental Housing Projects (24 CFR 92.210)

The proposed rule would amend § 92.210(a) to clarify that HUD may consider the physical condition of the housing or financial viability when preserving HOME-assisted units at risk of failure or foreclosure. The use of the term “Headquarters” is proposed to be removed in § 92.210(c) for phrasing consistency with other parts of the proposed rule; however, all approvals under § 92.210 must still be made by HUD Headquarters.

The Department has provided technical assistance for workouts to several participating jurisdictions with troubled projects, and physical viability is as much a consideration as financial viability when determining whether to permit additional flexibilities to preserve the affordability of a project. The physical viability of a property may be negatively impacted due to unanticipated extreme weather conditions or emergencies such as fire, flooding, and earthquakes. Changes to physical characteristics and factors may substantively impact the physical viability of a project, including unexpected structural or design issues, deferred maintenance due to unanticipated financial limitations, or unforeseen capital needs. Further, in determining the long-term viability of a project, the Department must consider the property's physical condition and needs in its review. Therefore, the proposed rule would revise the provisions of § 92.210 to permit HUD to consider preservation of a project based on the substantive deterioration of a project's physical viability due to unforeseen circumstances. It would also allow HUD to consider the future physical viability of a project in determining whether a project may access the flexibilities under § 92.210.

The proposed rule would also clarify in § 92.210(a) that a HOME-assisted rental project is no longer financially

viable if its operating costs significantly exceed its operating revenue and reserves and if it has insufficient resources to cover necessary capital repair costs. The proposed rule would revise the current requirement that the Department consider the likelihood of “long-term viability” to include physical viability and replace with the likelihood of the project's “long-term physical and financial viability to preserve affordability.” The Department's consideration of a project's “long-term” physical and financial viability does not mean that the Department will not consider projects that are near the end of their HOME periods of affordability nor does it mean that the Department's considerations of viability will be limited to a project's “long-term” performance.

The proposed rule would revise § 92.210(b) to change the amount of additional HOME funds a participating jurisdiction may invest in a troubled HOME-assisted rental project to make it financially and physically viable during the period of affordability. The total investment (original investment plus additional investment) must be the amount needed to address the physical and financial viability of the project and may not exceed the HOME per-unit subsidy limit in effect at the time of the additional investment. The use of HOME funds may include, but is not limited to, rehabilitation of the HOME units and recapitalization of project reserves to fund capital costs. The Department also proposes to clarify that it may impose conditions on the investment of additional HOME funds, including requiring the participating jurisdiction to extend the period of affordability, increase the number of HOME-assisted units, and/or change the number or designation of Low HOME rent and High HOME rent units.

The proposed rule would revise § 92.210(c) to clarify that even if there are no additional HOME funds invested in the troubled HOME-assisted rental project, the Department may, through written approval, permit participating jurisdictions to not only reduce the total number of HOME units but change the designation of units from Low HOME rent units to High HOME rent units in troubled projects with more than the minimum number of Low HOME rent units. Pursuant to 42 U.S.C. 12745 and 24 CFR 92.252, HOME requires at least 20 percent of HOME-assisted units in a project be restricted as Low HOME rent units with the other HOME-assisted units restricted as High HOME rent units. Low HOME rent units must be occupied by those at 50 percent of the

Area Median Income (“AMI”) and below, while High HOME rent units must be occupied by those at 80 percent AMI and below. Further, in accordance with the requirements for HOME rent limits set forth in § 92.252, the Low HOME rent units are restricted at lower rent levels than High HOME rent units. The Department has reviewed several troubled project requests in which converting Low HOME rent units to High HOME rent units (when there are more than the required minimum 20 percent Low HOME rent units) is sufficient to preserve the project by increasing the ongoing rental revenue to the project to cover project expenses and financially stabilize the property. Permitting participating jurisdictions to undertake such actions for troubled HOME-assisted rental projects will support and preserve HOME units through the required period of affordability.

12. Pre-Award Costs (24 CFR 92.212)

The proposed rule would add a new paragraph (b)(2) to address pre-award costs in a fiscal year when there is not a timely appropriation by Congress for the HOME program. The proposed rule would permit a participating jurisdiction, in a year when there is not a timely appropriation, to incur eligible administrative and planning costs as of the beginning of its program year or the date that the Department receives the consolidated plan describing the HOME allocation to which the costs will be charged, whichever is earlier. The proposed rule would also establish that an appropriation is not timely if the appropriation to the HOME program was signed into law less than 90 days before a participating jurisdiction’s program year start date. The Department has waived the current § 92.212(b) to permit pre-award costs under these conditions for many of the past fiscal years. The delay in the receipt of annual appropriations by the Department may have negative consequences for participating jurisdictions, including interruption of activities. Adding this new language to § 92.212(b) would avoid the need for approvals of a waiver of this requirement each year that there is a delayed appropriation and would assist participating jurisdictions to better plan for such years to minimize their impact.

13. Prohibited Activities and Fees (24 CFR 92.214)

The proposed rule would make several revisions to § 92.214 to expand, revise, and clarify the prohibited activities and fees for which HOME funds cannot be used. The proposed

revisions to § 92.214 are described more thoroughly in the text that follows.

The proposed rule would revise § 92.214(a)(6) to add that investing additional HOME funds in a troubled project in accordance with § 92.210 is an exception to the requirement that a participating jurisdiction cannot provide additional HOME funds to a previously assisted project. Section 92.214(a)(6) would also be amended to explicitly state that the maximum per-unit subsidy applicable to a project receiving additional HOME funds within one year of project completion is the maximum per-unit subsidy applicable at the time of project underwriting. The proposed rule would further revise § 92.214(a)(6) to align with the new definition of period of affordability added as a defined term to § 92.2.

The proposed rule would make minor revisions to § 92.214(a)(7) to improve clarity and readability.

The proposed rule would add a new paragraph (10) to § 92.214(a). As noted in the TBRA preamble discussion on § 92.209(j), the Department is concerned that surety bonds, security deposit insurance, and similar instruments disadvantage tenants as the tenant pays the cost of purchasing the bond or insurance in lieu of a security deposit but does not recoup any of the cost of the bond or security deposit policy upon vacating the unit. In addition, if there is damage to the unit, the bond issuer or insurer may pursue the tenant to cover any costs incurred to repair damage, negatively affecting the tenant’s credit or forcing the tenant to secure legal counsel. In response to these concerns, the proposed rule would prohibit the use of HOME funds for surety bonds, security deposit insurance, or similar instruments in lieu of or in addition to a security deposit in units occupied by TBRA by adding a new paragraph (10) to § 92.214(a).

The proposed rule would add language similar to that in the proposed § 92.214(a)(10) in a new paragraph (i) of § 92.214(b)(3) to prohibit project owners from charging for surety bonds, security deposit insurance, or similar instruments in lieu of or in addition to a security deposit in units. The proposed rule would also add a new paragraph (iii) to § 92.214(b)(3) to explicitly prohibit project owners from charging fees to inspect units or correct deficiencies in the property condition of units or common areas of the project that were not caused by the tenant. The costs associated with normal wear and tear or damage to a unit or common areas of a project that are not the result of negligence, recklessness, or

intentional acts by the tenant, must be paid from project operations and not passed on to the tenant.

Finally, to accommodate the proposed revisions to § 92.214(b)(3), the proposed rule would add a new paragraph (4) to § 92.214(b), which would detail the fees that owners are permitted to charge tenants.

14. Income Targeting: Tenant-Based Rental Assistance and Rental Units (24 CFR 92.216)

HUD proposes to revise § 92.216(a)(2) and (b)(2) to replace the use of the term “dwelling” with “housing” which is the accurate term for application of the requirement. While part 92 uses “housing” and “dwelling” interchangeably, these terms have been revised over the years to have separate definitions in other programs. Therefore, to avoid confusion, HUD would revise part 92 to replace “dwelling” with “housing,” where appropriate.

15. Income Targeting: Homeownership (24 CFR 92.217)

HUD proposes to revise § 92.217 to replace the use of the term “dwelling” with “housing.”

16. Recognition of Matching Contribution (24 CFR 92.219)

The proposed rule would add the term “tenant protection requirements” in § 92.219(a)(2)(ii) to clarify the substance of the requirements at § 92.253(a)–(c) and (d)(2) that are cited to in the regulation. The regulatory citations for § 92.253 would also be updated to reflect the changes to this section.

17. Match Credit (24 CFR 92.221)

The proposed rule would revise § 92.221(b) to clarify the requirements a participating jurisdiction must meet when using excess match contributions earned in a previous year, also referred to as “carry-over” or “carried over” match to meet a later year’s HOME match obligation. In 2015, HUD’s Office of Inspector General issued an audit report on HOME matching contributions that found widespread problems with participating jurisdictions not adequately documenting the validity and eligibility of match contributions.¹¹ Specifically, the HUD Inspector General found that many participating jurisdictions did not maintain required match logs or that logs were insufficient, did not identify all contributions in their carry-over match balances,

¹¹ See HUD OIG Audit Report Number: 2015–KC–0002, available at <https://www.hudoint.gov/sites/default/files/documents/2015-KC-0002.pdf>.

included nonexistent contributions in their carry-over balances, and did not fully support matching contributions they credited toward meeting their 25 percent match obligation.

To ensure that these deficiencies do not continue, the Department proposes to add a new paragraph (1) to § 92.221(b) to explicitly require a participating jurisdiction to have documentation supporting the source, eligibility, and value of match contributions that have been carried over from previous years at the time that they apply the contribution toward their match obligation. The proposed rule would also add a new paragraph (2) to § 92.221(b) to require participating jurisdictions to maintain records related to the source (*i.e.*, the project to which the contribution was made), eligibility, and amount of match contributions for 5 years from the date that they apply the match credit toward their match liability. The proposed rule would include conforming changes to the recordkeeping provisions at § 92.508(a)(2)(ix) to describe the scope and retention period that would apply for records of carried over match contributions.

18. Maximum Per-Unit Subsidy Amount, Underwriting, and Subsidy Layering (24 CFR 92.250)

The proposed rule would make several revisions to the HOME program's maximum per-unit subsidy limits regulations at § 92.250. Section 212(e) of NAHA (42 U.S.C. 12742(e)) requires the Department to establish limits on the amount of HOME funds that may be invested on a per-unit basis. For multifamily housing, NAHA requires that such maximum per-unit subsidy limits not be less than the per-unit limitations set forth in the mortgage insurance program authorized in section 221(d)(3) of the National Housing Act (12 U.S.C. 1715l) ("section 221(d)(3) limitations"), as adjusted by HUD to reflect the costs of land and construction in the area that exceeds the national average of such costs, up to 240 percent of the base mortgage limits. The Department has additional authority to adjust the 240 percent limits further based on the market area, number of bedrooms, eligible activity type (*e.g.*, homeownership, rental), and work performed (*e.g.*, rehabilitation, new construction). Notwithstanding the statutory language, the Department has historically implemented a maximum cap on the amount of HOME funds that may be used for the subsidy. However, after further review of the statutory language and Congressional record of the amendments made to title II of

NAHA by section 206 of the Housing and Community Development Act of 1992 (Pub. L. 102–550), the Department has determined that Congress intended the adjusted 221(d)(3) limitations to establish a floor, rather than a cap, for the maximum subsidy amount.

Due to the discontinuation of the section 221(d)(3) mortgage insurance program, the Department must establish an alternate benchmark as the maximum subsidy limit for the HOME program. The Department is currently operating under an interim policy that directs participating jurisdictions to use the basic mortgage limitations for section 234 of the National Housing Act's Condominium Housing, for elevator-type projects ("section 234 limitations"), in place of the discontinued section 221(d)(3) limitations.¹² The Department is currently adjusting the section 234 limitations using the High Cost Percentages that the Department calculates for its mortgage insurance programs. The Department chose this policy because it determined in 2015 that "[o]ver time, the limits issued by HUD for the Section 234 program have been identical to the 221(d)(3) limits."¹³ As the section 234 limitations were identical to the section 221(d)(3) limitations prior to the discontinuation of the section 221(d)(3) limitations, the Department still believes that the section 234 limitations are a reasonable alternative to the section 221(d)(3) limitations and consistent with section 212(e) of NAHA. However, due to HUD's determination that Congress intended the adjusted 221(d)(3) limitations to establish a floor, rather than a cap, for the maximum subsidy amount, HUD proposes to codify that the total amount of HOME funds that a participating jurisdiction may invest on a per-unit basis may not exceed the per unit dollar limits established by HUD in accordance with the requirements in section 212(e) of NAHA rather than codify the section 234 limitations. At § 92.250(a), HUD proposes to publish the methodology for determining maximum per-unit subsidy amounts in accordance with section 212(e) through a notice published in the **Federal Register** with the opportunity for comment. The proposed rule would also clarify § 92.250(a) by stating that HUD will use that methodology to publish the maximum per-unit subsidy limits for the area in which the housing is located

annually, in accordance with the published methodology, and will make adjustments annually. HUD intends to publish these limits on HUD's website.

Section 212(e) of NAHA requires that the Department consider on a market-per-market basis the cost of multifamily construction that meets State and local housing and building codes and the costs of land, with inflationary adjustments. HUD declines to maintain its use of the section 234 limitations for HOME because the section 234 limitations may not align with section 212(e) in the future, such as if the cost of multifamily construction or market conditions of the participating jurisdiction require a higher limit under section 212(e). Therefore, revising § 92.250 to refer to the statutory requirements and the process for publishing a methodology in accordance with the statutory requirements would avoid the need to waive or change HOME regulations to align with section 212(e) in the future.

The proposed rule would revise § 92.250(a) to require HUD to determine maximum per-unit subsidy limits for HOME on an annual basis in accordance with the statute and publish those limits (*i.e.*, on the HUD website or by notice).¹⁴ Based on the Congressional record clarifying the intent of section 212(e) of NAHA,¹⁵ the Department has determined that the statutory requirement provides much greater direction on the use of the section 221(d)(3) limitations as a floor while allowing for adjustments to the limitations based on specific criteria that affect project costs. To implement a revised methodology for the annual determination of the maximum per unit subsidy limit, HUD intends to issue a **Federal Register** notice in conjunction with this HOME rulemaking process. The notice for the revised methodology would identify an existing limit (*e.g.*, mortgage insurance limit) or outline a proposed method for establishing a limit in accordance with section 212(e) and request comments from industry stakeholders and the public. This would provide HUD with the opportunity to perform a higher level of review of current development and construction costs, evaluate ongoing changes in costs due to changes in building codes and industry practices, determine whether different eligible activities (*i.e.*,

¹⁴ See 42 U.S.C. 12742(e)(1)–(3).

¹² See Notice CPD–15–003, "Interim Policy on Maximum Per-Unit Subsidy Limits for the HOME Program," available at <https://www.hud.gov/sites/documents/15-03CPDN.PDF>.

¹³ *Id.* at 2.

¹⁵ See House Report 102–760, 1992 U.S.C.C.A.N. 3281 at Page 3301, which clarified that Public Law 102–550 amending Section 212 of NAHA, "[a]mends cost limits requirements to establish minimum cost limits equal to the per unit dollar limitation for the section 221(d)(3) program, as adjusted . . ."

homeownership vs. rental) should have different methodologies, and to consider and respond to comments in the implementation of the revised methodology. Until a revised methodology is finalized, HUD would establish the maximum per unit subsidy limit as 270 percent of the section 234 limitations.

The proposed rule would also add a new paragraph (c) to § 92.250 to permit a participating jurisdiction to exceed the maximum per-unit subsidy described in § 92.250(a) by 5 percent for a project that meets one of the acceptable Green Building standards enumerated by the Department. HUD shall allow participating jurisdictions and developers this flexibility because the Department is pursuing groundbreaking and innovative program designs in addressing the ambitious climate and green energy goals set by HUD leadership. By providing the flexibility to participating jurisdictions to exceed the per unit maximum subsidy limit by up to 5 percent to cover increased costs, HUD would be incentivizing participating jurisdictions and owners to create projects that meet a physical condition standard that involves the use of durable green building materials, innovative building methods, and renewable energy systems. The Department recognizes that the development of affordable housing that meets a green building standard and is more resilient to extreme weather events and climate change will result in increases to the costs of production. The Department believes that permitting a participating jurisdiction to exceed the maximum per-unit subsidy described in § 92.250(a) by up to 5 percent will sufficiently enable the participating jurisdiction and developer to absorb the higher costs associated with complying with a higher standard as well as some additional development costs unrelated to meeting the green building standard. The qualifying standards will be published in the **Federal Register** or HUD website.

*Specific solicitation of comment #2: The Department specifically requests public comment from participating jurisdictions, developers, and other affected members of the public about the green building standards that the Department should establish in the **Federal Register**. In addition, the Department seeks public comment about stakeholder experiences regarding the percentage increase in the cost of constructing or rehabilitating affordable housing to a green building standard and whether a 5 percent increase in the maximum per unit subsidy limit is sufficient. Finally, the Department*

requests public comment on whether permitting participating jurisdictions to exceed the maximum per unit subsidy limit by an amount in excess of the additional costs of green building measures (i.e., to provide additional HOME funds to cover a larger portion of other HOME-eligible development costs), would create a sufficient incentive to developers and owners to meet green building standards in projects that would otherwise not be designed to meet those standards.

In addition, the proposed rule would amend the language at § 92.250(b)(3)(i) to clarify that a participating jurisdiction must underwrite a homeowner's ability to repay the HOME-assistance for a homeowner rehabilitation project only if the assistance is provided as an amortizing loan.

19. Property Standards (24 CFR 92.251) Changes to § 92.251 Generally

The proposed rule would retitle § 92.251 as "Property standards and inspections." The proposed rule would move the inspection and financial oversight requirements currently at § 92.504(d) to the applicable paragraphs in § 92.251 to consolidate the property standards and inspection requirements in one section of the regulation. In addition, the Department proposes several revisions to the property standards applicable to HOME-assisted properties to implement statutory energy efficiency requirements; impose carbon monoxide detector requirements; incorporate green building standards when a participating jurisdiction elects to exceed the maximum per unit subsidy limit for a project pursuant to proposed § 92.250(c); provide administrative relief to reduce duplicative physical inspections and provide additional flexibility for small-scale housing; and correct an inadvertent limitation on homebuyer acquisition programs. Finally, the proposed rule also incorporates further conforming regulatory changes to the NSPIRE Final Rule.¹⁶ The specifics of these changes are described in further detail below.

Changes to Paragraph (a)

The proposed rule would reorganize § 92.251(a) by creating a new paragraph (a)(2) which would contain and expand upon the requirements for construction progress inspections currently in § 92.251(a)(2)(v). The rest of the current paragraph (a)(2) would be moved to a new paragraph (a)(3). In addition, the completion inspection requirements

currently imposed at § 92.504(d)(1)(i) would be added to the proposed paragraph (a)(2) (for new construction) and paragraph (b)(3) (for rehabilitation). Redesignated paragraph (a)(3) would also be revised to clarify that the listed requirements in paragraphs (a)(3)(i) through (vii) must be met by projects upon project completion, unless an earlier deadline is otherwise specified by the applicable statute, regulation, or standard. For example, the accessibility requirement in paragraph (a)(3)(i) of § 92.251 must be met prior to project completion, and the project must comply with the required deadline under the applicable statute or regulation.

The proposed rule at § 92.251(a)(3)(ii) would codify the statutory requirement that all HOME-assisted rental and homebuyer new construction projects meet the energy efficiency standards promulgated by HUD in accordance with section 109 of NAHA,¹⁷ including any revisions adopted by HUD and the U.S. Department of Agriculture (USDA). The 2013 HOME Final Rule did not include energy efficiency standards in § 92.251 because HUD intended to propose new standards for energy and water efficiency in a separate proposed rule. Pursuant to sections 215(a)(1)(F) and (b)(4) of NAHA (42 U.S.C. 12745(a)(1)(F) and (b)(4)), all newly constructed HOME-assisted housing must meet the energy efficiency codes promulgated by the Secretary in accordance with section 109 of NAHA (42 U.S.C. 12709). In addition, the Energy Independence and Security Act of 2007 (EISA) (Pub. L. 110–140) established procedures for HUD and the USDA to adopt periodic revisions to the International Energy Conservation Code (IECC) and to ANSI/ASHRAE/IES Standard 90.1: Energy Standard for Buildings, Except Low-Rise Residential Buildings (ASHRAE 90.1), subject to a determination by HUD and USDA that the revised energy codes do not negatively affect the availability or affordability of new construction of single and multifamily housing covered by EISA, and a determination by the Secretary of Energy that the revised codes "would improve energy efficiency."

Carbon Monoxide Detector Requirements

In the NSPIRE Final Rule, the Department codified carbon monoxide detection requirements in Public Law 116–20 for certain covered programs at

¹⁶ 88 FR 30442 (May 11, 2023).

¹⁷ 42 U.S.C. 12709.

24 CFR 5.703(d)(6).¹⁸ Because HOME is not a covered program subject to these statutory carbon monoxide detection requirements, the Department determined that rulemaking is necessary to implement these changes for the HOME program. Consequently, the proposed rule would add new paragraphs at § 92.251(a)(3)(vi) (for new construction) and § 92.251(b)(1)(xi) (for rehabilitation) and amends § 92.251(c)(3) (for acquisition of standard housing for homeownership) to impose carbon monoxide detection requirements for all HOME-assisted projects which will be adopted by HUD through a notice published in the **Federal Register**. The Department intends to evaluate the specific standards for installation of carbon monoxide alarms or detectors at 24 CFR 5.703(d)(6) for feasibility in new construction, rehabilitation, and homebuyer acquisition projects, respectively.

Smoke Detector Requirements

Similar to the carbon monoxide detector requirements implemented through the 2021 Consolidated Appropriations Act, described above, the 2023 Consolidated Appropriations Act¹⁹ created additional smoke alarm requirements in federally assisted housing. These requirements apply to several HUD programs but not HOME. These requirements include that federally assisted housing comply with National Fire Protection Association Standard (NFPA) 72, or any successor standard, to use hardwired smoke alarms or sealed and tamper resistant smoke alarms with ten-year non rechargeable, nonreplaceable batteries, that provide notification for persons with hearing loss. These requirements take effect December 29, 2024. HUD believes that in most jurisdictions similar requirements already exist, as

many jurisdictions already align with NFPA 72.

HUD is still working to provide guidance on these requirements for covered programs. This proposed rule does not include proposed regulatory text to align with the 2023 Consolidated Appropriations Act's smoke alarm requirements. However, HUD requests public comment on how such requirements would impact participating jurisdictions, owners, and developers of HOME-assisted housing. HUD is particularly interested in public comment on the feasibility of these requirements in HOME-funded homeownership programs that do not include rehabilitation or construction of housing (e.g., downpayment assistance programs). HUD is considering, at the final rule stage, revising the HOME regulations consistent with the forthcoming HUD guidance on these statutory requirements.

Specific solicitation of comment #3: The Department specifically seeks public comment on the proposal to require HOME-assisted units comply with NFPA 72, or any successor standard, to use hardwired smoke alarms or sealed or tamper resistant smoke alarms with ten-year non rechargeable, nonreplaceable batteries, that provide notification for persons with hearing loss. The Department is particularly interested in public comment on the feasibility of these requirements in HOME-funded homeownership programs that do not include rehabilitation or construction of housing (e.g., downpayment assistance programs).

Green Building Standard

HUD proposes to add paragraphs (a)(3)(vii) (for new construction) and (b)(1)(xii) (for rehabilitation) to § 92.251 to correspond with HUD's proposal at § 92.250(c) to require the housing meet one of the qualifying green building standards published in the **Federal Register** or HUD website when a participating jurisdiction exceeds the maximum per-unit subsidy limit pursuant to the proposed § 92.250(c), upon completion of the project.

Changes to Paragraph (f)

The proposed rule would require participating jurisdictions to establish written property standards that meet the minimum requirements at § 92.251(f)(1) for housing occupied by tenants assisted with TBRA, including compliance with State and local codes and ordinances, health and safety, and lead-based paint requirements. The proposed rule would also retitle § 92.251(f) as "Ongoing property condition standards and

inspections: Rental housing and housing occupied by tenants receiving HOME tenant-based rental assistance."

The Department also proposes to make a minor amendment to paragraph (f)(1)(i) to add the term "HOME" before "rental housing" to clarify that the **Federal Register** notice which HUD will publish will be specific to the HOME program.

Project Inspections

Through the NSPIRE Final Rule, the Department improved alignment of the HOME inspection standards with the standards of other HUD-assisted housing programs. The Department understands that HOME is frequently one of many financing sources in a multifamily rental development project and, therefore, HOME projects are often subject to the requirements of many other public and private funding sources. Consequently, HUD is proposing to provide administrative relief in this proposed rule by adding to § 92.251 paragraphs (b)(1)(viii)(A) (for rehabilitation projects), (f)(3)(i)(B) (for ongoing inspections of rental housing), and (f)(4)(ii) (for housing occupied by tenants receiving TBRA) to permit a participating jurisdiction to accept the completion or ongoing inspection, as applicable, conducted for another funding source in accordance with the National Standards for the Condition of HUD housing (24 CFR part 5, subpart G) or an alternative inspection standard, which HUD may establish through **Federal Register** notice to determine that the project and units are decent, safe, sanitary, and in good repair. The participating jurisdiction must still conduct initial and progress inspections of rehabilitation projects and determine compliance with the participating jurisdiction's HOME rehabilitation standards, State and local codes, ordinances, and zoning requirements. Under this proposed rule, a participating jurisdiction may accept an inspection performed under the Uniform Physical Condition Standards prior to the NSPIRE effective date. Inspections that occur after the effective date of NSPIRE for HOME and used by the participating jurisdiction to verify the housing is decent, safe, sanitary, and in good repair must be conducted under NSPIRE or an alternative inspection standard, as described in the proposed § 92.251.

For ongoing inspections of rental housing, HUD proposes to amend paragraph (f)(3) to permit a participating jurisdiction to accept an inspection that occurred within the past 12 months. However, the Department encourages participating jurisdictions to align the

¹⁸ See section 101, "Carbon Monoxide Alarms or Detectors in Federally Insured Housing" of Title I of Division Q, Financial Services Provisions and Intellectual Property, of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260), 134 Stat. 2162 (2020), which included amendments to section 3(a) and 8 of the United States Housing Act of 1937 (42 U.S.C. 1437a(a) and 42 U.S.C. 1437(f) (the "1937 Act")), section 202(j) of the Housing Act of 1959 (12 U.S.C. 1701q(j)), and sections 811(j) and 856 of the NAHA (42 U.S.C. 8013(j) and 42 U.S.C. 12905).

¹⁹ See section 601, "Smoke Alarms in Federally Assisted Housing" of Title VI of Division AA, Financial Services Matters, of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), 136 Stat. 4459 (2022), which included amendments to section 3(a) and 8 of the 1937 Act, section 202(j) of the Housing Act of 1959 (12 U.S.C. 1701q(j)), and sections 811(j) and 856 of the NAHA (42 U.S.C. 8013(j) and 42 U.S.C. 12905).

project's ongoing inspection schedule with the schedule of inspections of other HUD programs or funders. The proposed rule would require that a participating jurisdiction perform an on-site inspection within 12 months after project completion and every three years during the period of affordability. The participating jurisdiction may not accept the determination of another funder under § 92.251 for the first ongoing inspection occurring 12 months after project completion but may accept the determination of another funder in accordance with § 92.251 every three years thereafter.

For ongoing annual inspections for housing with tenants receiving TBRA, HUD proposes to insert a new paragraph (f)(4) for TBRA to state that a participating jurisdiction may accept an inspection performed for another funding source in accordance with § 92.251 that occurred within the past three months. The Department proposes a shorter timeframe for accepting inspections of TBRA units performed by other funders under § 92.251 because TBRA ongoing inspections are required annually after initial occupancy while inspections of HOME-assisted rental projects may be conducted every three years during the period of affordability.

The proposed rule would also add § 92.251(b)(1)(viii)(B) (for rehabilitation projects) and includes language at § 92.251(f)(3)(i)(B) (for ongoing inspections of rental housing) and § 92.251(f)(4)(ii) (for housing occupied by tenants receiving TBRA) to require that the participating jurisdiction document a determination by another funder that the project and unit(s) are decent, safe, sanitary, and in good repair. To document a determination means that the participating jurisdiction must obtain the inspection report that indicates that all deficiencies have been corrected. These paragraphs would also clarify that when the participating jurisdiction documents a determination by another funder under § 92.251, it is not required to conduct a duplicative HOME on-site inspection.

The proposed rule would restructure paragraph (c)(3) and add paragraph (c)(3)(ii) to eliminate the requirement at § 92.251(c)(3) that a homebuyer acquisition project (e.g., downpayment assistance) that does not meet HOME property standards must be rehabilitated or it cannot be acquired with HOME funds. This requirement was added in the 2013 HOME Final Rule and the Department is concerned that it had the unintended impact of reducing the supply of housing available for purchase by HOME-assisted homebuyers by prohibiting rehabilitation after the

HOME-assisted acquisition to meet required property standards. Currently, a home that does not meet property standards cannot be purchased with HOME funds. Also, the Department understands that sellers are often unwilling to perform rehabilitation to a home prior to its acquisition by a HOME-assisted homebuyer, making many properties ineligible for purchase with HOME funds. The proposed rule would add paragraph (c)(3)(ii) to § 92.251 to permit housing to be purchased by a homebuyer prior to compliance with HOME property standards if the homebuyer written agreement with the participating jurisdiction requires the project to meet HOME property standards within six months of acquisition and determines that funds are secured for rehabilitation. The participating jurisdiction would be required to conduct a final inspection within six months of the title transfer to determine compliance with the required property standards.

Through this proposed rule, the inspection standards for periodic on-site inspections of HOME-assisted rental housing including frequency of inspections, inspection samples, and annual certifications by owners at § 92.504(d)(1)(ii) would be moved to a new paragraph (f)(3). The inspection sample requirements in the proposed rule at § 92.251(f)(3)(iii) would require that the sample of units for an on-site inspection be a random sample rather than a statistically valid sample. While the Department's software creates a statistically valid sample of units for its inspection of HUD-assisted housing conducted using the NSPIRE Standards, HUD is proposing this change because it is concerned that participating jurisdictions do not have software capability to develop a statistically valid sample of units. In addition, participating jurisdictions have sought guidance about the requirement currently at § 92.504(d)(1)(ii)(D) regarding what constitutes a sample size appropriate for the size of the HOME-assisted project. Consequently, in the proposed § 92.251(f)(3)(iii) the Department would require inspection of a sample size of 20% of the HOME-assisted units in a project, except for a project with one to four HOME-assisted units where the requirement that 100% of the units be inspected remains unchanged.

When conducting inspections, the jurisdiction should consider the project's compliance with accessibility requirements as determined by 24 CFR part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), Titles II and III of the Americans

with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, and the Fair Housing Act (42 U.S.C. 3601–19) implemented at 24 CFR part 100, as applicable. These accessibility requirements apply to a project as a whole, including both HOME and non-HOME-assisted units. Where practicable, HUD recommends a participating jurisdiction select a random sample of units using a methodology that captures different unit types, features, and accessibility designations, and to the extent feasible, that the same units are not inspected in every inspection.

Specific solicitation of comment #4: The Department specifically seeks public comment on the proposal to require that a participating jurisdiction inspect at least 20% of the HOME-assisted units during its ongoing on-site inspections of rental housing.

In addition, the proposed rule would move the requirements § 92.504(d)(1)(iii) for annual on-site inspections of HOME-assisted housing occupied by tenants receiving TBRA to a new paragraph (f)(4) and clarify that inspections must determine whether the housing meets the property standards in § 92.251(f)(1).

The proposed rule would move the financial oversight requirements for HOME-assisted rental projects currently at § 92.504(d)(2) to § 92.251(f)(3)(iv). This change is proposed to consolidate the other periodic review requirements for rental housing during the period of affordability into one section of the regulation. In addition, the proposed rule would clarify the Department's intent that the financial oversight requirements apply to rental projects with 10 or more HOME-assisted units, which was discussed in the preamble to the 2013 HOME Final Rule but has remained a source of confusion for participating jurisdictions.

HUD proposes to move the requirements for re-inspections and the requirement to adopt a more frequent inspection schedule as the result of health and safety deficiencies currently at § 92.504(d)(1)(ii)(B) to the corrective and remedial action requirements of § 92.251, which HUD proposes to move to paragraph (f)(5). Relatedly, pursuant to section 226(c) of NAHA,²⁰ the proposed rule would provide an exception for small-scale housing from the requirement that a participating jurisdiction must adopt a more frequent inspection schedule for properties that have been found to have health and safety deficiencies. If all health and safety deficiencies are corrected, the

²⁰ 42 U.S.C. 12756(c).

proposed rule would permit but not require a participating jurisdiction to adopt a more frequent inspection schedule for small-scale housing. In the future, the Department hopes to simplify ongoing inspections for small-scale rental housing projects by developing a streamlined list of specific deficiencies for which participating jurisdictions would inspect. The changes described in this paragraph correspond to the administrative relief provided for small-scale housing at § 92.252.

The Department also proposes to move the requirements currently at § 92.251(f)(5) to paragraph (g) of § 92.251 and revise the new § 92.251(g) to add further clarity to the requirements for inspection procedures.

Specific solicitation of comment #5: The Department specifically requests public comment from participating jurisdictions and program participants regarding the challenges they have encountered in using HOME funds to assist small-scale housing, as defined in this proposed rule. The Department also requests public comment regarding the costs and benefits of the changes that HUD is proposing for small-scale housing in requirements for the frequency of income determinations and inspections and the use of alternative waiting lists.

20. Qualification as Affordable Housing: Rental Housing (24 CFR 92.252)

The Department most recently revised § 92.252 in the HOTMA Final Rule.²¹ Those changes become effective on January 1, 2024. The changes made to § 92.252(b)(2) in the HOTMA Final Rule divided the Low HOME Rent limit provision in § 92.252(b)(2) into paragraphs (b)(2)(i) and (b)(2)(ii) to separate the conditions that a HOME-assisted unit that also receives Federal or State project-based rental subsidy must meet in order for a project owner to charge the maximum rent allowable under the Federal or State project-based rental subsidy program.

The HOTMA Final Rule also revised § 92.252(h). These provisions are being renumbered, reorganized, and revised in the proposed § 92.252(g).

The proposed rule would amend the introductory text of § 92.252 to eliminate the requirement that a participating jurisdiction must submit a marketing plan to HUD for any HOME-assisted rental units that have not achieved initial occupancy within six months of project completion in IDIS. The participating jurisdiction would still be required to take action to ensure

the unit is rented if the unit is not occupied within six months and repay the HOME investment if the unit does not achieve initial occupancy within 18 months. The Department does not currently approve marketing plans, so this change would provide administrative relief to participating jurisdictions without eliminating the requirement that participating jurisdictions work with the project owner to develop and implement a marketing plan to meet the deadline for initial occupancy. This change does not revise any affirmative marketing requirements in § 92.351.

The proposed rule would also implement several changes to the rent limits at § 92.252 for HOME-assisted rental housing. The proposed rule would reorganize the general requirements that are currently in effect and apply to all rent limits by moving these requirements to the introductory text of § 92.252(a) rather than repeating the requirements in each paragraph. These general requirements include that the rent for a HOME-assisted unit must not exceed the rent limits, the Department will publish the HOME rent limits on an annual basis, with adjustments for number of bedrooms in the unit, the participating jurisdiction may designate (in its written agreement with the owner) more than the minimum HOME units (both High HOME and Low HOME rent units) in a rental housing project, and the rent limits apply to the rent plus the utilities or utility allowance. The proposed rule would also remove several duplicative requirements in § 92.252 to improve clarity and readability.

The proposed rule would reorganize § 92.252 by moving the requirements for High HOME Rent limits in § 92.252(a), Low HOME Rent limits in § 92.252(b), and SRO Housing rent limits in § 92.252(c) to the proposed § 92.252(a)(1), (a)(2), and (a)(3), respectively. The proposed rule would title the proposed § 92.252(a) as “HOME Rent Limits,” title the proposed § 92.252(a)(1) as “High HOME Rent Limits,” title the proposed § 92.252(a)(2) as “Low HOME Rent Limits,” and title the proposed § 92.252(a)(3) as “HOME Rent Limits for SRO Projects.”

The Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110–289, 122 Stat. 2654, approved July 30, 2008) amended the 1937 Act and made comprehensive and significant reforms to HUD’s Section 8 Tenant-Based Voucher and Project-Based Voucher programs. Many of the required regulatory changes at 24 CFR parts 982 were implemented through “The Housing and Economic Recovery Act of

2008 (HERA): Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs,” final rule (79 FR 36146), published on June 25, 2014 (the “HERA Final Rule”). One of the changes required by section 2835(a)(2) of HERA added section 8(o)(10)(F) to the 1937 Act (42 U.S.C. 1437f(o)(10)(F)) which streamlined the procedure for determining the rent reasonableness standard for assistance under the section 8 tenant-based voucher program in units receiving LIHTC or HOME funds. HUD fully implemented this streamlined process for LIHTC units in the HERA Final Rule. However, the HERA Final Rule did not fully implement the streamlined process for HOME-assisted units. Instead, as explained in the HERA Final Rule, the rent reasonableness requirements at § 982.507 for HOME-assisted units included a placeholder pending a future HOME rulemaking (which had just been completed in 2013) to revise conflicting HOME regulations. HUD anticipated that the future HOME rulemaking would revise the HOME regulations at 24 CFR part 92 to prevent participating jurisdictions and owners of HOME-assisted projects from being in non-compliance with HOME rent limits when receiving the rent amount determined by a public housing authority (PHA), pursuant to the rent reasonableness process established by HERA for a tenant with a section 8 housing choice voucher (HCV). As described in detail in this section, HUD is now proposing to make the required revisions to § 92.252 to align HOME rent limit requirements with the rent reasonableness requirements for HOME-assisted units in the proposed § 982.507(c)(3). The proposed changes would prevent the participating jurisdiction and an owner of HOME-assisted units from being in noncompliance with HOME rent limits when a PHA complies with the 1937 Act, as amended by HERA, in its HCV rent payments to owners. Section D. of the proposed rule discusses the proposed changes to § 982.507(c)(3) to fully implement the HERA section 8 HCV rent reasonableness process for HOME-assisted units.

The proposed rule would implement the following changes to remove conflicts with the proposed rent requirements for the section 8 HCV program at § 982.507(c)(3). HUD proposes to remove the applicability of the HOME rent limits in § 92.252 to payments provided under a Federal or State rental assistance or subsidy program. This change in proposed § 92.252(a) would revise current

²¹ 88 FR 9600 at 9612, 9614–9615.

program requirements in § 92.252 by permitting an owner to receive the rent determined by a PHA, in accordance with proposed § 982.507(c)(3), or under another Federal or State rental assistance or subsidy program even though the rent for HCV or another Federal or State rental assistance or subsidy program exceeds the HOME rent limits. HUD would still implement the requirements for rents in section 215(a) of NAHA (42 U.S.C. 12745(a)) by continuing to apply the HOME rent limits to the rent and utilities required to be paid by the tenant. This change would align the HOME program with the changes to the 1937 Act required by HERA for the PHA's determination of rent for HCV in HOME units. As the PHA must determine the HCV rent in compliance with sections 8(o)(10)(A) and (F) of the 1937 Act (42 U.S.C. 1437f(o)(10)(A) and (F)) as proposed in § 982.507(c)(3), the proposed changes to § 92.252 would prevent an owner from being in noncompliance with HOME rent limit requirements when receiving the required rent from a PHA on behalf of a tenant with HCV. Additionally, the existing rent limit requirements in § 92.252 can be confusing for owners and these revisions would provide additional clarity so that participating jurisdictions and owners understand that the HOME rent limit requirements do not conflict with the rent requirements for Federal rental assistance or subsidy programs or LIHTC.²² These proposed changes also align with the LIHTC requirements for rent, including when there is section 8 HCV assistance and other comparable forms of rental assistance applicable to the unit or household.²³

As discussed in further detail in the Regulatory Impact Assessment, estimates of increased potential annual gross rent collection arising from the proposed changes to HOME rent limits would only be fully realized if all HOME units have tenants that receive rental assistance. Precise data on how many tenants in HOME units that also receive tenant-based rental assistance like HCV does not exist, but it is unlikely that a majority of HOME units without a project-based subsidy are occupied by tenants with a tenant-based subsidy. Data reported to HUD at the time of initial HOME rental project

lease-up suggests that 24 to 30 percent of tenants in units without project-based subsidies receive HCVs. HUD anticipates that the changes in the proposed rule to conform to the changes by HERA, will result in an annual increase in payments to property owners of roughly \$78–\$125 million, which is approximately 0.3 to 0.5 percent of HCV's budget authority for rental assistance in FY 2023. The proposed changes therefore may potentially leave PHAs unable to provide rental assistance to 6,000–11,000 households that they otherwise would have if the PHAs had provided rental assistance payments up to the current HOME rent limits rather than the reasonable rent determined by a PHA. It is also possible that future Congressional appropriations would cover the same number of vouchers regardless of relatively small changes in per voucher costs, in which case the number of assisted households would not be affected. Nonetheless, Congress specifically provided for these proposed changes for HOME units in HERA and under the proposed rule, HOME rent limits would still apply to the rent and utilities paid by the tenant. The only impacts on tenants and prospective tenants are that tenants with HCVs or other tenant-based rental assistance would become more desirable to owners, and that residents of HOME-assisted projects could experience improved housing conditions (since some projects would see improved cash flow).

The proposed revisions would make the treatment of payments consistent under Federal or State project-based and tenant-based rental assistance programs for both High HOME and Low HOME rent units. As a result, the proposed revisions would also decrease administrative burden for participating jurisdictions and owners. Consequently, a participating jurisdiction may focus its monitoring and enforcement of HOME rent limit requirements on the amount that is required to be paid by the tenant to an owner rather than on whether payments for rent under a Federal or State tenant-based or project-based rental assistance or subsidy program meet the Low HOME and High HOME rent limit requirements.

The Department also proposes to move the requirement that subsequent rents for a project are not required to be lower than the HOME rent limits for the project in effect at the time of project commitment from § 92.252(f) to the proposed § 92.252(a). The proposed revision would clarify that the rent floor for a project is established at the time of commitment of HOME funds to the

project and may apply to rents at the time of initial occupancy as well as subsequent rents.

The proposed § 92.252(a)(2)(i) would clarify that the maximum rent is 30 percent of the annual income of a family whose income equals 50 percent of AMI, as determined by HUD, except when 30 percent of the annual income of a family with income at 50 percent AMI is higher than the fair market rent under the proposed § 92.252(a)(1)(i). This change would clarify that the only circumstance in which the High HOME Rent would be lower than the Low HOME Rent is if the fair market rent permitted in § 92.252(a)(1)(i) is lower than 30 percent of the annual income of a family whose income equals 50 percent AMI, as described in the proposed § 92.252(a)(2)(i). This proposed change is appropriate because the Department does not establish the 65 percent AMI rent limit, as permitted under § 92.252(a)(1)(ii), to be lower than the 50 percent AMI rent limit in § 92.252(a)(2)(i). As a result, there is no need to continue using “applicable rent” in the proposed § 92.252(a)(2)(i). The proposed revisions would clarify that if the fair market rent, as permitted under § 92.252(a)(1)(i), is lower than the rent limit of 30 percent of the annual income of a family whose income equals 50 percent AMI, as determined by HUD, the Low HOME rent limit in § 92.252(a)(2)(i) is the fair market rent permitted under the High HOME rent limit at § 92.252(a)(1)(i).

HUD is also proposing other changes to remove conflicts with the changes implemented by HERA in the proposed § 92.252(a)(2)(ii). The proposed rule would revise the current requirements at § 92.252(b)(2)(i) and (ii) by removing § 92.252(b)(2)(i) which currently applies to Low HOME rent units with tenant-based rental assistance and revising § 92.252(b)(2)(ii) to be the proposed § 92.252(a)(2)(ii). The proposed § 92.252(a)(2)(ii) would conform the requirement on rent contribution by the family to the proposed change that the HOME rent limits do not apply to payments provided under a Federal or State rental assistance or subsidy program by removing references to “Federal or State project-based rental subsidy” and “Federal or State project-based rental subsidy program.”

In the 2013 HOME Final Rule, the Department removed the discretion for a participating jurisdiction to use the local PHA utility allowance and required the use of the HUD Utility Model or a project-specific utility allowance based on the utilities used in the project. The Department identified and explained the permissible methods

²² The rent limits under the Low-Income Housing Credits or LIHTC are governed by 26 U.S.C. 42(g)(2)(A).

²³ Under 26 U.S.C. 42(g)(2)(B)(i), LIHTC gross rent does not include any payment under section 8 of the United States Housing Act of 1937 (42 USC § 1437f) or any comparable rental assistance program applicable to either the rental unit or the household occupying the unit.

of determining the utility allowance for a HOME-assisted rental project that align with LIHTC.²⁴ The purpose of the change in the 2013 HOME Final Rule was to require more accurate utility allowances and reward energy efficiency measures with the possibility of higher rental revenue to the owner. In doing so, the Department unintentionally created a conflict between the HOME program and the Section 8 project-based voucher (PBV) and HUD Veterans Affairs Supportive Housing (HUD-VASH) PBV programs, which require the use of a local PHA's utility allowance. Due to these conflicting requirements, the Department has approved numerous waivers of this requirement in § 92.252 when HOME and PBVs or HUD-VASH PBVs are combined in the same projects. Consequently, the proposed rule at § 92.252(b) would restore the option to use the local PHA's utility allowance for HOME-assisted rental projects to realign utility allowance requirements in HOME and PBVs.

Specific solicitation of comment #6: Rather than permitting all HOME-assisted projects to use the local PHA's utility allowance, should HUD limit the use of the PHA utility allowance to only HOME-assisted projects which also receive PBV or HUD-VASH PBV assistance?

The proposed rule would clarify the period of affordability requirements in proposed § 92.252(d) by removing "not less than" to require that HOME-assisted units meet the program requirements for the required period of affordability, beginning from the date of project completion, to prevent further confusion that the period of affordability must be more than the required period in the table in § 92.252 and to specify that the period of affordability starts at project completion. The proposed rule would also clarify in proposed § 92.252(d) that the affordability requirements for HOME rental housing include the applicable rent limits, period of affordability, and income requirements. The Department would also clarify that the means of enforcement for the affordability requirements include deed or use restrictions, liens on real property, a covenant running with the land, a recorded agreement restricting the use of the property, or any other mechanism approved in writing by HUD, under which the participating jurisdiction has

the right to require specific performance. The Department also proposes to revise § 92.252, as well as §§ 92.254 and 92.504, to make the means of enforcement for affordability requirements consistent throughout the proposed rule. The proposed § 92.252(e)(3) would also increase the minimum number of days for prior written notice of any increase in rents for HOME-assisted units from not less than 30 days to not less than 60 days.

Due to changes to the rent limit requirements in § 92.252(a), this proposed rule would renumber § 92.252(a) through (i).

The proposed rule would also update terminology to be consistent throughout the section. This includes revising the use of the term "maximum rent limit" to "rent limit" in paragraphs (a), (c), and (e) because the applicable rent limit is the maximum rent and the use of the term "maximum rent limit" in some places is confusing. In addition, the proposed rule would update any references to the renumbered paragraphs throughout the rule.

While the proposed rule in paragraph (b) would realign utility allowance requirements in HOME and PBVs, the proposed rule would still require that the utility allowance account for energy efficiency measures of the project. Despite this requirement, the Department recognizes that certain Federal or State tax credits and other incentives are available to owners of affordable housing projects in order to encourage energy retrofits and the installation of solar and/or wind facilities. Often these types of incentive programs require that the low-income tenants of the affordable rental housing receive financial benefit from the energy efficiency measures. Because the participating jurisdiction is required to update the project's utility allowance annually and must account for any energy efficiency measure of the project, the utility allowance provided to the tenant would likely decrease following any energy efficiency upgrades. This decrease in the utility allowance could therefore result in a financial benefit to the owner rather than the tenant. In addition, because the tenant may receive no financial benefit, the owner may not receive the tax credit or other incentives. Ultimately, as proposed, the HOME utility allowance requirements may disincentivize energy efficiency upgrades. As described below, HUD seeks public comment on how to avoid disincentivizing energy efficiency upgrades.

Specific solicitation of comment #7: The Department seeks input on whether and how the rule should facilitate the

conveyance of a financial benefit to low-income tenants when the project owner makes energy efficiency upgrades such as the installation of small-scale wind or solar facilities in connection with an eligible Federal or State program. HUD has issued guidance that currently describes how certain utility discounts or rebates can be treated under HUD income and utility allowance regulations.²⁵ *HOME is subject to the same income requirements under 24 CFR 5.609 as other program areas issuing guidance on the treatment of these discounts and rebates. The Department therefore also requests comment from the public on whether to go farther than this guidance for HOME projects through this HOME rulemaking. For example, should HUD maintain the same utility allowance for the project following energy efficiency upgrades to allow the tenant to realize the benefit of decreased utility costs? Both the current income regulations at 24 CFR 5.609 and 24 CFR 5.609 as revised in the HOTMA Final Rule exclude lump-sum additions to assets, as well as non-recurring income. However, if a HUD program provided a recurring financial benefit directly to a low-income tenant, should the rule exclude this income from the HOME income determinations?*

Specific solicitation of comment #8: The Department specifically requests public comment from participating jurisdictions, developers, and other affected members of the public about the appropriateness of the length of the HUD-required periods of affordability for HOME-assisted rental housing. The current regulation at 24 CFR 92.252(e) establishes periods of 5 years for a per-unit HOME investment of under \$15,000, 10 years for a per-unit investment between \$15,000 and \$40,000, and 15 years for a per-unit investment of more than \$40,000, 15 years for any unit involving refinancing of existing debt, and 20 years for any unit involving new construction. Section 215(a)(1)(E) of NAHA (42 U.S.C. 12745(a)(1)(E)) requires that the period of affordability be for the remaining useful life of the HOME-assisted property, as determined by HUD, without regard to the term of the mortgage or to transfer of ownership, or for such other period that HUD determines is the longest feasible period of time consistent with sound economics

²⁴ HOMEfires Vol. 13, No. 2 Guidance on How to Establish Utility Allowances for HOME-Assisted Rental Units, available at <https://www.hudexchange.info/resource/5034/homefires-vol-13-no-2-guidance-on-how-to-establish-utility-allowances-for-home-assisted-rental-units/>.

²⁵ See https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_Community_Solar_Credits_signed.pdf; https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_re_Community_Solar_Credits_in_MM_Buildings.pdf; and <https://www.hud.gov/sites/dfiles/PIH/documents/Community%20Solar%20Credits%20in%20PIH%20Programs.pdf>.

and the purposes of NAHA. Since the Department established these periods of affordability in 1991, costs have increased significantly, LIHTCs have become the primary funding mechanism for rental housing, and the housing affordability crisis in the country has worsened significantly. The Department seeks input about whether the length of the periods of affordability and the dollar thresholds and activity thresholds that are the basis of the current periods of affordability remain appropriate. In addition, the Department seeks input about any project feasibility challenges of the current HOME periods of affordability and factors that the HUD should consider in contemplating changes to the current periods of affordability.

Through this rule, the Department proposes to streamline procedures and simplify requirements in proposed §§ 92.252(g)(1), 92.253(e)(5), and 92.251(f)(5)(i) for small-scale rental housing projects (one to four total units) for reexamination of annual income, tenant selection, and ongoing physical inspections. Section 226(c) of NAHA permits HUD to provide streamlined procedures in monitoring compliance with HOME requirements for small-scale housing when HUD determines it is appropriate. While current HOME requirements may be standard for larger rental projects managed by professional landlords or property management companies, the requirements can be a significant disincentive to participation in the program for landlords or would-be landlords of small-scale properties such as homeowners adding an accessory dwelling unit (ADU) or HOME-assisted homebuyers purchasing duplexes or triplexes. Such small-scale projects may be an attainable method for participating jurisdictions with less resources to address their rental housing needs while generating income or supporting owner-occupants (irrespective of whether their own unit is HOME-assisted). Reducing administrative burden would make HOME a viable funding option for such programs that create ADUs or provide financing for resident landlords.

The proposed rule would revise § 92.252 to clarify requirements for tenant income re-examination, align with the requirements in § 92.203(a) and (b), and to provide flexibilities for small-scale housing, multifamily projects with a period of affordability of ten years or more, and for units with Federal or State project-based subsidy or tenant-based rental assistance. The proposed rule would revise the first paragraph of proposed § 92.252(g) to recognize the exceptions from § 92.203(b)(1)(i) for a

participating jurisdiction that accepts an annual income determination in accordance with § 92.203(a)(1) or (2) or determines income in accordance with § 92.203(b)(2). Currently, § 92.203(a)(1) requires a participating jurisdiction to accept a Federal or state project-based subsidy provider's determination of a family's annual income if a family is applying for a HOME unit assisted by a Federal or state project-based subsidy program. Similarly, pursuant to § 92.203(a)(2), a participating jurisdiction has the option to accept a rental assistance provider's determination of a family's annual income if the family is applying for a HOME unit and is receiving tenant-based rental assistance (e.g., a Housing Choice Voucher). This rule's revision to proposed § 92.252(g) would make the regulations at § 92.203 consistent with proposed § 92.252(g). The proposed rule would also revise the first paragraph in proposed § 92.252(g) to require the participating jurisdiction to require the owner to re-examine each tenant's annual income in accordance with the option in § 92.203(b)(1) that the participating jurisdiction selects and includes in the written agreement. The proposed rule would add paragraphs (1) through (3) to proposed § 92.252(g) to establish exceptions to this general re-examination requirement.

The proposed rule would reduce burdens on landlords of small-scale housing by adding paragraph (g)(1) to § 92.252 to permit a participating jurisdiction to permit an owner of small-scale housing to reexamine each tenant's annual income every three years rather than annually. For owners of small-scale housing that select the option at § 92.203(b)(1)(ii) and are located in participating jurisdictions which permit owners of small-scale housing to reexamine a tenant's annual income every three years, the proposed rule would except these owners of small-scale housing from the requirement to obtain annual self-certifications from their tenants within the three-year period following completion of these tenants' income examinations. This proposed change to the schedule of reexamining tenant annual income for small-scale housing would have a minimal effect on the landlord's rental income because the rent limit would not change until the tenant's income increased above 80 percent of AMI. In addition, this proposed change aligns with the other proposed changes for small-scale housing in § 92.251 to permit a three-year physical inspection requirement schedule rather than a risk-based

schedule and § 92.253 to permit the participating jurisdiction, upon request by an owner of small-scale housing, to establish alternative procedures to a written waiting list for small-scale housing, subject to HUD's written approval of the procedures and determination that the selection of a tenants from a waiting list in chronological order by the owner is impracticable.

The proposed rule would add paragraph (g)(2) to § 92.252 to impose and further clarify the existing requirement for owners of a multifamily project with a period of affordability of 10 years or more. Currently, during the period of affordability, an owner may re-examine tenant income annually using a statement and certification, in accordance with § 92.203(b)(1)(ii). The proposed rule would clarify that if a participating jurisdiction permits the owner to re-examine income using a statement and certification, the participating jurisdiction must require the owner to re-examine the income of each tenant using source documentation, at minimum, every six years, in accordance with § 92.203(b)(1)(i). This reflects the same requirement currently in § 92.252(g), but the language has been revised to clarify that the participating jurisdiction must enforce compliance by the owner with this requirement.

To align with the requirements in § 92.203(a), the proposed rule would also include an exception for units with Federal or State project-based subsidy or tenant-based rental assistance by adding paragraph (3) to 92.252(g). The proposed § 92.252(g)(3) would except an owner from re-examining a tenant's annual income in accordance with § 92.203(b) for HOME when a participating jurisdiction accepts an annual income determination under § 92.203(a)(1) or (2).

The proposed rule would renumber the existing § 92.252(i)(2) to § 92.252(h)(2) and makes several changes to the proposed § 92.252(h)(2) to improve readability and clarity regarding over-income tenant requirements. In addition to creating new paragraphs (h)(2)(i) and (ii), the proposed rule would clarify in the proposed § 92.252(h)(2)(i) that the participating jurisdiction may permit tenants of HOME-assisted units subject to rent restrictions under LIHTC to pay the rent amount required under LIHTC requirements. In the proposed § 92.252(h)(2)(ii), HUD would further clarify that an over-income tenant in a floating HOME-assisted unit must pay a rent amount no greater than the fair

market rent for comparable, non-HOME-assisted units in the neighborhood.

In proposed § 92.252(i), the proposed rule would also explicitly prohibit the use of surety bonds, security deposit insurance, or similar instruments to be used in lieu of or in addition to a security deposit in HOME-assisted units.

The proposed revisions to § 92.252(j) and (k) update citations to conform with the redesignation of the current § 92.253(d) as § 92.253(e) and the Department's proposal to move the requirements for on-site inspections and financial oversight of rental projects from § 92.504(d) to § 92.251(f) respectively.

21. Tenant Protections and Selection (24 CFR 92.253)

The Department is proposing significant revisions to the tenant protections and selection provisions in § 92.253, consistent with the priorities set out in the Administration's Renters' Bill of Rights.²⁶ HUD's proposed revisions to the HOME program in § 92.253 would provide a robust set of tenant protections appropriate to the HOME program. These tenant protections are based on the Department's review of existing HUD programs (e.g., the Section 8 PBV program²⁷ and the public housing program²⁸), a number of State statutes and local ordinances (e.g., Virginia,²⁹ Washington, DC,³⁰ California,³¹ Texas,³² and Florida³³), and the Military Housing Privatization Initiative³⁴). To implement the new tenant protections, HUD is proposing in § 92.253(a)(4) to require that all tenants in HOME-assisted rental housing units or receiving TBRA have a new HOME tenancy addendum appended to their lease. This HOME tenancy addendum would include the new tenant protections listed in § 92.253(b). Through this proposed rule, the Department would replace the list of prohibited lease terms currently in

§ 92.253(b) with a description of the provisions that HUD will include in the HOME tenancy addendum.

The proposed rule at § 92.253(a) would revise the heading of paragraph (a) to "Lease Contents" to more accurately describe the requirements within the paragraph, as proposed. The introductory text clarifies that the protections apply to both tenants of HOME-assisted rental housing as well as tenants receiving TBRA. The paragraph also clarifies an existing requirement that the tenant lease be in writing and adds a new requirement that the owner provide the participating jurisdiction a copy of the written lease before it is executed and when the written lease is revised. This new requirement gives the participating jurisdiction the ability to verify that the owner's lease includes the HOME tenancy addendum and otherwise complies with the revised requirements of this section.

The proposed rule at § 92.253(a)(1) would require that a tenant's lease contain more than one convenient method to communicate directly with the owner or the property management staff, including in person, by telephone, email, or through a web portal. This provision would provide tenants with a reasonable way to contact an owner's property management staff to request any repairs or maintenance that is necessary for the unit or the common areas of the project. Similarly, the proposed rule at § 92.253(a)(2) would require that a lease provide the participating jurisdiction's HOME program contact information so that a tenant can contact the participating jurisdiction. The proposed rule at § 92.253(a)(3) maintains the requirement that the Violence Against Women Act (VAWA) lease requirements contained in § 92.359(e) be included in a HOME tenant's lease, except as otherwise provided in § 92.359(b). The proposed rule at § 92.253(a)(4) would establish the requirement that a HOME tenancy addendum, as further described below, is contained in the lease.

The introductory text to proposed § 92.253(b) would establish that the HOME tenancy addendum shall prevail over any conflicting provisions of the lease. The introductory text would also explain that the lease, the HOME tenancy addendum, the VAWA addendum, and any addenda required by a Federal or State affordable housing program shall constitute the sole agreement between the owner and the tenant.

Specific solicitation of comment #9: The Department currently applies only the tenant protections contained in the current § 92.253(a) and (b) to tenants

receiving TBRA. The proposed rule would apply proposed paragraphs (a)–(c) and (d)(2) to tenants receiving TBRA, including tenants that only receive HOME security deposit assistance. The Department is seeking public comment on whether the requirements at § 92.253(b) and (d)(2) should be required for tenants that receive TBRA. If not, what tenant protection requirements should apply to tenants that receive TBRA?

The proposed rule at § 92.253(b)(1) would describe tenant protections surrounding the physical condition of the tenant's unit and the project. Section 92.253(b)(1)(i) describes the requirement that the owner maintain the physical condition of the unit and the project in accordance with the participating jurisdiction's ongoing physical condition standards in § 92.251(f).

The proposed rule at § 92.253(b)(1)(i) would establish that an owner shall repair and maintain the unit and the common areas in accordance with § 92.253(b)(1)(i). The proposed rule at § 92.253(b)(1)(ii)(A) would require that owners, as soon as practicable, provide tenants with expected time frames for maintaining and repairing units. The Department believes that this requirement is necessary to ensure transparent communications regarding when units will be repaired. The proposed rule at § 92.253(b)(1)(ii)(B) would require that owners, as soon as practicable, make repairs and perform maintenance on units and common areas in a professional manner and in accordance with the participating jurisdiction's property standards. The Department recognizes that repairs cannot always be performed immediately but seeks to clarify that the owner is still under an obligation to perform required repairs and to do so as soon as practicable. The proposed rule at § 92.253(b)(1)(ii)(C) would prohibit owners from charging tenants for the costs of addressing normal wear and tear or damage to a unit or common areas other than that caused by the tenant's negligence, recklessness, or intentional acts.

The proposed rule at § 92.253(b)(1)(iii) would require that, when a life-threatening deficiency in the physical condition of the tenant's unit or project impacts the tenant, the tenant shall be promptly relocated into either a housing unit that is decent, safe, sanitary, and in good repair, or placed into physically suitable lodging until repairs on the tenant's housing unit or project are completed. The Department anticipates that tenant relocation would only be necessary if repairs could not be completed on the day the life-

²⁶ Available at <https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf>.

²⁷ See HUD's Tenancy Addendum Section 8 Project-Based Voucher Program, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/52530C.pdf>; 24 CFR 983.256.

²⁸ 24 CFR part 966.

²⁹ Va. Code Ann. §§ 55.1–1200 through 1262.

³⁰ D.C. Official Code, Title 42, Ch. 35.

³¹ Cal. Civ. Code, D. 2; Cal Civ. Code, D. 3, Pt. 4, T. 5.

³² Tex. Prop. Code Title 8, Ch. 92.

³³ Fla. Stat. Title VI, Ch. 83.1.

³⁴ 10 U.S.C. 2890 and the Military Housing Privatization Initiative Tenant Bill of Rights, available at https://media.defense.gov/2020/May/18/2002302053/-1/-1/1/TENANT_BILLOFRIGHTS.PDF.

threatening deficiency is identified, in which case the proposed rule would require that the housing unit or lodging used for tenant relocation be provided at no additional cost to the tenant. The proposed § 92.253(b)(1)(iii) would be added because the Department seeks to prevent HOME tenants from remaining in housing that poses a threat to their physical safety and from being subjected to additional costs as a result of physical housing conditions outside their control.

The proposed rule at § 92.253(b)(1)(iv) would require that, where the owner controls the utilities, owners provide tenants with uninterrupted utility service in projects. The proposed rule at § 92.253(b)(1)(iv) would provide an exception to the proposed requirement for when utility services are interrupted for a reason that is beyond the control of the owner. The Department is proposing this revision to counteract a disturbing trend of so-called “self-help” evictions where owners use their ability to control utilities in a manner that is detrimental to tenants as a means to compel tenants to terminate their tenancy. In many States this “self-help” eviction practice is already illegal,³⁵ but, by addressing this issue in the proposed HOME tenancy addendum, the proposed rule would prohibit the practice throughout HOME-assisted rental housing and TBRA.

The proposed rule at § 92.253(b)(2)(i) would explain that a family has the right to reside with a foster child, foster adult, or live-in aide in the unit. The proposed requirement to allow foster children and adults to reside in a unit with a family is similar to the requirements contained in the Section 8 HCV program.³⁶ The proposed requirement to allow a live-in aide to reside in a unit with a family is part of the nondiscrimination requirements contained in § 92.350.

The proposed rule at § 92.253(b)(2)(ii) would explain that, except for shared housing arrangements in TBRA, the tenant’s household shall have exclusive use and occupancy of their unit. One of the rights of tenancy is the tenants’ exclusive use of their unit. Similar rights are contained in the HUD Section 8 project-based voucher program tenancy addendum,³⁷ in the lease requirements for public housing

tenants,³⁸ and in other leases used by servicemembers.³⁹

The proposed rule at § 92.253(b)(2)(iii) would set out the permitted situations where an owner may enter a tenant’s unit. The proposed rule at § 92.253(b)(2)(iii)(A) would allow an owner to enter a unit during reasonable hours when the owner is performing routine inspections and maintenance, making repairs to the unit, or showing the unit to prospective tenants. Before the owner may enter the unit under proposed

§ 92.253(b)(2)(iii)(A), the owner must give the tenant at least 2 days’ notice, which must include the purpose for entering the unit. The proposed rule at § 92.253(b)(2)(iii)(B) would allow an owner to enter a unit at any time, without advance notice, if the owner has a reasonable belief that an emergency requires entry to the unit. The proposed rule at § 92.253(b)(2)(iii)(C) would require that an owner that enters a unit when the tenant and all adult members of the household are absent from the unit must provide a written statement to the tenant explaining the date, time, and purpose of their entry of the unit.

The proposed rule at § 92.253(b)(2)(iv) would describe a tenant’s rights to reasonable access and use of the common areas of the project. This language is proposed to clarify HUD’s existing policy and explicitly prohibit owners from having separate amenities such as gyms, pools, spas, elevators, rooftop gardens, storage areas, and playrooms that only non-assisted tenants can access or use.

The proposed rule at § 92.253(b)(2)(v) would provide tenants the right to organize, create tenant associations, convene meetings, distribute literature, and post information at a project. Tenants have these explicit protections in other HUD programs, including HUD Multifamily Housing programs.⁴⁰ This is also a tenant right provided in a number of jurisdictions.⁴¹ The Department proposes to add these explicit protections to the HOME program because the Department has found that tenant organizations are especially helpful in providing tenants with representation in addressing community-wide issues and that tenant organizations may provide a more

sufficient counterweight to owners of larger projects who are not compliant with lease provisions or HUD requirements.

The proposed rule at § 92.253(b)(2)(vi) would state that a tenant may not be required to accept supportive services that are offered at the housing unless the tenant is living in transitional housing and such services are required in connection with that housing. This language is proposed to clarify HUD’s existing policy and is part of the prohibited lease provisions in the current § 92.253(b)(9).

The proposed rule at § 92.253(b)(3) would describe certain notices that must be provided to a tenant by an owner. The proposed rule at § 92.253(b)(3)(i) would require that an owner notify a tenant in writing of the specific grounds for any proposed adverse action by an owner. These actions can be a variety of different actions, including charging a tenant for tenant-caused damages. This proposed requirement is similar to requirements of other HUD programs such as HUD’s public housing program.⁴²

The proposed rule at § 92.253(b)(3)(ii) would require that a tenant be notified within 5 business days of any changes in ownership to the project, including through a foreclosure. The proposed rule at § 92.253(b)(3)(ii) would also require that owners provide tenants with 30 days’ notice of an impending sale or impending foreclosure of the property. These proposed requirements are similar to requirements contained in a variety of State statutes⁴³ and the Department proposes these policies so that tenants are informed about changes in ownership in their projects. Requiring that tenants receive notice of this potential change earlier in the process helps better prepare those tenants for these and other disruptive impacts that occur when there is a change of ownership at a project. Changes in ownership of a project may lead to more extensive changes in properties, including rehabilitation of units or termination of affordability restrictions. As such, reasonable notification requirements would allow tenants to better prepare for any future changes to their housing. Section 92.253(b)(3)(iii) clarifies the existing lease prohibition contained at § 92.253(b)(4), which prohibits an owner from instituting a lawsuit against the tenant without providing the tenant with notice.

³⁸ 24 CFR 966.4(d).

³⁹ See 10 U.S.C. 2890.

⁴⁰ See 24 CFR part 964 for tenant participation and tenant opportunities in public housing; 24 CFR part 245 for tenant participation in Multifamily Housing projects.

⁴¹ See D.C. Official Code § 42–3505.06; New York Consolidated Laws, Real Property Law—RPP § 230; Cal. Civ Code § 1942.6.

⁴² See 24 CFR 966.4(e)(8).

⁴³ See, e.g., Va. Code Ann. § 55.1–1237; Md Code, Real Property § 7–105.11.

³⁵ See, e.g., Fla. Stat. § 83.67; Va. Code Ann. § 55.1–1243.1; Cal. Civ. Code § 789.3; Mont. Code Ann. § 70–24–411.

³⁶ 24 CFR 982.551(h)(4).

³⁷ Available at <https://www.hud.gov/sites/dfiles/OCHGO/documents/52530CENG.pdf>.

The proposed rule at § 92.253(b)(4) would describe and further specify a tenant's rights to available legal proceedings and remedies. Most of the proposed § 92.253(b)(4) reflects tenant protections that already exist in the existing HOME rule, which are proposed to be revised for inclusion in the tenancy addendum or for clarification.

The proposed rule would renumber and slightly rephrase, for the purposes of the HOME tenancy addendum, the prohibited lease terms from the current § 92.253(b)(1)–(3) to § 92.253(b)(4)(i)–(iii), respectively. The proposed rule at § 92.253(b)(4)(iv) would provide additional clarification that a tenant has the right to independent legal representation in any legal proceedings in connection with the lease. A tenant is not required to appoint the owner as attorney-in-fact as part of the lease and has the right to independent counsel that can assist the tenant in any dispute relating to their lease, including non-binding arbitration or alternative dispute resolution processes that can precede a civil court proceeding. Preliminary studies have demonstrated that when a tenant has representation, a court is less likely to execute a warrant of eviction or enter a decision in favor of the owner.⁴⁴ While the Department is not proposing to provide HOME tenants with funds to obtain counsel, given the benefits that counsel can provide, the Department believes it is necessary to clarify that tenants always have the right to independent counsel.

The proposed rule at § 92.253(b)(4)(iv)(B) and (C) reframes the current regulatory requirements for prohibited lease terms contained in § 92.253(b)(4) and (5) into affirmative tenant protections for inclusion in the HOME tenancy addendum. The proposed § 92.253(b)(4)(iv)(B) and (C) explains that a tenant may not be required to waive any right to a trial by jury or waive the tenant's right to appeal or otherwise challenge a court decision in connection with a lease. Similarly, the proposed rule at § 92.253(b)(4)(v) would reframe the current prohibited lease term contained in § 92.253(b)(8) into a tenant protection. The proposed affirmative tenant protection in § 92.253(b)(4)(v) states that a tenant may only be required through the lease to agree to pay the owner's attorney's fees or other legal costs if the tenant loses the court proceeding with the owner.

The proposed rule at § 92.253(b)(5)(i) would state that an owner may not unreasonably interfere with the tenant's comfort, safety, or enjoyment of a rental unit or retaliate against a tenant. The proposed rule at § 92.253(b)(5)(i)(A)–(E) would provide that retaliation includes, but is not limited to, an owner's attempts, during a tenant's lease, to recover possession of the housing unit in a way that is not consistent with HUD requirements, decrease the services to be provided to the unit, interfere with a tenant's rights to privacy under State or local law, harass a household or their lawful guests, or refuse to honor the terms of the lease.

The proposed rule at § 92.253(b)(5)(ii) would describe the rights that a tenant may exercise without fear of retaliation by an owner. These rights of tenancy that a tenant may exercise include, but are not limited to, a tenant's rights to report inadequate housing conditions of the housing unit or project to the owner, participating jurisdiction, code enforcement officials, or HUD; the ability to request enforcement of the lease or any protection guaranteed under 24 CFR part 92; and the ability to request or obtain enforcement of any applicable protections under Federal, State, or local law. The Department believes that tenants must be able to exercise their rights under their lease and applicable law free from worry of reprisal or coercion. Several States have also prohibited retaliation against tenants when the tenant has complained to a governmental agency responsible for code enforcement, made a complaint to or filed a legal action against the owner, organized or has become a member of a tenant's organization, or has testified in a court proceeding against the owner.⁴⁵ Moreover, the Department believes that establishing this as a right within the lease itself will assist in addressing situations where owners retaliate against persons with disabilities that request reasonable accommodations in HUD-assisted housing units.

The proposed rule at § 92.253(b)(6) would establish confidentiality requirements to safeguard a tenant or applicant's personally identifiable information.

The proposed rule at § 92.253(c) would establish new security deposit requirements for HOME-assisted rental housing and TBRA. Under these proposed requirements, security deposits must be refundable and may be no greater than two months' rent. The proposed rule would also prohibit the

use of surety bonds or security deposit insurance to be used in lieu of or in addition to security deposits. Additionally, proposed § 92.253(c) would also provide that if an owner charges any amount against a tenant's security deposit, then the tenant must be provided a list of all items charged against the security deposit and be promptly refunded the remainder of the security deposit balance. The proposed change to § 92.253(c) is distinct from the current HOME regulation, which does not require refundable security deposits or that the owner identify the individual charges made against a security deposit. This proposed change is consistent with various State statutes⁴⁶ and other HUD programs⁴⁷ and provides another layer of protection for tenants in HOME-assisted rental housing and with TBRA.⁴⁸

The proposed rule at § 92.253(d) would revise the termination of tenancy provisions for both HOME-assisted rental housing and TBRA currently found at § 92.253(c). Currently, the rules are silent on what protections apply to termination of tenancy for tenants with tenant-based rental assistance, as tenant-based rental assistance is not subject to the termination of tenancy provisions in the current rule at § 92.253(c).

The proposed rule at § 92.253(d)(1)(i) would clarify that an owner may not terminate the tenancy of any tenant or household member or refuse to renew the lease of a tenant except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable Federal, State, or local law; for completion of the tenancy period for transitional housing or failure to follow any required transitional housing supportive services plan; or for other good cause. The Department is proposing this clarification to the language currently found at § 92.253(c) in response to questions about situations where an owner wishes to evict a member of the household but not the entire household. The Department recognizes that other HUD programs are more specific about the requirements that apply when expelling a single member of the household and is proposing these revisions to clarify the

⁴⁶ See, e.g., Tex. Prop. Code § 92.104; SDCL § 43–32–24; Md. Code, Real. Prop. § 8–203.

⁴⁷ See HUD's Section 8 Project-Based Voucher Program Tenancy Addendum, part B.12, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/52530CENG.pdf>. See also 24 CFR 960.509(b)(3)(v) for public housing requirements related to security deposits.

⁴⁸ Disputes surrounding the retention of a security deposit, if they arise, would typically remain a matter of state or local landlord-tenant law.

⁴⁴ See Ellen, I.G., O'Regan, K., House, S. and Brenner, R., 2021, Do lawyers matter? Early evidence on eviction patterns after the rollout of universal access to Counsel in New York City, Housing Policy Debate, 31(3–5), pp.540–561.

⁴⁵ See, e.g., Fla. Stat. § 83.64; Tex. Prop. Code § 92.331; Mont. Code § 70–24–431.

termination of tenancy requirements that apply to each household member.

The proposed rule at § 92.253(d)(1)(i)(A)–(D) would provide a more detailed explanation of “good cause” to terminate or refuse to renew a tenancy. The proposed rule at § 92.253(d)(1)(i)(A) would clarify that a tenant’s assets or the type of income or assets that the tenant possesses is not good cause to terminate or refuse to renew a tenancy. This was clarified in the preamble to the HOTMA Final Rule. In that rule, the Department stated that “[a] HOME PJ may only terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds for good cause, as defined in § 92.253(c), which does not include having the type of assets or an amount of assets in excess of the limitations in § 5.618.”⁴⁹ Because § 92.253 was not part of the HOTMA Final Rule, the Department proposes to use this opportunity to codify the requirements in proposed § 92.253(d)(1)(i)(A).

The proposed rule at § 92.253(d)(1)(i)(B) would describe other bases for other good cause, such as when a tenant creates a documented nuisance under applicable state or local law or when a tenant unreasonably refuses to provide the owner access to the unit to allow the owner to repair the unit. The Department holds these to be reasonable grounds for other good cause in other HUD programs, most notably the Section 8 PBV program,⁵⁰ and proposes to align HOME requirements with these other programs.

The proposed rule at § 92.253(d)(1)(i)(C) would establish that other good cause can also include where an owner must terminate a tenancy to comply with an order by a governmental entity or court that requires the tenant vacate the project or unit or a local ordinance that necessitates vacating the project or unit. In these instances, the Department believes it is reasonable for an owner to terminate a tenancy or refuse to renew a lease. Depending upon the nature of the order, under the proposed rule, the owner may still be found in violation of other HOME program requirements and their written agreement with the participating jurisdiction. For instance, if a governmental entity or court order to vacate was caused by the owner’s failure to maintain the property condition, then the owner of the HOME rental housing may still be found in violation of the

participating jurisdiction’s ongoing property condition standards.

The Department proposes to revise the notice requirements for termination or refusal to renew tenancy, currently found in § 92.253(c).

The proposed rule at § 92.253(d)(1)(i)(D) would clarify that in order for an owner to establish good cause for a violation of applicable Federal, state, or local law, there must be a record of conviction for a crime during the tenancy period that has a direct bearing on the tenant’s continued tenancy in the HOME rental housing project, such as a violation of law that affects the safety of persons or property. The proposed rule would also clarify that an owner shall not use a record of arrest, parole or probation, or current indictment to establish a violation of applicable Federal, state, or local law.

However, the proposed rule at § 92.253(d)(1)(i)(D) would further clarify that good cause based on a violation of applicable Federal, state, or local law cannot be based on a violation that occurred prior to tenancy, a violation that does not have a direct bearing on a tenant’s continued tenancy, or a basis other than a record of conviction. An owner may consider any mitigating circumstances relevant to whether the tenant will commit further violations of the lease or applicable Federal, State, or local law.

The proposed rule at § 92.253(d)(1)(ii) would require that owners provide 60 days’ notice instead of 30 days’ notice before the termination of tenancy. The Department recognizes that this proposed 60-day notice period extends beyond the 30-day notification requirement for nonpayment of rent recently proposed in the proposed rule entitled *30-Day Notification Requirement Prior to Termination of Lease for Nonpayment of Rent*⁵¹ (“30-Day Notice Rule”). One of the proposed changes in the 30-Day Notice Rule is to amend several program regulations to align HUD programs to require written notification of at least 30 days prior to lease termination resulting from nonpayment of rent. However, the programs with regulations that would be amended under the 30-Day Notice Rule do not have the same minimum 30-day statutory notice period that HOME has in 42 U.S.C. 12755(b). Moreover, the 30-Day Notice Rule was describing termination of tenancy for a specific ground, nonpayment of rent, and not the HOME statutory considerations in 42 U.S.C. 12755(b), which include good cause, as discussed throughout this preamble. Recognizing the challenges of

obtaining new affordable housing and to reduce the probability that a tenant will become homeless, the proposed rule’s increase to the notice period to 60 days would provide HOME tenants with a sufficient period of time to locate and secure a new rental unit. This increased notice period above the statutory minimum would also allow tenants to have additional time to object to or cure violations in order to reverse the termination. HUD believes that the public interest in avoiding increased homelessness significantly outweighs the risk that this proposed change to increase the notice period would disincentivize developers and owners from participating in the HOME program.

The Department is also proposing to require that owners provide the participating jurisdiction with a copy of the notice to vacate to assist the participating jurisdiction with monitoring the HOME units or units with TBRA as well as to help the participating jurisdiction answer any questions it receives from the tenant. The proposed rule at § 92.253(d)(1)(ii) would also provide that the 60-day notice period is not required if the termination of tenancy or refusal to renew is due to a direct threat to the safety of the tenants or employees of the housing or an imminent and serious threat to the property. This proposal would codify section 235 of Division L of the Consolidated Appropriations Act of 2016, Public Law 114–113, which revised section 225(b) of NAHA (42 U.S.C. 12755(b)) to specifically add, “Such [60]-day waiting period is not required if the grounds for the termination or refusal to renew involve a direct threat to the safety of the tenants or employees of the housing, or an imminent and serious threat to the property (and the termination or refusal to renew is in accordance with the requirements of State or local law).” Determining whether a person poses a direct threat to the safety of the tenants or employees of the housing, or an imminent and serious threat to the property is a fact-sensitive determination. There can be many different factors that an owner may choose to consider when making that determination, such as the nature of the conduct, the tenant’s past conduct, and the evidence that the owner has in their records. Moreover, even if the proposed 60-day notice period is not required pursuant to § 92.253(d)(1)(ii), any termination of tenancy or refusal to renew must comply with the requirements at § 92.253(d)(1)(iii).

The proposed rule at § 92.253(d)(1)(iii) would clarify that

⁴⁹ 88 FR 9600, 9613 (Feb. 14, 2023).

⁵⁰ See PBV Tenancy Addendum, Part B, paragraph 8.d, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/52530CENG.pdf>.

⁵¹ 88 FR 83877.

terminating or refusing to renew a tenancy must be in accordance with Federal, State, local law, and the requirements of 24 CFR part 92, including requirements related to fair housing, nondiscrimination, and VAWA.

The proposed rule at § 92.253(d)(1)(v) would clarify that an owner may not perform a constructive or so-called “self-help” eviction where the owner takes actions such as locking a tenant out of their unit or stopping utility services to a tenant’s units. These actions are already considered a violation of HUD’s current rules at § 92.253(c) but the proposed § 92.253(d)(1)(v) provides further clarification. The proposed rule at § 92.253(d)(1)(v) would also clarify that an owner may not create a hostile living environment or refuse to make reasonable accommodations in order to cause a tenant to terminate their tenancy. This proposal is consistent with the Department’s policy of prohibiting retaliation, as previously described. Additionally, an owner’s refusal to provide a reasonable accommodation in accordance with Federal requirements would also constitute a violation of the current HOME nondiscrimination requirements at § 92.350, as well as Federal nondiscrimination requirements under applicable Federal civil rights and fair housing laws.⁵²

The proposed rule at § 92.253(d)(2) would provide the requirements for terminating or refusing to renew the tenancy of a tenant assisted with TBRA. The proposed rule at the introductory text to § 92.253(d)(2)(i) would establish a requirement that the participating jurisdiction must adopt written standards for termination or refusal to renew a tenancy in the TBRA program. The Department believes by codifying this requirement, it would provide both participating jurisdictions and owners with more definitive requirements on how to permissibly terminate or refuse to renew a tenancy. To that end, the Department is also proposing to require that the written standards for terminating or refusing to renew a tenancy for a tenant assisted with TBRA be included in the lease or in the rental assistance contract between the participating jurisdiction and the tenant. As proposed, the written standards included in the lease or rental assistance contract must provide a good cause standard for terminating or refusing to renew a tenancy. The proposed rule does not modify a participating jurisdiction’s discretion to provide

TBRA to a tenant to lease a new unit even if an owner has terminated the family’s tenancy or refused to renew the lease under § 92.253(d)(2).

The proposed rule at § 92.253(d)(2)(i)(A)–(F) would include the standard for termination or refusal to renew a tenancy for good cause for TBRA. This proposed good cause standard includes many of the same types of good cause justifications that are proposed for HOME rental housing under § 92.253(d)(1)(i), including serious or repeated violation of the terms and conditions of the lease; violation of applicable Federal, State, or local law through a record of conviction of a crime that beards directly on continued tenancy; when a tenant creates a documented nuisance under applicable state or local law or when a tenant unreasonably refuses to provide the owner access to the unit to allow the owner to repair the unit; when an owner must terminate a tenancy to comply with an order issued by a governmental entity or court that requires the tenant vacate the project or unit; or a local ordinance that necessitates vacating the residential real property. Similar to the proposed changes in § 92.253(d)(1)(i)(D), HUD’s proposed language in § 92.253(d)(2)(i)(B) would also clarify that good cause based on a violation of applicable Federal, state, or local law shall be based on a record of conviction of a crime that bears directly on the tenant’s continued tenancy and not a record of arrest, parole or probation, or current indictment. This does not affect good cause based on a direct threat to the safety of the tenants or employees of the housing or an imminent and serious threat to the property. The proposed rule would further clarify that good cause based on a violation of applicable Federal, state, or local law must not be based on a violation that occurred prior to tenancy, a violation that does not have a direct bearing on one’s continued tenancy, or a violation that does not result in a record of conviction. An owner may consider any mitigating circumstances relevant to whether the tenant will commit further violations of the lease or applicable Federal, State, or local law.

The proposed rule at § 92.253(d)(2)(i)(D) would also include reasons for good cause termination or refusal to renew a tenancy that are common in private rental markets. These proposed good cause reasons include when an owner intends to withdraw the unit from the rental market so that the owner can occupy the unit; to allow an owner’s family member to occupy the unit; or to demolish or substantially rehabilitate the unit. These

circumstances are sufficient basis to terminate or refuse to renew a tenancy under the Section 8 HCV program and to take a unit off the rental market in most States. The Department also believes that requiring a more onerous standard would negatively impact the ability of tenants to utilize TBRA in privately held units.

The proposed rule at § 92.253(d)(2)(i)(E) would also clarify that an owner is not required to maintain tenancy after the termination of the rental assistance contract. This proposed clarification mirrors similar provisions in the project-based voucher program tenancy addendum, where the lease automatically terminates if the Housing Assistance Payments contract terminates or if the PHA terminates assistance to the tenant.⁵³

Specific solicitation of comment #10: Currently, a rental assistance contract can be between a participating jurisdiction and either an owner or a tenant. The Department is also aware of many participating jurisdictions that have tri-party rental assistance contracts where the owner, the tenant, and the participating jurisdiction all sign the rental assistance contract. The Department is seeking feedback on whether a rental assistance contract should always be executed by an owner so that the participating jurisdiction can require that the HOME-assisted tenant’s lease contain the HOME tenancy addendum and that the owner follow all applicable TBRA requirements.

The proposed rule at § 92.253(d)(2)(ii) would require that an owner provide a tenant assisted with TBRA with a written or otherwise accessible notice to vacate the unit that specifies the grounds for the action at least 30 days before termination of the tenancy. This proposed requirement would codify the requirement contained in section 4024(c)(1) of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act (15 U.S.C. 9508(c)(1)), which requires that the lessor of a covered dwelling unit “may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate.” In previous guidance, the Department has determined that units receiving TBRA are covered dwelling units as defined by the CARES Act.⁵⁴ In

⁵³ See HUD’s Section 8 Project-Based Voucher Program Tenancy Addendum, part B.9 and 10, as applicable, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/52530CENG.pdf>.

⁵⁴ See the HOME Investment Partnerships Program FAQs (May 1, 2020), available at <https://www.hud.gov/sites/dfiles/CPD/documents/HOME-FAQs-COVID-19.pdf>.

⁵² See e.g., 24 CFR 5.105(a).

this proposed rule, the Department would specify that the minimum 30-day notice period does not apply if the termination or refusal to renew tenancy is due to a direct threat to the safety of the tenants or employees of the housing or an imminent and serious threat to the property, as specified in section 235 of Division L of the Consolidated Appropriations Act of 2016 (Pub. L. 114–113), which revised section 225(b) of NAHA (42 U.S.C. 12755(b)). Even if the proposed 30-day notice period is not required pursuant to § 92.253(d)(2)(ii), any termination of tenancy or refusal to renew must comply with the requirements at § 92.253(d)(2)(iii). The Department also proposes that owners provide participating jurisdictions with a copy of the notice to vacate within 5 business days of when the notice is served to the tenant. This proposed change would allow a participating jurisdiction to better monitor its TBRA program and enables the participating jurisdiction to further assist the tenant in finding a new unit to use their TBRA.

Similar to the HOME rental housing provisions in proposed § 92.253(d)(1)(iii), the proposed rule at § 92.253(d)(2)(iii) would require a termination of or refusal to renew tenancy to be in accordance with Federal, State, local law, and the requirements of part 92. The proposed rule would further clarify that this includes but is not limited to complying with fair housing, nondiscrimination, and VAWA requirements. HUD notes that in a forthcoming rulemaking, HUD will propose changes related to VAWA requirements, including in part 92. HUD will invite the public to comment on those proposed VAWA requirements in its future VAWA rulemaking. The proposed rule at § 92.253(d)(iv) would also clarify that an owner may not perform a constructive or so-called “self-help” eviction where the owner takes actions such as locking a tenant out of their unit or stopping utilities services to a tenant’s unit.

The proposed rule would redesignate the current provisions on tenant selection at § 92.253(d) to § 92.253(e). The current § 92.253(d)(4) states that owners of HOME rental housing may not exclude an applicant on the basis of holding a housing choice voucher or certificate. The proposed rule would broaden the current requirement at § 92.253(d)(4), which would be redesignated as § 92.253(e)(4), to include an applicant with Federal or State tenant-based rental assistance. This proposal is consistent with the intent of NAHA and it better enables applicants to utilize their Federal or State TBRA. The proposed rule also

revises the language in current § 92.253(d)(3)(ii), which is proposed to be redesignated as § 92.253(e)(3)(ii), to further clarify that projects with preferences or limitations for persons with disabilities must be open to all eligible persons with disabilities. The Department also proposes to further clarify that an owner may advertise the project as offering various supportive services, including a description of the specific supportive services available, which may aid persons with disabilities in determining whether the supportive services may meet their needs.

The Department also proposes revisions to the HOME waiting list requirements, currently at § 92.253(d)(5) but proposed to be redesignated to § 92.253(e)(5). The proposed rule at § 92.253(e)(5) would allow a participating jurisdiction, upon request by an owner of a small-scale housing project, to establish alternative waiting list procedures for the selection of tenants, subject to HUD’s written approval of the procedures and determination that the selection of a tenants from a waiting list in chronological order by the owner is impracticable. The proposed rule is providing this flexibility because the use and maintenance of a waiting list for a small-scale housing project is often impracticable as the lower availability and turnover of such units in a project, particularly when there is only one rental unit, may result in a list of applicants that are no longer interested in the unit or are unreachable when the unit becomes available. Owners of small-scale housing often do not have the same capacity as owners of larger multifamily properties to continuously update a waiting list to maintain an accurate list of applicants to enable leasing as soon as the unit becomes available. The Department believes this proposed change would better assist private owners of smaller rental properties that wish to participate in the HOME program by reducing their administrative burden and recognizing that the selection of a tenant from a waiting list is not practicable for some small-scale projects.

The proposed rule at § 92.253(f) would add a new provision regarding health and safety, which would require that if a participating jurisdiction has actual knowledge of an environmental, health, or safety hazard affecting a project, unit, or HOME tenants, that the participating jurisdiction inform the owner and tenants of the nature, date, and scope of such hazards. The Department believes this is a reasonable requirement in light of recent environmental hazards like those in

Jackson, Mississippi; Flint, Michigan; and East Palestine, Ohio. Similarly, the proposed rule at § 92.253(f) would require that if an owner has actual knowledge of an environmental, health, or safety hazard affecting a project, unit, or HOME tenants, that the owner inform the participating jurisdiction. The proposed rule would clarify that this notification requirement only applies for hazards discovered after the environmental review process because all hazards discovered during that process will have been corrected or mitigated, or have a satisfactory mitigation plan in place, in accordance with the requirements in 24 CFR part 50 or part 58.

22. Qualification as Affordable Housing: Homeownership (24 CFR 92.254)

The proposed rule would reformat § 92.254(a)(2) to improve clarity and readability. Specifically, the proposed rule would add a new paragraph § 92.254(a)(2)(iv) to clarify the process a participating jurisdiction must follow if it chooses to determine its own 95 percent of median purchase price for the area in lieu of using limits provided by HUD. The proposed rule would make corresponding changes to § 92.254(a)(2)(iii), including moving portions of the text from § 92.254(a)(2)(iii) to the proposed § 92.254(a)(2)(iv), which permits a participating jurisdiction to determine the 95 percent of the median purchase price for the area, consistent with the proposed § 92.254(a)(2)(iv).

The proposed rule would move language in § 92.254(a)(2)(iii) to § 92.254(a)(2)(iv)(A) and revise certain requirements. Specifically, the current regulation at § 92.254(a)(2)(iii) states that a participating jurisdiction developing its own 95 percent of median purchase price for the area must set forth the price for “different types of single family housing.” This language is vague and confusing. The proposed rule at § 92.254(a)(2)(iv)(A) would clarify that the participating jurisdiction must set forth the 95 percent median price limits for the area on single family housing of one, two, three, and four units. The proposed rule would also move requirements from the current regulation at § 92.254(a)(2)(iii) to § 92.254(a)(2)(iv)(B) and (C) and clarify that the requirements at the proposed § 92.254(a)(2)(iv)(B) apply to the 95 percent median price limits for the area on housing located outside of metropolitan areas. The proposed rule also reorganizes and lists the required information in each action plan in proposed § 92.254(a)(2)(iv)(C) for clarity and readability.

HUD proposes to revise § 92.254(a)(3) to extend the deadline for the sale of a homebuyer unit acquired, rehabilitated, or constructed with HOME funds from 9 to 12 months. If a HOME-assisted homebuyer unit is not sold before the proposed 12-month sales deadline, the unit must be restricted as an affordable rental unit under § 92.252 and rented to an eligible tenant in accordance with the rental housing requirements of § 92.252. This means that any homebuyer unit that is not sold to a qualified homebuyer by the deadline or restricted as a HOME-assisted rental unit in accordance with § 92.252 does not qualify as affordable housing under 24 CFR part 92 and therefore, the participating jurisdiction must repay the HOME funds to its local HOME account in accordance with § 92.503(b)(1).

Specific solicitation of comment #11: The Department requests public comment on whether the existing 9-month deadline for the sale of homebuyer units acquired, rehabilitated, or constructed with HOME funds is reasonable and whether extending the deadline to 12 months would increase the use of HOME funds for homeownership programs.

The proposed rule at § 92.254(a)(3) would also clarify that the rental requirements at § 92.252, including the period of affordability in § 92.252(d), apply to HOME-assisted homebuyer housing that fails to sell by the proposed 12-month deadline. In response to ongoing misunderstandings by participating jurisdictions of this requirement, proposed revisions in § 92.254(a)(3) would more explicitly state that if a unit intended for homeownership has not been sold to an eligible homebuyer by the proposed 12-month deadline, the participating jurisdiction must immediately convert the unit to HOME-assisted rental housing that meets the requirements in § 92.252 and impose the required affordability restrictions for the appropriate rental housing period of affordability (which differs from the period of affordability for homebuyer housing). If at some future time the participating jurisdiction permits an owner to sell or otherwise convey a unit that converted from a homebuyer activity to a rental activity pursuant to § 92.254(a)(3), the participating

jurisdiction may permit the sale in accordance with § 92.255.

HUD proposes to revise § 92.254(a)(5)(i) to address questions regarding the appropriate process for determining the sale price of housing at resale. When a HOME-assisted homebuyer sells a property during the period of affordability, section 215(b)(3) of NAHA requires a participating jurisdiction to sell the unit to another low-income homebuyer at a price that is affordable to a reasonable range of low-income homebuyers and that provides the original homeowner with a fair return on their investment. The current HOME regulations do not clearly define how a participating jurisdiction must set a resale price that both provides for a fair return to the original homebuyer and is affordable to a reasonable range of low-income homebuyers. The proposed rule at § 92.254(a)(5)(i) would clarify that the resale price, subject to market conditions, is the homeowner's "fair return on investment" added to the original purchase price of the housing.

Participating jurisdictions have communicated various challenges in implementing the statutory requirements that a HOME-assisted unit at resale must be sold to another low-income homebuyer at a price that is (1) affordable to a reasonable range of low-income homebuyers and (2) provides the original homebuyer with a fair return on their investment, including the homeowner's investment and improvements made to the property. It is difficult for participating jurisdictions to create a resale formula that provides a fair return to the homeowner at a price that is affordable to a range of low-income homebuyers, without additional HOME assistance to the subsequent homebuyer. To assist participating jurisdictions that choose to impose resale provisions, HUD proposes to amend § 92.254(a)(5)(i) to add four permissible resale formulas that comply with these requirements in a new proposed paragraph (A). The Department believes that providing compliant resale formulas will help participating jurisdictions avoid noncompliance with the resale requirements and provide clarity and fairness to homebuyers.

Specifically, the Department proposes to add paragraphs (A)(1) through (4) to

§ 92.254(a)(5)(i) to describe the four permissible resale formulas: (1) itemized formula, (2) appraisal formula, (3) index formula, and (4) fixed-rate formula. These proposed resale formulas would be used to determine a HOME-assisted homebuyer's fair return on investment and the resale price. Variations of the proposed itemized formula are commonly used in State and local homebuyer programs not funded by the HOME program, while the appraisal, indexed, and fixed-rate formulas are commonly used by community land trusts and other advocates of shared appreciation models.⁵⁵ Though HUD is providing these four different permissible resale formulas, the proposed rule would not require participating jurisdictions to use any of the formulas and participating jurisdictions may continue to design their own resale provisions, subject to HUD review and approval. The four resale formulas in the proposed rule are described below.

The proposed rule at § 92.254(a)(5)(i)(A)(1) would establish an itemized resale formula, which determines the homeowner's fair return on investment by multiplying a clearly defined, publicly accessible index or standard (e.g., change in consumer price index, median area income, or median purchase price over the term of ownership) by the sum of the homeowner's downpayment, equity from the payment of mortgage principal, and the value of any capital improvements. This itemized resale formula would permit a participating jurisdiction to decide whether it will depreciate the value of the capital improvements and whether the formula will take into consideration any reduction in value due to damage or deferred maintenance of the property.

⁵⁵ Shared appreciation homeownership models create long-term, affordable homeownership opportunities by imposing restrictions on the resale of subsidized housing units. See HUD's Office of Policy Development and Research *Policy Matters* (Fall 2012) for additional information, available at <https://www.huduser.gov/portal/periodicals/em/fall12/highlight3.html>.

Change in clearly defined, publicly accessible index or standard

MULTIPLIED BY

$$\left(\begin{array}{c} \text{(Homeowner's downpayment + sum of all homeowner principal payments + value of capital improvements)} \\ \text{MINUS} \\ \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \end{array} \right)$$

EQUALS

Fair return

$$\text{Original sales price} + \text{Fair return} = \text{Resale price}$$

The proposed rule at § 92.254(a)(5)(i)(A)(2) would establish an appraisal-based resale formula, which determines a homeowner's fair return on investment based on the amount of market appreciation, if any, realized over the term of ownership. The amount of market appreciation over

the term of ownership would be determined by subtracting the appraised value of the property at the time of initial purchase from the appraised value at the time of resale. The fair return on investment would be determined by multiplying the amount of market appreciation over the term of

homeownership by a clearly defined, publicly accessible standard or index. Given the complexity and skill required to conduct an appraisal, the proposed rule would require State-licensed or certified third-party appraisers to conduct the appraisals.

$$\text{Clearly defined, publicly accessible index or standard} \times (\text{New appraisal} - \text{initial appraisal}) = \text{Fair return}$$

$$\text{Original sales price} + \text{Fair return} = \text{Resale price}$$

The proposed rule at § 92.254(a)(5)(i)(A)(3) would establish an index resale formula, which determines a homeowner's fair return based on the value of the homeowner's investment adjusted in proportion to changes in a specified index, such as the Consumer Price Index or U.S Housing

Price Index. Using the proposed index formula, the homeowner's fair return on investment would be calculated by multiplying the change in the index during the term of ownership by the sum of the original purchase price and the value of any capital improvements. The proposed rule would permit a

participating jurisdiction to decide whether to depreciate the value of any capital improvements and/or take into consideration any reduction in value due to damage or delayed maintenance of the property.

Change in clearly defined, publicly accessible index

MULTIPLIED BY

$$\left(\begin{array}{c} \text{(Original purchase price + value of capital improvements)} \\ \text{MINUS} \\ \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \end{array} \right)$$

EQUALS

Fair return

$$\text{Original sales price} + \text{Fair return} = \text{Resale price}$$

The proposed rule at § 92.254(a)(5)(i)(A)(4) would establish a fixed-rate formula, which determines a homeowner's fair return on investment by applying a fixed percentage increase to the homeowner's investment each year they own the unit. The fair return on investment would be determined by

multiplying the fixed percentage by the number of years the homeowner owned and occupied the home, with the resulting rate multiplied by the sum of the original purchase price of the home and the value of any capital improvements. Like the itemized and indexed formulas proposed in

§ 92.254(a)(5)(i)(A)(1) and (A)(3), the proposed rule would permit the participating jurisdiction to choose whether to depreciate the value of any capital improvements made to the property and/or take into consideration any reduction in value due to damage or delayed maintenance of the property.

(Fixed rate $\times$ length of homeownership)

MULTIPLIED BY

$$\left(\frac{\text{(Original purchase price + value of capital improvements)}}{\text{MINUS}} \right. \\ \left. \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \right)$$

EQUALS

Fair return

Original sales price + Fair return = Resale price

The proposed rule would redesignate the text in the current paragraph (A) of § 92.254(a)(5)(i) as § 92.254(a)(5)(i)(B) and (C) and the current paragraph (B) of § 92.254(a)(5)(i) would be redesignated as § 92.254(a)(5)(i)(D). The proposed rule would also move the last sentence of the current paragraph § 92.254(a)(5)(i)(A) into the proposed § 92.254(b) under the title, “Preserving affordable housing that was previously assisted with HOME funds.” To make it easier to locate requirements related to the use of enforcement mechanisms, termination of affordability restrictions in specific circumstances, the presumption of affordability requirements, and the preservation of affordability, the proposed rule would clarify and revise these requirements in the proposed paragraphs (B), (C), and (D) of § 92.254(a)(5)(i) and § 92.254(b), respectively.

The current regulatory provision in § 92.254(a)(5)(i)(A) states that “deed restrictions, covenants running with the land, or other similar mechanisms must be used as the mechanism to impose the resale requirements.” HUD is proposing to revise § 92.254(a)(5)(i)(A) in the proposed § 92.254(a)(5)(i)(B) to clarify that a recorded agreement restricting the use of the property and the imposition of “use restrictions” are both permissible methods of enforcing affordability requirements. This is a clarification of existing policy as each of these types of enforcement mechanisms would be considered “similar mechanisms” under the current rule. The proposed rule at § 92.254(a)(5)(i)(B) would also require written HUD approval of any means of enforcement other than the ones expressly listed to enforce resale provisions.

The proposed rule at § 92.254(a)(5)(i)(C) would clarify the minimum period of affordability if the owner of record before a termination event obtains an ownership interest in the property after the event.

The proposed rule at § 92.254(a)(5)(i)(D) would incorporate the text of the current § 92.254(a)(5)(i)(B), except that it would remove the specific references to

Empowerment Zone or Enterprise Community applications under 24 CFR 597 which are no longer applicable, as the incentives and authority to accept applications have expired. The proposed rule would redesignate the current introductory text in § 92.254(a)(5)(ii) and provision at § 92.254(a)(5)(ii)(A) as § 92.254(a)(5)(ii)(A) and § 92.254(a)(5)(ii)(B), respectively. These proposed revisions improve clarity and the organization of § 92.254(a)(5)(ii). The text of the current paragraphs at § 92.254(a)(5)(ii)(A)(1)–(5) would be redesignated as § 92.254(a)(5)(ii)(B)(1)–(5) and HUD proposes revisions to the proposed § 92.254(a)(5)(ii)(B)(5), as described below.

The proposed rule at § 92.254(a)(5)(ii)(B)(5) would be revised to state that the HOME investment subject to recapture is the amount of HOME funds that directly assisted the homebuyer to purchase the unit. The current regulation states that the amount subject to recapture is the amount of HOME assistance that enabled the homebuyer to buy the dwelling unit. The Department has found the current regulatory language to be problematic because participating jurisdictions have incorrectly based the amount of HOME funds subject to recapture on the total amount of HOME funds invested in the project, instead of the direct assistance to the homebuyer that enabled the homebuyer to purchase the unit (*i.e.*, downpayment assistance and any HOME assistance that reduced the purchase price from fair market value to an affordable price). The proposed revision would improve the clarity of this requirement.

The proposed rule at § 92.254(a)(7) would be revised to improve the clarity and readability of the paragraph. In addition, to better reflect the requirements of the paragraph, the proposed rule at § 92.254(a)(7) would be retitled as “Homebuyer assistance for lease-purchase.” The proposed rule at § 92.254(a)(7) would also be revised to clarify that in homeownership projects that receive HOME funds for acquisition, rehabilitation, or new

construction, the participating jurisdiction may assist a homebuyer through an existing lease-purchase program if the lease-purchase agreement is executed between the owner and homebuyer prior to the completion of the acquisition, construction, or rehabilitation. The proposed rule at § 92.254(a)(7) would also clarify that if HOME funds are used to construct or rehabilitate the housing unit, the housing must be purchased within 36 months of the execution of the lease-purchase agreement. Further, if HOME funds are used to acquire housing to be resold to an eligible homebuyer, the proposed rule would require the unit to be purchased within 42 months of executing the lease-purchase agreement. The proposed rule at § 92.254(a)(7) would also clarify that a unit under a lease-purchase agreement is subject to the homeownership affordability requirements of § 92.254 unless the unit fails to sell within the required timeframes. If a unit fails to sell to an eligible homebuyer within the required timeframe, the unit must become affordable rental housing that complies with the requirements in § 92.252. Finally, the proposed rule at § 92.254(a)(7) would clarify that the participating jurisdiction must verify the income eligibility of a household at the time of signing the lease-purchase agreement and include the income of all members living in the housing.

The proposed rule would redesignate the current § 92.254(b), (c), (d), (e), and (f) as § 92.254(c), (d), (e), (f) and (g), respectively. The Department proposes to consolidate the current requirements at § 92.254(a)(5)(i)(A) and § 92.254(a)(9) into proposed § 92.254(b) and substantially revise requirements on a participating jurisdiction’s authority to use purchase options, rights of first refusal, or other preemptive rights to preserve affordability, including the use of preemptive rights to purchase housing before foreclosure, to improve the effectiveness, organization, and clarity of the rule.

The proposed rule at § 92.254(b) would revise the current heading of § 92.254(a)(9) by deleting the words

“that was previously.” The proposed rule would also add an introductory sentence to clarify that “preserving affordability of housing assisted with HOME funds” is permitted when there is a termination event threatening the affordability restrictions (e.g., foreclosure, transfer in lieu of foreclosure or assignment of an FHA-insured mortgage to HUD) and provides that a participating jurisdiction may take certain actions in accordance with proposed § 92.254(b)(1)–(3) to preserve the affordability of HOME-assisted housing.

The proposed rule would specify in § 92.254(b)(1) that the actions to preserve affordability include exercising purchase options, rights of first refusal, or other preemptive rights to obtain ownership of the housing before foreclosure, subject to the requirements in proposed § 92.254(b)(1)(i)–(iv). The proposed rule would add § 92.254(b)(1)(i)–(iv) to require the participating jurisdiction that acquires housing under § 92.254(b)(1) to sell the housing to a new eligible homebuyer within 6 months of the date that the participating jurisdiction obtains ownership (§ 92.254(b)(1)(i)) and impose a period of affordability for the eligible homebuyer that is equal to the remaining period of affordability of the former homeowner, unless the participating jurisdiction provides additional direct HOME assistance to the new eligible homebuyer (§ 92.254(b)(1)(ii)). If the participating jurisdiction provides additional direct HOME assistance to the eligible homebuyer, the proposed § 92.254(b)(1)(iii) would require the period of affordability to be recalculated in accordance with § 92.254(a)(4). The proposed § 92.254(b)(1)(iii) and § 92.254(b)(2)(iv) would revise the current requirements in § 92.254(a)(9)(ii) to state that when additional HOME funds directly assist the eligible homebuyer, the additional investment or cost must be treated as a new project. The proposed rule would also move the requirement on maximum per-unit subsidy amount in the current § 92.254(a)(9)(iii) and revise the requirement in the proposed § 92.254(b)(1)(iv) to establish that the total HOME funds for a project is the original HOME investment plus additional investment and the total HOME funds must not exceed the per-unit subsidy limit in § 92.250(a) in effect at the time of the additional investment, subject to HUD approval.

HUD is proposing to permit the participating jurisdiction to use additional HOME funds for certain costs to preserve affordability of HOME-

assisted units. The provisions currently at § 92.254(a)(9)(i)(A)–(D) would be redesignated as § 92.254(b)(2)(i)–(iv) and would be revised to include additional eligible costs and requirements and specify whether costs are treated as amendments to the original project or a new project. HUD proposes that the costs described in the proposed § 92.254(b)(2)(i)–(iii) be treated as amendments to the original project and the cost described in § 92.254(b)(2)(iv) be treated as a new project because the costs in proposed § 92.254(b)(2)(i)–(iii) are costs to obtain and prepare the HOME-assisted housing for resale while the cost in § 92.254(b)(2)(iv) is direct assistance to a new eligible homebuyer for a new homeownership activity. The proposed rule at § 92.254(b)(2)(ii) would also require that when a participating jurisdiction uses additional HOME funds to undertake necessary rehabilitation of the housing, the housing must be rehabilitated to meet the applicable property standards in § 92.251. HUD is also revising the current § 92.254(a)(9)(iii) by moving the provision that allows participating jurisdictions the flexibility to charge certain costs as administrative costs under § 92.207 into a new § 92.254(b)(2)(v).

The proposed rule would add new paragraphs at § 92.254(b)(3)(i)–(iv) to codify the amendments to NAHA in the Consolidated Appropriations Act, 2016 (Pub. L. 114–113) that CLTs may hold and exercise purchase options, rights of first refusal, or other preemptive rights to purchase housing to preserve affordability, including but not limited to the right to purchase the housing in lieu of foreclosure. The proposed rule at § 92.254(b)(3)(i), (ii), (iii), and (iv) would each establish the conditions under which a participating jurisdiction may permit a CLT to exercise these rights. Specifically, the proposed rule at § 92.254(b)(3)(i) would require the CLT to obtain ownership of the housing subject to existing HOME affordability restrictions. The proposed rule at § 92.254(b)(3)(ii) would require the CLT to resell the housing within 6 months to an eligible homebuyer that will use the housing as their principal residence in accordance with § 92.254(a)(3). The proposed rule at § 92.254(b)(3)(iii) would require the CLT to impose a period of affordability that is equal to the remaining period of affordability of the former owner. Finally, the proposed rule at § 92.254(b)(3)(iv) would prohibit the participating jurisdiction from providing additional HOME funds to the CLT to obtain ownership, rehabilitate the housing, hold the housing pending

resale to another homebuyer, or provide downpayment assistance to the subsequent eligible homebuyer.

The proposed rule would redesignate the current § 92.254(e) as § 92.254(f) and further clarify the requirement at § 92.254(e). Some participating jurisdictions contract with for-profit and nonprofit organizations that provide private, first mortgage financing so that these organizations may also provide HOME homeownership financing to eligible homebuyers in conjunction with the first mortgage. The 2013 HOME Final Rule added § 92.254(e) to establish safeguards to prevent inappropriate provisions of HOME funds in such situations. Although the purpose and applicability of the current § 92.254(e) are described in the preamble of the 2013 HOME Final Rule, many HOME stakeholders mistakenly believe that these provisions apply to all entities that provide HOME-funded homeownership assistance. The proposed rule at § 92.254(f) would make it explicit that participating jurisdictions must have proper oversight over these lending organizations through the execution of an appropriate written agreement. Specifically, the proposed rule at § 92.254(f) would clarify that participating jurisdictions may provide HOME funds through a for-profit lending institution that is a contractor, or provide HOME funds to a nonprofit lending institution as a contractor or subrecipient, so that the institution may provide HOME homeownership assistance in conjunction with first mortgage financing.

In addition to proposing to redesignate the current § 92.254(f) as § 92.254(g), the Department would make several revisions to the homebuyer underwriting requirements in the proposed § 92.254(g)(1). The current regulations require a participating jurisdiction to establish written underwriting standards that evaluate the housing debt and overall debt of the family, the appropriateness of the amount of assistance, monthly expenses of the family, assets available to acquire the housing, and financial resources to sustain homeownership. Affordable housing advocates have argued that the current regulation may inadvertently exclude households that have overall debt and monthly expenses that exceed a participating jurisdiction’s underwriting standards, yet the household otherwise demonstrates an ability to sustain a mortgage. To address these concerns and streamline this portion of the regulation, the proposed rule at § 92.254(g)(1) would revise the underwriting standards by eliminating

the need to evaluate both the housing debt and overall debt of the family and instead would require the participating jurisdiction to evaluate the overall debt of the family projected after purchase of the housing. In addition, the proposed rule at § 92.254(g)(1) would eliminate the requirement that a participating jurisdiction evaluate the monthly expenses of the family.

The current regulation at § 92.254(f)(1) also requires a participating jurisdiction to establish written policies for underwriting standards for homeownership assistance to determine that the amount of assistance a homebuyer receives is neither more or less than necessary to sustain homeownership. However, the amount of HOME assistance required by a homebuyer may exceed the amount a participating jurisdiction has determined as reasonable given the amount of available HOME funds. Consequently, the proposed rule at § 92.254(g)(1) would require participating jurisdictions to establish a standard to determine the maximum amount of direct HOME assistance that it may provide a family. The proposed paragraph would also more explicitly state that a participating jurisdiction may not provide a single, fixed amount of assistance to every homebuyer receiving assistance in the participating jurisdiction's homebuyer program, irrespective of the homebuyer's income, assets, or other circumstances because such a program design does not take into account the individual financial circumstances of each homebuyer.

23. Purchase of HOME Units by In-Place Tenants (24 CFR 92.255)

The proposed rule would revise § 92.255 to clarify the requirements for the purchase of a HOME-assisted rental unit during its period of affordability by an existing tenant. This section, currently titled "Converting rental units to homeownership units for existing tenants," would be retitled as "Purchase of HOME units by in-place tenants" to reflect the proposed requirements of § 92.255 more accurately. The proposed rule would retain the requirement that a tenant's refusal to purchase the unit is not good cause for termination of tenancy or a reason not to renew the lease. The proposed rule would also clarify that a participating jurisdiction may not permit an owner to sell and a tenant to buy an existing HOME-assisted rental unit through a lease-purchase program.

The proposed rule would maintain the current requirement in paragraph (a) of this section that a tenant qualify for homeownership in accordance with the

requirements of § 92.254. This means that the tenant must qualify as low-income at the time of purchase. If the tenant is not assisted with additional HOME funds to purchase the unit, the proposed rule would require the period of affordability to equal the remaining period of affordability of the rental unit. However, if additional HOME funds are provided to the tenant to purchase the unit, the period of affordability would be the greater of the remaining period of affordability if the unit had remained a rental unit or the required period based on the amount of direct homebuyer assistance provided.

24. Set-Aside for Community Housing Development Organizations (CHDOs) (24 CFR 92.300).

To maintain the program's effectiveness, it is essential that HOME funds be provided only to developers that have adequate development experience and financial stability to complete projects timely, on-budget, and at a high level of quality. Since the beginning of the HOME program, there have been challenges with CHDOs not having the required substantial expertise to meet the development capacity standards and the requirement that 15 percent of each HOME allocation be used only for housing, owned, developed, or sponsored by organizations that qualify as CHDOs, as defined at § 92.2.

Section 231(a) of NAHA⁵⁶ and § 92.300 require a participating jurisdiction to reserve not less than 15 percent of its HOME allocation for investment only in housing to be "owned, developed or sponsored" by a CHDO. The current regulations at § 92.300(a)(2), (a)(3), and (a)(4) establish the requirements for a project to be "owned," "developed," or "sponsored" by a CHDO respectively. Rental housing is "owned" by a CHDO if the CHDO is the owner in fee simple absolute of the affordable rental housing⁵⁷ and where HOME funds are used for new construction or rehabilitation of the housing, the CHDO hires and oversees the developer that rehabilitates or constructs the housing. Rental housing is "developed" by a CHDO if the CHDO is the owner of the housing in fee simple absolute⁶³ and the developer of the housing to be constructed or rehabilitated. The CHDO, when acting as a developer of rental housing, must be in "sole charge of all aspects of the development project." Pursuant to

§ 92.300(a)(2) and (3), when rental housing is "owned" or "developed" by a CHDO, the CHDO must own the housing during development and throughout the period of affordability in § 92.252. For rental housing to be "sponsored" by a CHDO, a CHDO must comply with the current § 92.300(a)(4) which requires the housing to be "owned," as defined in § 92.300(a)(2), or "developed," as defined in § 92.300(a)(3), by: a subsidiary of the CHDO, a limited partnership of which the CHDO or its subsidiary is the sole general partner, or a limited liability company of which the CHDO or its subsidiary is the sole managing member. The current § 92.300(a)(4) also provides a second rental sponsorship role under which the CHDO develops the housing project and conveys it to another nonprofit at a predetermined time. For homeownership housing, the current § 92.300(a)(6) requires housing that is "developed" by a CHDO to be in "sole charge of construction." NAHA and part 92 only permit an entity that qualifies as a CHDO to act as a sponsor in the development of affordable housing.

The proposed rule would correct a drafting error throughout § 92.300 by changing "community development housing organizations" to "community housing development organizations." The proposed rule also makes technical edits to wording in § 92.300(a)(3), (a)(4), (a)(6), and (a)(6)(i). Paragraph § 92.300(a)(5)(iii) would be revised to add the word "private" to the reference to nonprofit organizations so it refers to "private" nonprofit organizations and a technical correction to paragraph § 92.300(e) would add the word "must" before describing written agreement requirements.

The proposed rule would clarify the requirement in § 92.300(a)(2) that when rental housing is "owned" by the CHDO, the CHDO must oversee or, at minimum, hire or contract with an experienced project manager to oversee all aspects of the development. While HUD requires the CHDO to oversee all aspects of the development, the current requirement at § 92.300(a)(2) only explicitly states that at minimum, the CHDO must hire or contract with an experienced project manager. The revision clarifies that hiring or contracting with an experienced project manager is the minimum standard to meet the requirement that a CHDO oversee all aspects of the development when rental housing is "owned" by the CHDO.

Through the proposed rule, HUD is proposing to make it substantially easier for many community-based nonprofit organizations to access the CHDO set-

⁵⁶ 42 U.S.C. 12771(a).

⁵⁷ In accordance with § 92.300, the CHDO may have a long-term ground lease when rental housing is "owned" or "developed" by a CHDO.

aside as “developers” by revising § 92.300(a)(3) to permit the CHDO to share responsibilities in the development process, provided that the CHDO remains in charge of (*i.e.*, maintains decision-making authority over) these responsibilities. The responsibilities that may be shared include: selecting the site, obtaining permit approvals and all project financing, selecting architects, engineers, and general contractors, overseeing project progress, and determining the reasonableness of costs. The Department believes this revision would assist many organizations to augment their development expertise, while preserving the statutory intent that the CHDO be in charge of project development decisions in the interest of low-income community residents. The proposed rule at § 92.300(a)(4) would also be amended so that the sponsor provisions require the CHDO or its subsidiary to be the managing general partner rather than the sole general partner of a limited partnership. The proposed rule at § 92.300(a)(4) would also allow the CHDO or its subsidiary to be the managing member of a limited liability company rather than require the CHDO to be the sole managing member of a limited liability company.

In response to ongoing questions from participating jurisdictions, the proposed rule at § 92.300(a)(4)(ii) would clarify that the set-aside funds are provided by the participating jurisdiction directly to the owner of the project. This is a statutory requirement of the HOME program under section 226 of NAHA (42 U.S.C. 12756) and is currently required in the rule. This change to add paragraph (ii) to § 92.300(a)(4) would further clarify that HOME funds are only provided by a participating jurisdiction (or its subrecipient) directly to the entity that owns the project.

The proposed rule would eliminate the requirement that rental housing developed pursuant to § 92.300(a)(3) or sponsored pursuant to § 92.300(a)(4) continue to be owned by a CHDO throughout the period of affordability. These provisions requiring ownership of the housing for the entire period of affordability by the CHDO that “developed” or “sponsored” the housing have created difficulties when the status of the CHDO that developed or sponsored the project changes (*e.g.*, a bankruptcy, decrease in capacity, or other business necessity) and acquisition of the housing by another CHDO must occur. These difficulties include finding another qualified CHDO that has the capacity to own the project and the administrative burden in transferring the project to another

CHDO, which may take a significant amount of time. In many instances, finding another CHDO that is willing and has capacity to assume ownership of the housing is often not feasible. Such difficulties have jeopardized efforts to preserve the housing’s affordability. Through the proposed change to § 92.300(a)(3) and § 92.300(a)(4), HUD is seeking to enable ownership transfers that are necessary to sustain the CHDO projects in operation and maintain compliance with HOME requirements. While the proposed rule provides flexibility in ongoing ownership of rental housing that is “developed” or “sponsored” by a CHDO, the proposed rule would maintain the ongoing ownership requirements for rental housing that is “owned” by a CHDO, pursuant to the CHDO ownership provisions at § 92.300(a)(2).

The proposed rule at § 92.300(a)(5) would also revise the sponsor provisions to conform to the new requirements for housing that is “developed” by a CHDO under proposed § 92.300(a)(3) and make minor clarifications that a CHDO sponsors rental housing if the CHDO develops the rental housing “in accordance with § 92.300(a)(3)” and agrees to convey “the project” to an identified private nonprofit organization at a predetermined time after completion of the project.

With respect to homeownership housing assisted with CHDO set-aside funds, the proposed rule would revise § 92.300(a)(6) to permit the CHDO to share the developer role with another entity provided that the CHDO is in charge of (*i.e.*, maintains decision-making authority over) all aspects of the development process, including selecting the site, obtaining permit approvals and all project financing, selecting architects, engineers, and general contractors, overseeing project progress, determining the reasonableness of costs, identifying eligible homebuyers, and overseeing the sale of homeownership units.

The proposed rule at § 92.300(a)(7) would further clarify that a participating jurisdiction must determine the form of assistance in accordance with § 92.205(b) that it will provide to a CHDO for a rental housing project under § 92.300(a)(4) and must provide the assistance directly to the entity that owns the project. HUD also proposes to make technical corrections to the language at § 92.300(a)(7) for readability.

The proposed rule at § 92.300(b) would also permit nonprofit organizations that meet all the provisions of the “community housing development organization” definition in

§ 92.2, except for the capacity requirement in paragraph (9) of that definition, to be assisted with the capacity building funding authorized by § 92.300(b) in order to obtain the demonstrated capacity required to qualify as a CHDO.

25. Housing Education and Organizational Support (24 CFR 92.302)

The proposed rule would designate all but the first sentence of the current language in § 92.302 as a new paragraph (a). The proposed paragraph (a) would include the current text in § 92.302 regarding HUD’s **Federal Register** notice. The first sentence currently in § 92.302 regarding HUD’s authority to provide education and organizational support services would remain in the introductory text to § 92.302.

The proposed rule would also add paragraph (b) to § 92.302 to add the definition for CLT and requirements specific to the use of technical assistance funding by a CLT in section 233(f) of NAHA (42 U.S.C. 12773(f)), implemented by section 213(a)(13) of the Housing and Community Development Act of 1992 (Pub. L. 102–550). The proposed rule would establish that HUD may provide housing education and organizational support, as described in § 92.302, to a CLT, only if CLT meets the definition of a “community housing development organization” at § 92.2, except for the requirements in paragraphs (9) and (10) of the definition of CLT. The requirements would also include that the CLT is established to complete the activities in § 92.302(b)(3), the CLT carries out the activities in § 92.302(b)(3), the CLT’s corporate membership is open to residents of a particular geographic area, as specified in the organization’s bylaws, and the CLT’s board of directors includes a majority of members who are elected by the corporate membership and is composed of equal numbers of lessees pursuant to paragraph (b)(2)(ii), members who are not lessees, and any other category of persons described in the organization’s bylaws. The applicability of the definition and requirements for a CLT at § 92.302(b) would be limited to the use of HOME funds under § 92.302.

26. Displacement, Relocation, and Acquisition (24 CFR 92.353)

The proposed rule would amend the last sentence of § 92.353(c)(2)(ii)(A), which describes persons not displaced as including persons whose tenancy was terminated under § 92.253(d). The last sentence would be amended to conform to the change of written notice

requirements contained in § 92.253(d) instead of the current 30-day notice requirement.

The proposed rule would amend the sentence in § 92.353(c)(2)(ii)(C) to explain that for purposes of determining eligibility for assistance under the URA, a person is not displaced if they meet the definition of “persons not displaced” contained in the URA at 49 CFR 24.2. This is to correct an error in the current citation.

27. Conflict of Interest (24 CFR 92.356)

The proposed rule would amend § 92.356(d)(1) to revise the description of the meaning of “public disclosure.” The proposed § 92.356(d)(1) would state that public disclosure is considered a combination of various communication formats, including but not limited to publication on the recipient’s website, electronic mailings, media advertisements, and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers. The proposed rule at § 92.356(d)(1) would also require evidence of the public disclosure, of the nature of the conflict, and a description of how the public disclosure was made. The proposed rule at § 92.356(e) would insert a new paragraph (2) to add whether an opportunity was provided for open competitive bidding or negotiations as a factor to be considered for exceptions under § 92.356(e).

28. Reallocation by Formula (24 CFR 92.454)

The proposed rule would add a new paragraph (5) to § 92.454(a) that would explicitly allow HUD to reallocate HOME funds that become available due to reductions in grants pursuant to § 92.551 or § 92.552. While HUD applies this requirement for reallocation of funds in practice, the Department would codify the practice in this proposed rule. The proposed rule would also revise § 92.454(b) to specify that participating jurisdictions from which the reductions in funds occurred under § 92.551 or § 92.552 would not be included in the reallocation of these funds.

29. The HOME Investment Trust Fund (24 CFR 92.500)

The proposed rule would revise § 92.500(c)(2)(ii) to clarify the requirements for when a participating jurisdiction may establish a second local account of the HOME Investment Trust Fund. Specifically, the proposed rule at § 92.500(c)(2)(ii) would state that a participating jurisdiction may establish a second local account if, among other requirements, the participating

jurisdiction has its own local affordable housing trust fund used for matching contributions to the HOME program and the statute or local ordinance governing the local affordable housing trust fund requires repayments from the local affordable housing trust fund to be made to the participating jurisdiction’s HOME Investment Trust Fund local account. The regulation currently uses the term “trust fund” for both the participating jurisdiction’s local affordable housing trust fund and its HOME Investment Trust Fund local account and the proposed change is designed to distinguish between the two types of funds and clarify the requirement.

30. Program Disbursement and Information System (24 CFR 92.502)

The proposed rule would revise the requirements in § 92.502 regarding the program’s Integrated Disbursement and Information System (IDIS). First, the proposed rule at § 92.502(b) would change the paragraph heading from “Project set-up” to “Project funding.” This change would clarify that this section refers to funding an activity in IDIS after the participating jurisdiction has committed funds to a specific local project. The proposed rule at § 92.502(b) would also remove the sentence that identifies investments that require the set-up in IDIS as acquisition, new construction, or rehabilitation of housing, and TBRA investments. This proposed change is appropriate because it would avoid confusion about other investments that must be set up in IDIS that are not included in the regulation. The proposed rule at § 92.502(b) would also clarify that the participating jurisdiction is required to enter complete project set-up information before funding an activity in the data system. These changes would clarify that this requirement is about activity funding after a participating jurisdiction commits HOME funds to a specific local project and not about activity set-up. This clarification is necessary because IDIS allows a participating jurisdiction to set up an activity before having complete project set-up information. While a participating jurisdiction may set up an activity in IDIS, the participating jurisdiction cannot fund an activity (*i.e.*, identify specific investments) before it executes the HOME Investment Partnership Agreement, submits the applicable banking and security documents, complies with the environmental requirements under 24 CFR part 58, including submission of the request for release of funds, when applicable, and commits funds to a specific local project. The addition of the written

agreement execution date field in IDIS helps the participating jurisdiction to comply with the requirement to commit funds to a specific local project before funding a corresponding activity in the data system.

The proposed rule at § 92.502(d)(1) would remove the requirement that a participating jurisdiction provide satisfactory project completion information within 120 days of the final project drawdown. Currently, § 92.502(d)(1) requires the participating jurisdiction to provide satisfactory project completion information within 120 days of the final project drawdown or HUD may suspend other project set-ups or take additional corrective actions. This language is no longer needed because of the four-year project completion requirement set forth in § 92.205(e). If the participating jurisdiction is required to complete a HOME-assisted project within four years of committing funds to the project, then that time period would include entering complete project completion information into HUD’s IDIS because the definition of project completion at § 92.2 includes entering the project completion information into the IDIS established by HUD. Therefore, if a participating jurisdiction has complied with the four-year project completion requirement, it has complied with § 92.502(d) and no further HUD action is required.

The proposed rule would revise § 92.502(d)(2) to specify that the maximum amount of additional HOME funds that may be committed to a project up to one year after project completion is limited by the maximum per-unit subsidy amount established under § 92.250 at the time of underwriting. Adding this specificity would align with the changes to § 92.250 and provide further clarity on the limits on HOME investments in a project.

31. Participating Jurisdiction Responsibilities; Written Agreements (24 CFR 92.504)

The Department proposes several amendments to § 92.504, including revising the heading of the section to reflect the relocation of onsite inspection requirements to § 92.251. Many of the proposed amendments are intended to clarify ambiguous language, improve readability, move existing requirements to more appropriate paragraphs, and reformat certain provisions for clarity. The proposed revisions to § 92.504 are described more thoroughly below.

Throughout § 92.504, the proposed rule would revise the statement “the

written agreement must conform” to “the written agreement must contain.” This revision would make clear the Department’s intent that the written agreement must include the applicable requirements in § 92.504.

The proposed rule would amend § 92.504(b) to clarify that the required written agreement must be a legally binding agreement between the participating jurisdiction and the entity receiving HOME funds for an activity. The proposed rule would revise § 92.504(b) to require that HOME written agreements be separate and apart from financing documents such as mortgages, deeds of trust, regulatory agreements, or promissory notes. The current regulation does not specifically require a separate written agreement or use of a particular format. The Department has commonly found that when HOME written agreement requirements are made a part of other financing documents, many required provisions are not included, and the documents do not properly commit HOME funds as defined at § 92.2. The proposed change would help ensure written agreements are compliant with HOME requirements and reduce monitoring findings and other enforcement actions, including repayment of HOME funds.

The required contents of the written agreement between participating jurisdictions and other entities are in § 92.504(c). The Department is proposing numerous changes throughout § 92.504, many of which are intended to revise or clarify the required contents of the written agreement based on the role an entity will assume or the type of project undertaken. The proposed rule would make a technical correction to the last sentence of § 92.504(c) introductory text to add “by role and type of entity.” The proposed rule would also make numerous non-substantive revisions to the introductory paragraph at § 92.504(c) and to § 92.504(c)(1)–(7) to add clarity to existing language and improve readability.

The proposed rule would revise § 92.504(c)(1)(i) (*Use of the HOME funds*) to add “anticipated” before “type and number of housing projects” to specify that the written agreement must include the anticipated and not final type and number of housing projects to be funded in the description of the amount and use of the HOME funds. The proposed rule would also amend § 92.504(c)(1)(ii) (*Affordability*) and § 92.504(c)(1)(x) (*Enforcement of Agreement*) to move the requirement that the written agreement between the participating jurisdiction and the State

recipient include a means of enforcement of the affordability requirements from § 92.504(c)(1)(x) to § 92.504(c)(1)(ii). The proposed rule would also add the means of enforcement examples of use restrictions, a recorded agreement restricting the use of the property, and other mechanisms approved by HUD in writing, under which the participating jurisdiction has the right to require specific performance.

The Department proposes this change to properly place the described requirement under paragraph § 92.504(c)(1)(ii) concerning affordability requirements rather than in § 92.504(c)(1)(x) which establishes requirements for enforcement of the written agreement. After the proposed movement of text, § 92.504(c)(1)(x) would only contain provisions relating to the enforcement of the written agreement (*i.e.*, remedies for breach of the written agreement and suspension or termination if the State recipient materially fails to comply with any term of the agreement). The proposed rule would also revise § 92.504(c)(1)(iii) to change “if” to “whether” and remove “to be” for clarity.

The proposed rule at § 92.504(c)(1)(ii) would remove the inclusion of “recaptured HOME funds” in the requirement that the agreement establish whether repayment of HOME funds must be remitted to the State or State recipient for additional eligible activities or retained by the State recipient for additional HOME activities. The Department is proposing to remove “recaptured HOME funds” because it does not accurately reflect the requirements between the participating jurisdiction and the State recipient. The use of “recaptured HOME funds” in the current provision at § 92.504(c)(1)(ii) specifically refers to funds repaid by a homeowner pursuant to § 92.254(a)(5)(ii) and its inclusion is not necessary. Section 92.504(c)(1)(ii) already specifies that the written agreement must state whether repayment of HOME funds must be paid to the State participating jurisdiction or the State recipient and such repayments include recaptured funds under § 92.254(a)(5)(ii). Conforming revisions to remove “recaptured HOME funds” in similar provisions within § 92.504(c)(2) would also be made through this proposed rule.

The proposed rule would revise § 92.504(c)(1)(v) project requirements to add that the written agreement for HOME rental housing between the participating jurisdiction and State recipient must require the use of the HOME tenancy addendum in

accordance with § 92.253 for all HOME-assisted units or for all HOME-assisted tenants. The proposed amendment is necessary to conform to proposed changes at § 92.253 concerning tenant protections and selection which require, among other things, that leases for HOME-assisted rental units and tenants receiving TBRA include the HOME tenancy addendum. The proposed rule would revise § 92.504(c)(1)(v) to reflect changes for TBRA by requiring the agreement to comply with the requirements at § 92.253(a)–(c) and (d)(2) concerning lease contents, HOME tenancy addendum, security deposits, and termination of tenancy.

The proposed rule would amend § 92.504(c)(1)(vi) to clarify that the written agreement must include the imposition of VAWA requirements by the State participating jurisdiction on the State recipient when HOME funds are being provided to the State recipient for the provision of TBRA or the development of rental housing where the State recipient will own the housing.

The proposed rule would correct two citations that have changed due to updates to 2 CFR part 200 in paragraphs § 92.504(c)(1)(x) and § 92.504(c)(2)(ix) from 2 CFR 200.338 to 2 CFR 200.339 and 2 CFR 200.339 to 2 CFR 200.340.

The proposed rule would revise § 92.504(c)(1)(xi) to specify the types of entities that a State recipient may enter into a written agreement with for the use of HOME funds. These entities would be specified as a CHDO, subrecipient, homeowner, homebuyer, tenant (or landlords receiving TBRA), or contractor providing services to or on behalf of the State recipient. The Department is also proposing to further clarify the statutory and current regulatory requirements that the participating jurisdiction must ensure compliance with HOME requirements through binding contractual agreements with project owners in response to frequent questions by participating jurisdictions on this requirement. To address these frequent questions, the proposed rule would revise § 92.504(c)(1)(xi) to clarify and confirm that HOME funds must be provided directly to the owner, by the State recipient on behalf of the participating jurisdiction, under the terms and conditions of the written agreement. Further, the proposed rule would relocate from § 92.504(c)(1)(ii) to § 92.504(c)(1)(xi) the requirement that the agreement must establish that the repayment of any form of HOME funds, from an entity with which the State recipient is entering a written agreement, must be remitted to the State

or, if permitted by the State, retained by the State recipient for additional eligible activities. The requirement is proposed to be relocated because the placement reflects its applicability to repayments made by entities with whom the State recipient enters written agreements. There are no substantive changes to the relocated text.

In the introductory text to § 92.504(c)(2), the proposed rule would remove the definition of subrecipient because it is already a defined term in § 92.2. The proposed rule would add “the following” to § 92.504(c)(2) before delineating requirements of the written agreement.

The proposed rule would revise § 92.504(c)(2)(i) to clarify that the written agreement between the participating jurisdiction and the subrecipient that administers some or all the participating jurisdiction’s HOME program must include the *anticipated* and not final type and number of housing projects to be funded in its description of the amount and use of the HOME funds for one or more programs. The addition of the term “anticipated” would clarify that, at the time the participating jurisdiction enters the written agreement with a subrecipient to administer the program, the exact type and number of housing projects to be funded may not be known. A change would be made to paragraph § 92.504(c)(2)(ii) to remove “to be” from the sentence. In paragraph § 92.504(c)(2)(xii) the term “organizations” would be revised to “organization.”

The proposed rule would revise the language of § 92.504(c)(2)(iv) to conform with the proposed changes to the definition of a subrecipient. Pursuant to the “subrecipient” definition in § 92.2, a governmental entity or nonprofit organization is not a subrecipient if it is receiving HOME funds as the owner of a HOME rental project. The proposed rule would revise § 92.504(c)(2)(iv) to state that when the subrecipient is administering a HOME rental housing program or TBRA program on behalf of the participating jurisdiction, the written agreement between the subrecipient and the participating jurisdiction must include the subrecipient’s obligations to meet the VAWA requirements under § 92.359.

The proposed rule would revise § 92.504(c)(2)(ix) to insert “written” before “agreement” in the heading and paragraph for consistency. The proposed rule would revise § 92.504(c)(2)(x) to conform to the proposed changes to § 92.504(c)(3). The proposed changes to § 92.504(c)(3), described more thoroughly below,

would include revisions to more accurately describe owner entities to which the requirements of § 92.504 are applicable. In response to inquiries by participating jurisdictions, the Department proposes additional revisions to § 92.504(c)(2)(x) to further clarify the statutory and regulatory requirement that the participating jurisdiction must ensure compliance with HOME requirements through binding contractual agreements with project owners. The proposed rule at § 92.504(c)(2)(x) would further clarify that HOME funds must be provided *directly* to the owner by the subrecipient on behalf of the participating jurisdiction under the terms and conditions of the written agreement. The proposed rule at § 92.504(c)(2)(x) would also add in the requirement that the written agreement establish whether repayment of HOME funds must be remitted to the participating jurisdiction or may be retained by the subrecipient for additional eligible activities. The proposed rule would also amend § 92.504(c)(2)(xi) to specify that the prohibited fees or charges are those listed in § 92.214.

The proposed rule would add a new paragraph at § 92.504(c)(2)(xii) (*Project requirements*) to expressly impose the requirements that the agreement require enforcement of the project requirements in 24 CFR subpart F, as applicable and in accordance with the type of project assisted. The proposed rule at § 92.504(c)(2)(xii) would also require that for rental projects, the written agreement between the subrecipient and other entities must require that the HOME tenancy addendum is used in accordance with § 92.253 for all HOME-assisted units or for all HOME-assisted tenants. The proposed addition of this new paragraph is necessary to conform to changes at § 92.253 concerning tenant protections and selection which require, among other things, that leases for HOME-assisted rental units and tenants receiving TBRA include the HOME required tenancy addendum. The proposed new paragraph at § 92.504(c)(2)(xii) also reflects changes to § 92.253(a)–(c) and (d)(2) for TBRA by requiring the agreement between the subrecipient and the rental owner or tenant comply with the requirements concerning tenant protections, security deposits, and termination of tenancy.

The proposed rule would revise the heading at § 92.504(c)(3) to “*For-profit or nonprofit housing owner (other than a community housing development organization or single family owner-occupant)*.” This proposed change to the paragraph heading would remove the sponsor or developer terms so that

§ 92.504(c)(3) would only set forth requirements for a written agreement between a for-profit or non-profit owner that is not a CHDO or single family owner occupant, as stated in the revised paragraph heading. The proposed heading revision would remove “developer” because a participating jurisdiction is not permitted to enter into a written agreement for HOME funds with an entity that is not (or will not be) the owner of the project and is solely managing the development process. This proposed revision would not exclude a developer that is entering into a written agreement to use HOME funds to become the owner of the project. In addition, the proposed rule would delete “sponsor” from the heading as the term is unnecessary and duplicative for purposes of the HOME program because the role of sponsor is only permitted for CHDOs and as the sponsor, pursuant to § 92.300, the CHDO must be the owner of the project.

The proposed rule would move requirements for written agreements with CHDOs from the introductory text of § 92.504(c)(3) to § 92.504(c)(6). Similar to the proposed changes at §§ 92.504(c)(1)(xi) and 92.504(c)(2)(x), the proposed rule would revise § 92.504(c)(3) to further clarify the current requirement that the participating jurisdiction must ensure compliance with HOME requirements through binding contractual agreements with project owners by stating the requirement that HOME funds must be provided directly to the owner under the terms and conditions of the written agreement.

The proposed rule would make conforming changes to § 92.504(c)(3)(i) to remove sponsor and developer in the same way those terms would be removed from the introductory text to § 92.504(c)(3). In addition, the proposed rule would revise § 92.504(c)(3)(i) to clarify that the agreement must specify the actual amount of HOME funds provided to the housing owner. In the past, participating jurisdictions have asked whether the inclusion of the final amount of HOME funds provided to a housing owner in the written agreement is required by the language in § 92.504(c)(3)(i) (*i.e.*, “complete budget” and items “in sufficient detail to provide a sound basis for the participating jurisdiction to effectively monitor performance under the agreement to achieve project completion and compliance with the HOME requirements.”). The addition of “specific amount and” in § 92.504(c)(3)(i) is to further clarify that the actual (not projected) amount of HOME funds provided to a housing

owner must be in the written agreement. While the Department recognizes that the amount of HOME funds may change from the time of commitment to project completion, the participating jurisdiction must have a written agreement with the housing owner that meets the requirements under this section, including the final amount of the HOME funds, and must amend the written agreement to include the final amount, if necessary.

The proposed rule would also revise § 92.504(c)(3)(i) to clarify that the agreement must state that any and all repayments made by the owner on HOME assistance (*i.e.*, grants or loans) must be remitted to the participating jurisdiction, unless the participating jurisdiction permits a subrecipient or State recipient to retain the funds, in accordance with HOME requirements. The proposed revision aligns with the clarification of HOME requirements regarding repayments and payments on investments of HOME funds, the use of program income, and would further assist participating jurisdictions in complying with HOME statutory and regulatory requirements when providing funds to owners.

The proposed rule would amend § 92.504(c)(3)(ii) to add liens on real property and a recorded agreement restricting the use of the property as a means of enforcing the affordability requirements in § 92.252 and § 92.254. The proposed rule at § 92.504(c)(3)(ii) would also make minor clarifying changes to improve readability. The proposed rule at § 92.504(c)(3)(ii)(A) and (B) would also remove the reference to “developer” to conform with the changes made to the introductory text of § 92.504(c).

In addition, a conforming change would be made to § 92.504(c)(3)(ii)(A) to correct a citation from § 92.252(f)(2) to § 92.252(e)(2). A conforming change would also be made to § 92.504(c)(3)(iii) to correct a citation from § 92.253(d) to § 92.253(e). A technical correction would be made to § 92.504(c)(3)(vii) to add “or use” before “restrictions” to add specificity.

As described earlier in this proposed rule, the Department is proposing significant changes to the tenant protections in § 92.253. To ensure compliance with these changes, the proposed rule would revise § 92.504(c)(3)(iii), which requires that the written agreement contain applicable project requirements in 24 CFR subpart F, to explicitly require that the written agreement require compliance with tenant protections in § 92.253.

The proposed rule at the introductory text to § 92.504(c)(3)(v), § 92.504(c)(3)(v)(A), and § 92.504(c)(3)(viii) would remove references to “sponsor” and “developer” to conform with the changes proposed to the introductory text of § 92.504(c). In addition, to improve clarity, the proposed rule would make minor, non-substantive edits to § 92.504(c)(3)(vi) and § 92.504(c)(3)(ix) to improve the readability of each paragraph.

The proposed rule would change the heading of § 92.504(c)(3)(vii) from “*Enforcement of the agreement*” to “*Enforcement of HOME requirements and the agreement*” to clarify that the paragraph includes requirements regarding enforcement of the written agreement and enforcement of HOME requirements. The proposed rule would amend § 92.504(c)(3)(vii) to properly describe the means of enforcement of HOME requirements and removes the duplicative text on enforcement of affordability requirements. The proposed change is necessary to eliminate non-relevant language from § 92.504(c)(3)(vii), which is already properly covered in § 92.504(c)(3)(ii) (*Affordability*). The proposed rule at § 92.504(c)(3)(vii) would also incorporate minor, non-substantive edits and be reorganized to improve readability.

The proposed rule would remove the current § 92.504(c)(3)(x). The CHDO provisions in the current § 92.504(c)(3)(x) would be moved to the revised requirements for written agreements between participating jurisdictions and CHDOs at § 92.504(c)(6). The proposed rule would re-number paragraph (xi) of § 92.504(c)(3) to § 92.504(c)(3)(x) and amend the proposed § 92.504(c)(3)(x) to add clarity by specifying that the agreement must state the fees that may be charged by the owner in accordance with § 92.214(b)(4) and prohibit owners from charging any of the prohibited fees in § 92.214. The proposed § 92.504(c)(3)(x) would delete the second sentence in the paragraph because it restates the requirements in § 92.214 for fees rather than describing a requirement for the written agreement. The proposed rule would also change a reference from “developer” to “owner” in § 92.504(c)(3)(x) to conform with the changes proposed to the introductory text of § 92.504(c).

To improve clarity and readability, the Department proposes minor, non-substantive revisions to the introductory text of § 92.504(c)(4), including removing “and the length of the agreement” in § 92.504(c)(4)(i) because

it duplicates § 92.504(c)(4)(iii), as well as other non-substantive revisions to § 92.504(c)(4)(ii). The Department also proposes minor revisions to the heading and introductory text to § 92.504(c)(5), § 92.504(c)(5)(i), and § 92.504(c)(5)(ii). The proposed rule would amend the heading of § 92.504(c)(5) to clarify that the paragraph also applies to an owner receiving TBRA or security deposit assistance. The amendment is necessary to address the omission of the express inclusion of owner and does not create a new requirement. The proposed rule would also add new paragraphs at § 92.504(c)(5)(i)(A) and § 92.504(c)(5)(i)(B).

The proposed rule at § 92.504(c)(5)(i) would move its second sentence to the new paragraph at § 92.504(c)(5)(i)(A). The proposed new paragraph at § 92.504(c)(5)(i)(B) would reflect the proposed changes to § 92.251(c)(3) concerning the applicability of property standards to existing housing that is acquired for homeownership. The proposed rule would also revise § 92.504(c)(5)(iii) to clarify that the requirement to enter into a rental assistance contract or security deposit contract may be entered into by either tenants or owners receiving payments under a TBRA program. This proposed revision is necessary to correct the omission of “owner” and does not create a new requirement.

The Department proposes to revise § 92.504(c)(6) to cover written agreements with CHDOs for all eligible activities or projects. The proposed rule at § 92.504(c)(6) would be organized by the HOME activity or use of assistance and would incorporate the requirements in the current paragraphs at § 92.504(c)(3)(x), § 92.504(c)(6), and § 92.504(c)(7). The proposed rule at § 92.504(c)(6) would also reflect the proposed revisions made to §§ 92.300, 92.301, and 92.303. The proposed rule at § 92.504(c)(6) would establish minimum requirements for a written agreement with a CHDO for the use of set-aside funds under § 92.300 in the proposed § 92.504(c)(6)(i), for the use of HOME funds for operating expenses in the proposed § 92.504(c)(6)(ii), and for project-specific technical assistance and site control loans or project-specific seed money loans in the proposed § 92.504(c)(6)(iii).

The proposed rule would redesignate the current § 92.504(c)(6) and the current § 92.504(c)(7) as § 92.504(c)(6)(ii) and § 92.504(c)(6)(iii), respectively. The proposed rule at § 92.504(c)(6)(i) would require that an agreement for the use of set-aside funds by a CHDO must include the requirements in § 92.504(c)(3) and other

additional CHDO-specific requirements. These requirements include that the agreement must identify the role of the CHDO, require that the CHDO comply with the applicable requirements in § 92.300(a) for its role, must specify whether a CHDO developing homeownership housing may retain the proceeds from the sale of the housing and the funds must be used for HOME activities or to benefit low-income families, and must require a separate written agreement between the CHDO and its co-developer that contain the provisions described in the proposed § 92.504(c)(6)(i)(C)(1)–(4) if the CHDO will be sharing developer responsibilities. The proposed rule at § 92.504(c)(6)(ii) would also clarify that if a CHDO enters into a written agreement to receive HOME funds for operating expenses, there must be separate written agreement that complies with § 92.504(c)(6) for the CHDO's use of HOME funds for the project. The text of the proposed § 92.504(c)(6)(iii) would remain unchanged from the current text in § 92.504(c)(7) except that the term "Community housing development organization" would be removed from the heading.

The proposed rule would redesignate paragraph § 92.504(c)(8) as § 92.504(c)(7). The proposed rule would also move the inspection and financial oversight requirements at § 92.504(d) of the existing rule to the applicable paragraphs in § 92.251 to consolidate the property standards and inspection requirements in one section of the regulation.

32. Applicability of Uniform Administrative Requirements (24 CFR 92.505)

The proposed rule would revise the applicability of 2 CFR part 200 to participating jurisdictions, State recipients, and subrecipients receiving HOME funds, to exclude the additional provisions of 2 CFR 200.328 and 200.344. The Department proposes to remove 2 CFR 200.328 from 24 CFR 92.505 because HOME is subject to statutory requirements that mandate the collection of data through IDIS in order to monitor compliance with HOME requirements and HUD does not apply 2 CFR 200.328 in practice. The Department would also remove the applicability of 2 CFR 200.344 because the regulation poses significant challenges to participating jurisdictions and does not align with programmatic requirements. The proposed rule would therefore remove the applicability of 2 CFR 200.344 and establish HOME-specific closeout procedures in § 92.507.

33. Closeout (24 CFR 92.507)

HUD proposes to amend the HOME closeout regulations at § 92.507 to establish program-specific procedures and better align programmatic and administrative requirements for grant closeout. The existing regulation references the closeout requirements at 2 CFR 200.344, which has very specific requirements for the timing of closeouts and reporting by the participating jurisdiction after the end of the grant's period of performance, as set forth in the HOME grant agreement. Under the proposed closeout requirements at § 92.507, HUD would provide participating jurisdictions greater flexibility to request additional time, if needed, to meet certain program requirements, such as meeting project completion requirements. HUD recognizes that there are many things that could disrupt a participating jurisdiction's intended timeline for activity completion. To complete all program activities, including, but not limited to, satisfying reporting requirements, participating jurisdictions are permitted to request an extension of one year beyond the nine-year period of performance, as identified in the grant agreement, for good cause.

The proposed rule at § 92.507(a) would codify the current closeout process for HOME grants and describe the process, including the requirements that must be completed by the participating jurisdiction prior to initiating closeout. The proposed § 92.507(a) would require the participating jurisdiction complete certain actions required for closeout in proposed § 92.507(b), and obligations and actions required post-closeout in § 92.507(c). The proposed rule would establish that HUD may report a participating jurisdiction's material failure to comply with the terms and conditions of the award or closeout requirements to the OMB-designated integrity and performance system (currently, FAPIIS) and pursue other remedies in 2 CFR 200.339.

Even if HUD approves an extension pursuant to the proposed § 92.507, a participating jurisdiction must still expend its funds by the end of the grant's budget period. The statutory requirement that funds must be expended within the budget period or returned to the U.S. Department of Treasury cannot be revised. Further, the proposed rule would clarify that certain requirements survive grant closeout. While this is not a change from the current requirements, HUD is taking the opportunity to again clarify that closeout of a HOME grant does not

relieve a participating jurisdiction from project oversight in accordance with 24 CFR part 92 for as long as specified in the requirements applicable to the assisted project and participating jurisdiction.

34. Recordkeeping (24 CFR 92.508)

The proposed rule would make several conforming changes in the recordkeeping section of the regulation at § 92.508 to cross reference updated citations throughout the section. The proposed rule at § 92.508(a)(2)(ix) would also add language requiring that a participating jurisdiction that will apply excess matching contribution to a future fiscal year's liability must have records of the source of match at the time of application of the match credit and maintain the records for five years from the date of application to demonstrate compliance with the matching requirements of § 92.218 through § 92.222. The addition of this language would make it clear that participating jurisdictions must track the source and application of excess matching contributions if it is carried over and applied to future years' matching liability. The HUD Office of Inspector General found that several participating jurisdictions were not keeping adequate records of matching contributions during its audit of the HOME matching requirement.⁵⁸ These participating jurisdictions mistakenly thought that once matching funds were credited that the participating jurisdiction no longer needed to identify the source of the match when some or all of the matching funds were carried over to the subsequent year. This resulted in participating jurisdictions not being able to adequately identify the source of the carried over matching contribution. The proposed change would require participating jurisdictions to keep records demonstrating compliance with the matching requirements specifically for excess match carried forward from one year to the next.

The proposed rule at § 92.508(a)(3)(iii) would also be revised to add recordkeeping requirements demonstrating that a project complied with one of the comprehensive green building standards established by HUD if the participating jurisdiction used the higher maximum per-unit subsidy limitation permitted for such project under § 92.250(c). HUD proposes to revise the recordkeeping requirement at § 92.508(a)(3)(iv) to reflect that the proposed rule would move the on-site

⁵⁸ HUD Office of Inspector General, Publication Report Number 2015–KC–0002.

inspection standards and financial review requirements from § 92.504(d) to § 92.251(f).

35. Corrective and Remedial Actions (24 CFR 92.551)

The proposed rule would add a new paragraph (3) to § 92.551(c). The proposed § 92.551(c)(3) would codify HUD's existing practice to permit a participating jurisdiction to correct a performance deficiency by voluntarily agreeing to a reduction in its HOME grants by an amount equal to the amount of any expenditures that were not in compliance with HOME requirements.

36. Notice and Opportunity for Hearing; Sanctions (24 CFR 92.552)

The proposed rule would add three new paragraphs at § 92.552(a)(1)(v), § 92.552(a)(1)(vi), and § 92.552(a)(1)(vii). These new paragraphs would reflect existing sanctions that HUD has the discretion to impose. The new proposed § 92.552(a)(2)(v) would codify the existing sanction that HUD may reduce a participating jurisdiction's HOME grants by an amount equal to the amount of any expenditures that were not in compliance with HOME requirements. The proposed rule at § 92.552(a)(2)(vi) would also add that HUD may revoke a jurisdiction's designation as a participating jurisdiction. This addition makes § 92.552 consistent with § 92.107 because that revocation power is already permitted under that section, as authorized by section 216(9) of NAHA (42 U.S.C. 12746(9)). The Department is also revising § 92.552(a)(2) to add paragraph (vii) to make the section consistent with an existing sanction permitted under 24 CFR part 200 that applies to HOME funds. The proposed § 92.552(a)(2)(vii) would provide participating jurisdictions with additional notice that HUD may terminate the assistance in whole or in part in accordance with 24 CFR 200.340 to enforce program requirements.

37. American Dream Downpayment Assistance Initiative (24 CFR Part 92, Subpart M)

The proposed rule removes subpart M of the HOME regulations, which codified the regulatory requirements for the American Dream Downpayment Initiative (ADDI) program. ADDI was authorized in 2003 and included a sunset provision, which stated that "Secretary shall have no authority to make grants under this Act after December 31, 2007." ADDI funds were last appropriated in 2008. HOME participating jurisdictions used

American Dream Downpayment Initiative grants for downpayment assistance to low-income, first-time homebuyers. The Department has closed out all American Dream Downpayment Initiative grants. Definitions applicable to ADDI and not used in the HOME program are also removed. Given that the ADDI program is no longer active, subpart M of the HOME regulations is not necessary.

B. Conforming Changes to 24 CFR Parts 91, 570, and 982

1. Change to 24 CFR Part 91

The proposed rule would make minor conforming changes to 24 CFR part 91 to update citations consistent with the proposed changes to 24 CFR part 92. HUD would also remove § 91.220(l)(2)(viii) and § 91.320(k)(2)(viii) because those paragraphs are no longer applicable given that the ADDI program is no longer active.

2. Change to 24 CFR 570.200

The proposed rule would address pre-award costs for the annual CDBG program by clarifying the effective date of the grant agreement. The proposed change would fix the effective date of an entitlement grant agreement as of the date HUD executes the grant agreement. The Department has waived § 570.200(h) for pre-award costs of grantees in many of the past Federal fiscal years to allow the effective date of a grantee's grant agreement for a Federal fiscal year with delayed enactment of the appropriation to be the earlier of the grantee's program year start date or the date that the Consolidated Plan (with the grantee's actual allocation amounts) is received by HUD. The proposed change at § 570.200(h) would assist grantees to better prepare for a Federal fiscal year when there is not a timely appropriation and eliminate the need for the Department to issue waivers of the requirements in § 570.200 when a timely appropriation has not been made by Congress.

3. Change to 24 CFR 982.507

The procedure for determining the rent reasonableness standard for tenant-based assistance under the HCV program in units receiving LIHTC or assistance under the HOME program was streamlined by section 2835(a)(2) of HERA. This HERA provision added section 8(o)(10)(F) to the 1937 Act. HUD fully implemented this streamlined process in its regulations for LIHTC units through the HERA Final Rule.⁵⁹ The HERA Final Rule did not fully

implement the streamlined process for HOME program units. Instead, as explained in the HERA Final Rule, the HCV rent reasonableness requirements for HOME units would be addressed as part of a separate HOME program rulemaking that would cover HOME rent requirements for both non-voucher families and voucher families. The HERA Final Rule reserved § 982.507(c)(3) to be amended accordingly as part of that future HOME program rulemaking.

This proposed rule would revise § 982.507 to fully implement the HERA streamlined HCV rent reasonableness process for HOME assisted units. In accordance with section 8(o)(10)(F) of the 1937 Act (42 U.S.C. 1437f(o)(10)(F)), § 982.507(c)(3) would provide that if the rent requested by the owner exceeds the HOME rents for non-voucher families, the PHA must determine that the rent to the owner is a reasonable rent and the rent shall not exceed the lesser of (1) the reasonable rent and (2) the payment standard established by the PHA for the unit size involved.

Additionally, HUD is proposing a technical revision to § 982.507(c)(2) to provide greater clarity with respect to the rent reasonableness requirements for LIHTC units. The current regulatory text in § 982.507(c)(2) provides that the PHA must "perform a rent comparability study in accordance with program regulations" if the rent requested by the owner exceeds the LIHTC rents for non-voucher families. This rent comparability determination is the same process the PHA undertakes for non-LIHTC HCV units under § 982.507(b) to determine that the rent to owner is a reasonable rent in comparison to rent for other comparable units. Consequently, HUD proposes to revise the wording of § 982.507(c)(2) to clarify that the PHA is required to determine the rent to owner is a reasonable rent in accordance with paragraph (b) of § 982.507 and not some separate process.

III. Findings and Certifications

Regulatory Review—Executive Orders 12866, 13563, and 14094

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively

⁵⁹ 79 FR 36146.

burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 (Modernizing Regulatory Review) amends section 3(f) of Executive Order 12866, among other things. Updating the HOME program regulation is consistent with the objectives of Executive Order 13563 to reduce burden, as well as the goal of modifying and streamlining regulations that are outmoded and ineffective.

This proposed rule would make many changes to the HOME program regulations, which were first promulgated in 1991, and have not been significantly updated since 2013. The proposed rule would: revise CHDO qualification requirements for community-based non-profit housing organizations to access CHDO set-aside funds to own, develop, and sponsor affordable housing; revise HOME rent requirements to implement statutory changes made to the U.S. Housing Act of 1937 by section 2835(a)(2) of HERA; facilitate the use of HOME funds for small one-to four-unit rental projects; incentivize inclusion of ambitious Green Building standards in new construction, reconstruction and rehabilitation projects; and expand flexibilities for community land trusts to participate in the HOME program. The proposed rule would also provide enhanced flexibility in TBRA programs; strengthen and expand tenant protections; and clarify the resale requirements for homeownership housing. The proposed rule would also include technical amendments or simplifications to certain changes made in the 2013 HOME Final Rule, the HOTMA Final Rule, and the NSPIRE Final Rule. The proposed rule was determined to be a significant regulatory action under section 3(f) of Executive Order 12866, as amended (although not an economically significant regulatory action under the order).

HUD prepared a regulatory impact analysis (RIA) that addresses the costs and benefits of the proposed rule. HUD’s RIA is part of the docket file for this rule at <https://www.regulations.gov>. As described in the RIA, HUD anticipates that the economic impact of the proposed rule would be almost entirely within the HOME program. In other words, the proposed changes to the HOME program would affect what

participating jurisdictions do with the HOME funds they receive from HUD and how projects that accept this funding source can operate. Many of the proposed policy adjustments would only have a practical impact if participating jurisdictions choose to respond to them by altering how they use HOME funds. HUD strongly encourages the public to view the docket file.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule aims to improve the HOME program by making several changes to its Federal regulations that would increase flexibility for grantees in using their HOME grants, streamline administrative requirements, implement statutory changes regarding rent restrictions in HOME rental projects, and enhance tenant protections for HOME-assisted rental households. As described in the RIA that HUD prepared, HUD anticipates that the economic impacts of the proposed rule would be almost entirely within the HOME program. In other words, the proposed changes to the HOME program would affect what participating jurisdictions do with the HOME funds they receive from HUD and how projects that accept this funding source can operate. Many of the proposed policy adjustments would only have a practical impact if participating jurisdictions choose to respond to them by altering how they use HOME funds. For the reasons presented, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available through the Federal eRulemaking Portal at <http://www.regulations.gov>. The FONSI is also available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban

Development, 451 Seventh Street SW, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the FONSI by calling the Regulations Division at 202–708–3055 (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 all comments submitted are available for inspection and downloading at www.regulations.gov.

Executive Order 13132, Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) imposes substantial direct compliance costs on State and local governments and is not required by statute, or (ii) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any State, local, or Tribal governments, or on the private sector, within the meaning of the UMRA.

Paperwork Reduction Act

The information collection requirements contained in this proposed rule will be submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The proposed rule would change the annual income determination requirement for households assisted with HOME TBRA from annual to bi-

annual, which reduces the burden hours. The proposed rule includes a new provision in 24 CFR 92.250 to increase the maximum subsidy limit allowed for HOME projects based on whether the project shall meet a more comprehensive property standard that includes Green Building criteria, which would lead to a slight increase in burden for participating jurisdictions with qualified projects. The proposed rule would amend 24 CFR 92.252 to eliminate the requirement that a participating jurisdiction must submit to HUD a marketing plan for any HOME-

assisted rental units that have not achieved initial occupancy within six months of project completion in IDIS, which would reduce the reporting burden on participating jurisdictions with unoccupied HOME-assisted rental units. The proposed rule adds paragraph (g)(i) to 24 CFR 92.252 to permit an owner of small-scale housing to re-examine annual income every three years, rather than annually, therefore reducing burden for income determination. The proposed tenancy lease addendum, described in 24 CFR 92.253, would replace multiple,

separate functions, and would result in a decrease in paperwork burden. The proposed changes in 24 CFR 92.300 to define the qualifications for a CHDO would result in increased applications and certification, which may lead to an increase of paperwork burden. Overall, the proposed rule results in a net decrease of burden by 28,852 total estimated annual burden hours.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

24 CFR section reference	Number of parties	Frequency of responses	Number of responses per party	Estimated average time for requirements (hours)	Total estimated annual burden (hours)
§ 92.252(g)(i) Small scale housing income determination	2,000	Annual	1	2	4,000
§ 92.209(c)(1) Annual income determination for TBRA	72,000	Annual	1	0.75	54,000
§ 92.250 Increase maximum subsidy limits for ambitious green building.	188	Annual	1	2	376
§ 92.253 Tenant protections (including lease addendum requirement).	6,667	Annual	1	3	20,001
§ 92.300 Designation of CHDOs	600	Annual	1	1.5	900
§ 92.251 Property standards and inspection requirements.	6,000	Annual	1	3	18,000
§ 92.252 6-month marketing plan for unoccupied rental units.	60	Annual	1	1	60
§ 92.507 Grant closeout procedures	652	Annual	1	1	652

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from member of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number (FR-6144-P-01) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building,

Washington, DC 20503, Fax: (202) 395-6947

And

Reports Liaison Officer, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7233, 7th Street SW, Washington, DC 20410.

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <https://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the <https://www.regulations.gov> website can be viewed by other commenters and interested member of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

List of Subjects

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure; Low and moderate income housing; Manufactured homes; Rent subsidies; Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure; American Samoa; Community development block grants; Grant programs—education; Grant programs—housing and community development; Guam; Indians; Loan programs—housing and community development; Low and moderate income housing; Northern Mariana Islands; Pacific Islands Trust Territory; Puerto Rico; Reporting and recordkeeping requirements; Student aid; Virgin Islands.

24 CFR Part 982

Grant programs—housing and community development; Grant programs—Indians; Indians; Public housing; Rent subsidies; Reporting and recordkeeping requirements.

For the reasons stated above, HUD proposes to amend 24 CFR parts 91, 92, 570, and 982 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

§ 91.220 [Amended]

■ 2. In § 91.220:

- a. Amend paragraph (l)(2)(v) by removing the citation to “92.254(a)(2)(iii)” and adding, in its place, a citation to “92.254(a)(2)(iv)”;
- b. Amend paragraph (l)(2)(vii)(D) by removing the citation to “92.253(d)” and adding, in its place, a citation to “92.253(e)”;
- c. Remove paragraph (l)(2)(viii).

§ 91.320 [Amended]

■ 3. In § 91.320:

- a. Amend paragraph (k)(2)(v) by removing the citation to “92.254(a)(2)(iii)” and adding, in its place, a citation to “92.254(a)(2)(iv)”;
- b. Amend paragraph (k)(2)(vii)(D) by removing the citation to “92.253(d)” and adding, in its place, a citation to “92.253(e)”;
- c. Remove paragraph (k)(2)(viii).

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 4. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839; 12 U.S.C. 1701x.

■ 5. In § 92.2:

- a. Remove the definition of “ADDI funds”;
- b. Amend the definition of “Commitment” by removing the word “official” in the introductory text to paragraph (1) and adding, in its place, the word “officials”, by removing the word “downpayment” in paragraph (1)(i) and adding, in its place, the word “homeownership”, and by removing the words “or subrecipient” throughout paragraph (2)(ii)(A);
- c. Amend the definition of “Community housing development organization” by revising paragraphs (4), (5), (8)(i), and (9);

- d. Add the definition of “Community land trust” in alphabetical order;
- e. Remove the definitions of “Displaced homemaker” and “First time homebuyer”;
- f. Amend the definition of “Homeownership” by removing the words “or in a” in the introductory text to the definition and adding, in their place, the word “or” and by removing the words “Low Income Housing Tax Credits” in paragraph (4) and adding, in their place, the words “Low-Income Housing Credits (26 U.S.C. 42)”;
- g. Add the definition of “Period of affordability” in alphabetical order;
- h. Amend the definition of “Program income” by revising the introductory text and paragraphs (2) and (3);
- i. Amend the definition of “Reconstruction” by revising the last sentence;
- j. Amend the definition of “Single family housing” by removing the words “one-to four-family” and adding, in their place, the words “one-to four-unit”;
- k. Remove the definition of “Single parent”;
- l. Add the definition of “Small-scale housing” in alphabetical order;
- m. Revise the definition of “State recipient”;
- n. Amend the definition of “Subrecipient” by removing the words “public agency” and adding, in their place, the words “governmental entity”, by removing the word “downpayment” and adding, in its place, the word “homeownership”, and by removing the word “solely”; and
- o. Amend the definition of “Tenant-based rental assistance” by removing the word “dwelling” and adding, in its place, the word “housing”.

The revisions and additions read as follows:

§ 92.2 Definitions.

* * * * *

Community housing development organization means: * * *

(4) Is tax exempt as follows:

(i) The private nonprofit organization has a tax exemption ruling from the Internal Revenue Service under section 501(c)(3) or (4) of the Internal Revenue Code of 1986 (26 CFR 1.501(c)(3)–1 or 1.501(c)(4)–1);

(ii) The private nonprofit organization is a subordinate organization that has been included in its 501(c)(3) or (4) central organization’s group exemption letter by the Internal Revenue Service; or,

(iii) The private nonprofit organization is wholly owned by the community housing development organization, as defined in this part, and

is disregarded as an entity separate from its owner organization for federal tax purposes.

(5) Is not a governmental entity (including the participating jurisdiction, other jurisdiction, Indian tribe, public housing authority, Indian housing authority, housing finance agency, or redevelopment authority) and is not controlled by a governmental entity. An organization that is created by a governmental entity may qualify as a community housing development organization; however, no more than one-third of the board members of the organization may be officials or employees of the participating jurisdiction or governmental entity that created the community housing development organization. Further, no governmental entity may have the right to appoint more than one-third of the organization’s board members. The board members appointed by a governmental entity and the board members that are officials or employees of the participating jurisdiction or governmental entity that created the organization may not appoint any of the remaining two-thirds of the board members. The officers or employees of a governmental entity may not be officers or employees of a community housing development organization;

* * * * *

(8) * * *

(i) Maintaining at least one-third of its governing board’s membership for residents of low-income neighborhoods, other low-income community residents, designees of low-income neighborhood organizations, or authorized representatives of nonprofit organizations in the community that address the housing or supportive service needs of residents of low-income neighborhoods, including homeless providers, Fair Housing Initiatives Program providers, Legal Aid, disability rights organizations, and victim service providers. For urban areas, “community” may be a neighborhood or neighborhoods, city, county, or metropolitan area; for rural areas, it may be a neighborhood or neighborhoods, town, village, county, or multi-county area; and

* * * * *

(9) Has a demonstrated capacity for carrying out housing projects assisted with Federal funds, Low-Income Housing Credits (26 U.S.C. 42), or local and state affordable housing funds.

(i) To satisfy this requirement and demonstrate capacity as a developer of a HOME-assisted project, the nonprofit organization must have employees or volunteers with housing development

experience who will work directly on the HOME-assisted project. If a nonprofit organization is demonstrating capacity using a volunteer's experience, the volunteer must serve as a board member or officer of the nonprofit organization, and the volunteer may not be compensated by or have their services donated by another organization. For its first year of funding as a community housing development organization, an organization may satisfy this requirement through a contract with a consultant who has housing development experience to train appropriate key staff of the organization;

(ii) An organization that will own housing must demonstrate capacity to act as owner of a project and meet the requirements of § 92.300(a)(2);

(iii) An organization that will sponsor housing must demonstrate capacity as a developer or capacity to act as owner, as described in paragraph (9)(i) and (ii) of this definition; and

* * * * *

Community land trust means a nonprofit organization that:

(1) Has the development and maintenance of housing that is permanently affordable to low- and moderate-income persons as its primary purposes;

(2) Is not sponsored or controlled by a for-profit organization;

(3) Uses a lease, covenant, agreement, or other enforceable mechanisms to require housing and related improvements on land held by the community land trust to be affordable to low- and moderate-income persons for at least 30 years; and

(4) Retains a right of first refusal or preemptive right to purchase the housing and related improvements on land held by the community land trust to maintain long-term affordability.

* * * * *

Period of affordability means the required period, as specified in § 92.252 and § 92.254, that requirements under this part apply to HOME-assisted housing.

* * * * *

Program income means gross income received by the participating jurisdiction, State recipient, or a subrecipient at any time, generated from the use of HOME funds or matching contributions. When program income is generated by housing that is only partially assisted with HOME funds or matching funds, the program income shall be the amount prorated to reflect the percentage of HOME funds invested

in the project. Program income includes, but is not limited to, the following:

* * * * *

(2) Gross income from the use or rental of real property, owned by the participating jurisdiction or State recipient that was acquired, rehabilitated, or constructed, with HOME funds or matching contributions, less costs incidental to generation of the income (*Program income* does not include gross income from the use, rental, or sale of real property received by the project owner or developer, unless all or a portion of the income must be paid to the participating jurisdiction, subrecipient, or State recipient, in which case, the amount that must be paid to the participating jurisdiction, subrecipient, or State recipient is program income.);

(3) Payments and repayments on grants, loans (*i.e.*, principal and interest), or investments made using HOME funds or matching contributions, including such payments and repayments made after the period of affordability;

* * * * *

Reconstruction * * * Reconstruction is rehabilitation for purposes of this part, except that the property standards for new construction in § 92.251(a) apply to all reconstruction projects.

* * * * *

Small-scale housing means a rental housing project of no more than four units or a homeownership project with no more than three rental units on the same site.

* * * * *

State recipient means a unit of general local government designated by a State participating jurisdiction to receive HOME funds to administer all or some of the State participating jurisdiction's HOME programs, own or develop affordable housing, provide homeownership assistance, or provide tenant-based rental assistance.

* * * * *

§ 92.50 [Amended]

■ 6. In § 92.50, amend paragraph (c)(3) by removing the words "poor households" and adding, in their place, the words "households below the poverty line".

■ 7. Amend § 92.101 by revising paragraph (a) introductory text and paragraph (d), and adding paragraph (g) to read as follows.

§ 92.101 Consortia.

(a) A consortium of geographically contiguous units of general local government is a unit of general local government for purposes of this part if

the requirements of this section are met. A unit of general local government separated by a body of water that is only accessible by the public through a permanent means other than a connecting road, bridge, railway, or highway may be considered geographically contiguous if the consortium demonstrates that the unit of general local government separated by the body of water is part of the same housing market and local commuting area as one or more members of the consortium. A local commuting area is the geographic area that encompasses neighborhoods where people live and are reasonably expected to routinely travel back and forth to a common employment hub, population center, or worksite.

* * * * *

(d) If the representative unit of general local government distributes HOME funds to member units of general local government, the representative unit is responsible for applying to the member units of general local government the same requirements as are applicable to subrecipients, including the written agreement requirements in 24 CFR 92.504(c)(2).

* * * * *

(g) If a consortium changes its representative unit of general local government but retains the same membership, the consortium shall still be considered the same unit of general local government for purposes of this part. If the representative unit of general local government changes and the composition of the consortium changes, either by adding or removing individual members, then the consortium shall be a new unit of general local government for purposes of this part and shall be required to comply with all applicable consolidated plan requirements in 24 CFR part 91.

■ 8. Amend § 92.201 by adding a new sentence to the end of paragraph (a)(2), and removing the last sentence of paragraph (b)(2) to read as follows:

§ 92.201 Distribution of assistance.

(a) * * *

(2) * * * A participating jurisdiction may not commit HOME funds to a project outside its jurisdiction and within the boundaries of a contiguous local jurisdiction until it has secured the financial contribution of the jurisdiction in which the project is located.

* * * * *

■ 9. In § 92.203:

■ a. Revise the introductory text of paragraph (a) and the heading of paragraph (b);

■ b. Amend paragraph (b)(1) introductory text by removing the

citation “§ 92.252(h)” and adding, in its place, the citation “§ 92.252(g)”;

■ c. Revise paragraph (b)(1)(ii) and the first sentence of paragraph (b)(1)(iii);

■ d. Revise the heading of paragraph (c);

■ e. Amend paragraph (c)(1) by removing the citation to “§ 5.609(a) and (b) of this title” and adding, in their place, a citation to “24 CFR 5.609(a) and (b)”;

■ f. Revise paragraph (d);

■ g. Amend paragraph (e)(1) by removing the citation to “§ 5.618 of this title” and adding, in its place, a citation to “24 CFR 5.618”, and by removing the citation to “§ 5.609(a)(2) of this title” and adding, in its place, a citation to “24 CFR 5.609(a)(2)”;

■ h. Amend paragraph (e)(3) by removing the citation to “§ 5.617 of this title” and adding, in its place, a citation to “24 CFR 5.617”;

■ i. Amend paragraph (f)(1)(i) by removing the citation to “§ 5.611(a) of this title” and adding, in its place, a citation to “24 CFR 5.611(a)”, and by removing the citation to “§ 5.611(c) through (e) of this title” and adding, in its place, a citation to “24 CFR 5.611(c) through (e)”;

■ j. Amend paragraph (f)(1)(ii) by removing the citation to “§ 92.252(b)(2)(i)” and adding, in its place, a citation to “§ 92.252(a)(2)(ii) or (iii)”, by removing the citation to “§ 5.611(a) of this title” and adding, in its place, a citation to “24 CFR 5.611(a)”, and by removing the citation to “§§ 5.611(c) through (e) of this title” and adding, in its place, a citation to “24 CFR 5.611(c) through (e)”;

■ k. Amend paragraph (f)(1)(iii) by removing the citation to “§ 5.611(a) of this title” and adding, in its place, a citation to “24 CFR 5.611(a)”.

The revisions and additions read as follows:

§ 92.203 Income determinations.

(a) *Income eligibility.* To determine a family is income-eligible, the participating jurisdiction must determine the family’s income as follows:

* * * * *

(b) *Determining and documenting annual income.*

(1) * * *

(ii) Obtain from the family a written statement or, where needed due to disability, a statement in another format, of the amount of the family’s annual income and family size, along with a certification that the information is complete and accurate. The certification must state that the family will provide source documents upon request. If there is evidence that a tenant’s statement and certification provided in accordance

with § 92.203(b)(1)(ii) failed to completely and accurately state information about the family’s size or income, a tenant’s income must be re-examined in accordance with § 92.203(b)(1)(i).

(iii) Obtain a written statement from the administrator of a government program which examines the annual income of the family each year and under which the family receives benefits.

* * * * *

(c) *Definitions of “annual income.”*

* * * * *

(d) *Use of income definitions.* A participating jurisdiction may use either of the definitions of “annual income” in paragraph (c) of this section, however, the participating jurisdiction may use only one definition of “annual income” for each HOME-assisted program (e.g., downpayment assistance program) that it administers and only one definition for each rental housing project. For rental housing projects containing units assisted by a Federal or State project-based rental subsidy program or tenants receiving Federal tenant-based rental assistance, where a participating jurisdiction is accepting a public housing agency, owner, or rental assistance provider’s determination of annual and adjusted income, the participating jurisdiction must calculate annual income in accordance with paragraph (c)(1) of this section so that only one definition of annual income is used in the rental housing project.

* * * * *

■ 10. In § 92.205:

■ a. Revise paragraph (a)(2);

■ b. Remove the last sentence of paragraph (b)(1);

■ c. Add paragraph (b)(3); and

■ d. Revise the first sentence of paragraph (e)(2).

The revisions and addition read as follows:

§ 92.205 Eligible activities: General.

(a) * * *

(2) Acquisition of vacant land or demolition may only be undertaken for a project that will provide affordable housing and meets the requirements for a specific local project in paragraph (2)(i) of the definition of “commitment” in § 92.2.

* * * * *

(b) * * *

(3) The participating jurisdiction must establish the terms of assistance, subject to the requirements of this part.

* * * * *

(e) * * *

(2) If project completion, as defined in § 92.2, does not occur within 4 years of

the date of commitment of funds for a specific local project, the project is considered to be terminated and the participating jurisdiction must repay all funds invested in the project to the participating jurisdiction’s HOME Investment Trust Fund in accordance with § 92.503(b). * * *

■ 11. In § 92.206:

■ a. Amend paragraph (a)(1) by removing the citation “§ 92.251” and adding, in its place, the citation “§ 92.251(a)”;

■ b. Amend paragraph (a)(2) by removing the citation “§ 92.251” and adding, in its place, the citation “§ 92.251(b)”;

■ c. Amend paragraph (b)(1) by removing the word “single-family” and adding, in its place, the words “single family”;

■ d. Amend the introductory text to paragraph (b)(2) by removing the words “affordability period” and adding, in their place, the words “period of affordability”;

■ e. Revise paragraphs (b)(2)(ii), (c), (d)(1), and (d)(8).

The revisions read as follows:

§ 92.206 Eligible project costs.

* * * * *

(b) * * *

(2) * * *

(ii) Require a review of management practices to demonstrate that disinvestment in the property has not occurred, that the long term needs of the project can be met, and that the feasibility of serving the targeted population over the minimum period of affordability of 15 years can be demonstrated;

* * * * *

(c) *Acquisition costs.* Costs of acquiring improved or unimproved real property and costs for a long-term ground lease, including costs of acquisition by homebuyers.

(d) * * *

(1) Architectural, engineering, or related professional services required to prepare plans, drawings, specifications, work write-ups, or for HUD environmental review or other environmental studies or assessments. The costs may be paid if they were incurred not more than 24 months before the date that HOME funds are committed to the project and the participating jurisdiction expressly permits HOME funds to be used to pay the costs in the written agreement committing the funds.

* * * * *

(8) Cost of property insurance during development.

* * * * *

§ 92.207 [Amended]

■ 12. In § 92.207, amend paragraph (e) by removing the words “under a cost allocation plan prepared”.

■ 13. Amend § 92.208 by adding paragraph (c) to read as follows:

§ 92.208 Eligible community housing development organization (CHDO) operating expense and capacity building costs.

* * * * *

(c) An organization that meets the definition of “community housing development organization” in § 92.2, except for the requirements in paragraph (9) of the definition, may receive HOME funds for operating expenses and capacity building costs in accordance with paragraph (a) of this section in order to develop demonstrated capacity and qualify as a community housing development organization.

■ 14. In § 92.209:

■ a. Amend paragraph (c)(1) by removing the last sentence;

■ b. Revise paragraphs (c)(2)(iv), (c)(3), (g), (h)(2), (h)(3)(ii), (i), and (j)(5);

■ c. Amend paragraph (j)(1) by removing the word “dwelling” and adding, in its place, the word “housing”;

■ d. Add paragraph (j)(6); and

■ e. Remove paragraph (l).

The revisions and addition read as follows:

§ 92.209 Tenant-based rental assistance: Eligible costs and requirements.

* * * * *

(c) * * *

(2) * * *

(iv) *Homebuyer program.* HOME tenant-based rental assistance may assist a tenant who has been identified as a potential low-income homebuyer through a lease-purchase agreement, with monthly rental assistance payments for a period up to 36 months (*i.e.*, 24 months, with a 12-month renewal in accordance with paragraph (e) of this section). The HOME tenant-based rental assistance payment may not be used to accumulate a downpayment or closing costs for the purchase; however, all or a portion of the homebuyer-tenant's monthly contribution toward rent may be set aside for this purpose, in accordance with the lease-purchase agreement. If a participating jurisdiction determines that the tenant has met the lease-purchase criteria and is ready to assume ownership, HOME funds may be provided for downpayment assistance in accordance with the requirements of this part.

* * * * *

(3) *Existing tenants in projects that will receive HOME assistance.* A participating jurisdiction may select low-income families currently residing in housing units that will be rehabilitated or acquired with HOME funds under the participating jurisdiction's HOME program.

Participating jurisdictions using HOME funds for tenant-based rental assistance programs may establish local preferences for the provision of this assistance. Families so selected may use the tenant-based assistance in the rehabilitated or acquired housing unit or in other qualified housing.

* * * * *

(g) *Tenant protections.* The tenant must have a lease that complies with the requirements in § 92.253(a)–(c) and (d)(2).

(h) * * *

(2) The participating jurisdiction must establish a minimum tenant contribution to rent, except that the participating jurisdiction may establish conditions in its written policies under which a tenant would be relieved of all or a portion of the minimum contribution due to financial hardship.

(3) * * *

(ii) The Section 8 Housing Choice Voucher Program payment standard in 24 CFR 982.503.

(i) *Housing standards.* The participating jurisdiction must require the housing occupied by a family receiving tenant-based rental assistance under this section to meet the participating jurisdiction's property standards under § 92.251. Initially and annually thereafter, the participating jurisdiction must determine the housing complies with its property standards and is decent, safe, sanitary, and in good repair in accordance with § 92.251(f).

* * * * *

(j) * * *

(5) Paragraphs (b), (c), (d), (f), (g), and (i) of this section are applicable when HOME funds are provided for security deposit assistance, except that income determinations pursuant to paragraph (c)(1) of this section and inspections pursuant to paragraph (i) of this section are required only at the time the security deposit assistance is provided.

(6) Surety bonds or security deposit insurance and similar instruments may not be used in lieu of or in addition to a security deposit in units occupied by tenants receiving tenant-based rental assistance.

* * * * *

■ 15. Revise § 92.210 to read as follows:

§ 92.210 Troubled HOME-assisted rental housing projects.

(a) The provisions of this section apply only to an existing HOME-assisted rental project that, within the HOME period of affordability, is no longer financially viable or its physical viability has substantively deteriorated due to unforeseen circumstances. For purposes of this section, a HOME-assisted rental project is no longer financially viable if its operating costs significantly exceed its operating revenue, considering project reserves and the owner is unable to pay for necessary capital repair costs. For purposes of this section, physical viability means a project's current or future ability to maintain affordability based on the physical characteristics and factors of the project's site and improvements. HUD may approve the actions described in paragraphs (b) and (c) of this section to strategically preserve a rental project after consideration of market needs, available resources, and the likelihood of the long-term physical and financial viability of the project in preserving affordability.

(b) Notwithstanding § 92.214, a participating jurisdiction may request and HUD may permit, pursuant to a written memorandum of agreement, a participating jurisdiction to invest additional HOME funds in the existing HOME-assisted rental project. The total HOME funding for the project (original investment plus additional investment) must be necessary to improve the physical and financial viability of the project and may not exceed the per-unit subsidy limit in § 92.250(a) in effect at the time of the additional investment. The use of HOME funds may include, but is not limited to, rehabilitation of the HOME units and recapitalization of project reserves for the HOME units (to fund capital costs). If additional HOME funds are invested, HUD may impose additional conditions, including requiring the participating jurisdiction to extend the period of affordability, increase the number of HOME-assisted units, and change the number or designation of Low HOME rent and High HOME rent units.

(c) HUD may, through written approval, permit the participating jurisdiction to reduce the total number of HOME-assisted units or change the designation of units from Low HOME rent units to High HOME rent units where there are more than the minimum number of Low HOME rent units in the project. In determining whether to permit a reduction in the number of HOME-assisted units, HUD will take into account the required period of

affordability and the amount of HOME assistance provided to the project.

■ 16. In § 92.212:

■ a. Amend paragraph (a) by removing “may incur costs”, and adding, in its place, “may incur costs described in this section”; and

■ b. Revise paragraph (b).

The revision reads as follows:

§ 92.212 Pre-award costs.

* * * * *

(b) *Administrative and planning costs.*

(1) Eligible administrative and planning costs may be incurred as of the beginning of the participating jurisdiction’s consolidated program year (see 24 CFR 91.10) or the date HUD receives the consolidated plan describing the HOME allocation to which the costs will be charged, whichever is later.

(2) In any year in which timely Congressional appropriations have not been provided for the HOME program, a participating jurisdiction may incur eligible administrative and planning costs as of the beginning of its program year or the date that HUD receives its consolidated plan describing the HOME allocation to which the costs will be charged, whichever is earlier. An appropriation is not timely if the appropriation was signed into law less than 90 days before a participating jurisdiction’s program year start date.

* * * * *

■ 17. Amend § 92.214 by:

■ a. Revising paragraphs (a)(6) through (9);

■ b. Adding paragraph (a)(10);

■ c. Revising paragraph (b)(3); and

■ d. Adding paragraph (b)(4).

The revisions and additions read as follows.

§ 92.214 Prohibited activities and fees.

(a) * * *

(6) Provide assistance (other than tenant-based rental assistance, assistance to a homebuyer to acquire housing previously assisted with HOME funds, assistance permitted under § 92.210, or assistance to preserve affordability of homeownership housing in accordance with § 92.254(b)) to a project previously assisted with HOME funds during the period of affordability. However, additional HOME funds may be committed to a project for up to one year after project completion (see § 92.502), but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250 at the time of underwriting;

(7) Pay for the acquisition of property owned by the participating jurisdiction, unless such property is acquired by the

participating jurisdiction in anticipation of carrying out a HOME project;

(8) Pay delinquent taxes, fees, or charges on properties to be assisted with HOME funds;

(9) Pay for any cost that is not eligible under §§ 92.206 through 92.209; or

(10) Pay for surety bonds, security deposit insurance, or similar instruments in lieu of or in addition to a security deposit in units occupied by tenants receiving tenant-based rental assistance (including assistance in paying security deposits).

(b) * * *

(3) The participating jurisdiction must prohibit project owners from charging for:

(i) Surety bonds, security deposit insurance, or similar instruments in lieu of or in addition to a security deposit in units;

(ii) Fees that are not customarily charged in rental housing (e.g., laundry room access fees); and

(iii) Fees to inspect units or correct deficiencies in the property condition of units or common areas of the project that were not caused by the tenant.

(4) Rental project owners may charge:

(i) Reasonable application fees to prospective tenants;

(ii) Parking fees to tenants only if such fees are customary for rental housing projects in the neighborhood; and

(iii) Fees for services such as bus transportation or meals, as long as the services are voluntary and fees are charged for services provided.

§ 92.216 [Amended]

■ 18. In § 92.216, amend paragraphs (a)(2) and (b)(2) by removing the word “dwelling” and adding, in its place, the word “housing”.

§ 92.217 [Amended]

■ 19. Amend § 92.217 by removing the word “dwelling” and adding, in its place, the word “housing”.

■ 20. Amend § 92.219 by revising the first sentence of paragraphs (b)(2)(ii) and the first sentence of paragraph (b)(2)(iii) to read as follows:

§ 92.219 Recognition of matching contribution.

* * * * *

(b) * * *

(2) * * *

(ii) The participating jurisdiction must execute, with the owner of the housing (or, if the participating jurisdiction is the owner, with the manager or developer), a written agreement that imposes and enumerates all of the affordability requirements in § 92.252 and tenant protection requirements in § 92.253(a)–(c) and

(d)(2) or § 92.254, whichever are applicable; the property standards requirements of § 92.251; and income determinations made in accordance with § 92.203. * * *

(iii) A participating jurisdiction must establish a procedure to monitor HOME match-eligible housing to ensure continued compliance with the requirements of § 92.203 (Income determinations), § 92.252 (Qualification as affordable housing: Rental housing), § 92.253(a)–(c) and (d)(2) (Tenant protections), and § 92.254 (Qualification as affordable housing: Homeownership).

* * *

* * * * *

■ 21. Amend § 92.221 by adding paragraphs (b)(1) and (2) to read as follows:

§ 92.221 Match credit.

* * * * *

(b) * * *

(1) To apply an excess matching contribution to a future fiscal year’s match liability, the participating jurisdiction must have documentation, at the time of application, demonstrating the matching contribution complied with the matching requirements at §§ 92.218–92.221 at the time it was made. Documentation must include project records of the type and amount of the matching contribution.

(2) A participating jurisdiction must maintain the records in paragraph (b)(1) of this section for five years from the date of application of the excess matching contribution to the liability.

* * * * *

■ 22. Amend § 92.250 by revising paragraphs (a) and (b)(3)(i), and adding paragraph (c) to read as follows:

§ 92.250 Maximum per-unit subsidy amount, underwriting, and subsidy layering.

(a) *Maximum per-unit subsidy amount.* The total amount of HOME funds that a participating jurisdiction may invest on a per-unit basis in affordable housing may not exceed the per-unit dollar limits established by HUD in accordance with section 212(e) of the Act. HUD will publish the per-unit dollar limits for the area in which the housing is located annually. HUD will publish its methodology for determining maximum per-unit dollar limits through a notice in the **Federal Register** with the opportunity for comment.

(b) * * *

(3) * * *

(i) An underwriting analysis of the homeowner’s ability to repay the HOME-funded rehabilitation loan is

required only if the loan is an amortizing loan; and

* * * * *

(c) A participating jurisdiction may exceed the per-unit dollar limits described in paragraph (a) of this section by up to 5 percent if the project meets one of the green building standards identified by HUD and published in the **Federal Register**.

■ 23. In § 92.251:

■ a. Revise the section heading and paragraph (a)(2);

■ b. Add paragraph (a)(3);

■ c. Revise paragraphs (b)(1)(vi) and (viii);

■ d. Add paragraphs (b)(1)(xi) and (xii);

■ e. Amend paragraph (b)(2) by removing the words “The construction documents” and adding, in their place, the words “The construction contract and documents”;

■ f. Revise paragraph (b)(3), the first sentence of paragraph (c)(1), and paragraph (c)(3);

■ g. Revise the introductory text of paragraph (f);

■ h. Amend the introductory text of paragraph (f)(1) by removing the words “affordability period” and adding, in their place, the words “period of affordability” and by removing the words “each of the following” and adding, in their place, the words “all of the following”;

■ i. Revise paragraphs (f)(1)(i), (3), (4), and (5); and

■ j. Add new paragraph (g).

The revisions and additions read as follows:

§ 92.251 Property standards and inspections.

(a) * * *

(2) *Construction progress and final inspections.* The participating jurisdiction must conduct on-site progress and final inspections of construction to ensure that work is done in accordance with the applicable codes, the construction contract, and construction documents. Before completing the project in the disbursement and information system established by HUD, the participating jurisdiction must perform an on-site inspection of the project to determine that all contracted work has been completed and that the project complies with the property standards and requirements in paragraph (a) of this section. All inspections performed by the participating jurisdiction must be conducted in accordance with the participating jurisdiction’s inspection procedures.

(3) *HUD requirements.* All new construction projects must also meet the following requirements upon project

completion, unless an earlier deadline is otherwise required by the applicable statute, regulation, or standard:

(i) *Accessibility.* The housing must meet the accessibility requirements of 24 CFR part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and Titles II and III of the Americans with Disabilities Act (42 U.S.C. 12131–12189) implemented at 28 CFR parts 35 and 36, as applicable. Covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implements the Fair Housing Act (42 U.S.C. 3601–3619).

(ii) *Energy Efficiency Standards.* Newly constructed housing shall qualify as affordable housing under this part only if it meets the energy efficiency standards promulgated by the Secretary in accordance with section 109 of the Cranston–Gonzalez National Affordable Housing Act (42 U.S.C. 12709).

(iii) *Disaster mitigation.* Where relevant, the housing must be constructed to mitigate the impact of future disasters (e.g., earthquakes, hurricanes, flooding, and wildfires) in accordance with State and local codes and ordinances, and such other requirements that HUD may establish.

(iv) *Written cost estimates, construction contracts and construction documents.* The participating jurisdiction must ensure the construction contract(s) and construction documents describe the work to be undertaken in adequate detail so that inspections can be conducted. The participating jurisdiction must review and approve written cost estimates for construction and determining that costs are reasonable.

(v) *Broadband infrastructure.* For new commitments made after January 19, 2017, for a new construction housing project of a building with more than 4 rental units, the construction must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the participating jurisdiction determines and, in accordance with § 92.508(a)(3)(iv), documents the determination that:

(A) The location of the new construction makes installation of broadband infrastructure infeasible; or

(B) The cost of installing the infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden.

(vi) *Carbon monoxide detection.* The common areas of a project and all units within the project must meet or exceed

the carbon monoxide detection standards adopted by HUD through **Federal Register** notice; and

(vii) *Green building standards.* If a participating jurisdiction is exceeding the maximum per-unit subsidy limit pursuant to § 92.250(c), then upon completion, the housing must meet one of the green building standards established by HUD.

(b) * * *

(1) * * *

(vi) *Disaster mitigation.* Where relevant, the participating jurisdiction’s standards must require the housing to be improved to mitigate the impact of future disasters (e.g., earthquake, hurricanes, flooding, and wildfires) in accordance with State and local codes and ordinances, and such other requirements that HUD may establish.

* * * * *

(viii) *HUD housing standards.* The standards of the participating jurisdiction must be such that, upon completion, the HOME-assisted project and units will be decent, safe, sanitary, and in good repair. This means that the HOME-assisted project and units will meet the standards in 24 CFR 5.703, except that paragraph (b)(1)(xi) of this section shall apply instead of the carbon monoxide detection requirements at 24 CFR 5.703(b)(2) and (d)(6). For all HOME-assisted projects and units, the requirements at 24 CFR 5.705–5.713 do not apply. At minimum, the participating jurisdiction’s rehabilitation standards must require correction of the specific deficiencies published in the **Federal Register** for HOME-assisted projects and units. For SRO housing, 24 CFR 5.703(d) shall only apply to the extent that the SRO unit contains the room or facility referenced in 24 CFR 5.703(d).

(A) The participating jurisdiction may accept a determination made under another HUD program, upon the completion of the rehabilitation, that the HOME-assisted project and units are decent, safe, sanitary, and in good repair in an inspection conducted under the National Standards for the Condition of HUD housing (24 CFR part 5, subpart G) or an alternative inspection standard, which HUD may establish through **Federal Register** notice.

(B) If a participating jurisdiction is accepting a determination pursuant to paragraph (b)(1)(viii)(A), then the participating jurisdiction must document the determination in accordance with § 92.508(a)(3)(iv) and is not required to perform a HOME inspection of the project and units for compliance with 24 CFR 5.703.

* * * * *

(xi) *Carbon monoxide detection.* The common areas of a project and all units within the project must meet or exceed the carbon monoxide detection standards adopted by HUD through **Federal Register** notice.

(xii) *Green building standards.* If a participating jurisdiction is exceeding the maximum per-unit subsidy limit pursuant to § 92.250(c), then upon completion of the rehabilitation the housing must meet one of the green building standards established by HUD.

* * * * *

(3) *Frequency of inspections.* The participating jurisdiction must conduct an initial property inspection to identify the deficiencies that must be addressed and must conduct on-site progress and final inspections to determine that work was done in accordance with the construction contract and construction documents. Before completing the project in the disbursement and information system established by HUD, the participating jurisdiction must perform an on-site inspection of the project to determine that all contracted work has been completed and that the project complies with the property standards and requirements in paragraph (b) of this section. All inspections performed by the participating jurisdiction must be conducted in accordance with the participating jurisdiction's inspection procedures.

(c) * * *

(1) Existing housing that is acquired with HOME assistance for rental housing, and that was newly constructed or rehabilitated less than 12 months before the date of commitment of HOME funds, must meet the property standards for new construction in paragraph (a) or rehabilitation in paragraph (b) of this section, as applicable. * * *

* * * * *

(3) Existing housing that is acquired for homeownership (e.g., downpayment assistance) must be decent, safe, sanitary, and in good repair. The participating jurisdiction must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local housing quality standards and code requirements and the housing does not contain the specific deficiencies established by HUD based on the applicable standards in 24 CFR 5.703 and published in the **Federal Register** for HOME-assisted projects and units. The housing must also meet or exceed the carbon monoxide detection

standards adopted by HUD through **Federal Register** notice.

(i) The participating jurisdiction must inspect the housing and document compliance with paragraph (c)(3) of this section based upon an inspection that is conducted no earlier than 90 days before the commitment of HOME assistance. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards of paragraph (c)(3) before the acquisition, except as provided in paragraph (c)(3)(ii) of this section.

(ii) If the housing will not be rehabilitated to meet the standards in paragraph (c)(3) of this section before acquisition, then the housing may still be acquired if all of the following conditions are satisfied:

(A) The written agreement between the participating jurisdiction and the homebuyer requires the property to meet the standards within 6 months of acquisition with HOME assistance;

(B) Funding is secured to complete the rehabilitation necessary to comply with the standards; and

(C) The participating jurisdiction conducts a final inspection within six months after acquisition and determines that the property meets the standards.

(iii) All inspections performed by the participating jurisdiction must be conducted in accordance with the participating jurisdiction's inspection procedures.

* * * * *

(f) *Ongoing property condition standards and inspections: Rental housing and housing occupied by tenants receiving HOME tenant-based rental assistance.*

(1) * * *

(i) *Compliance with State and local codes, ordinances, and requirements.* The participating jurisdiction's standards must require the housing to meet all applicable State and local code requirements and ordinances. In the absence of existing applicable State or local code requirements and ordinances, at a minimum, the participating jurisdiction's ongoing property standards must provide that the property does not contain the specific deficiencies established by HUD based on the applicable standards in 24 CFR 5.703 and published in the **Federal Register** for HOME rental housing (including manufactured housing) and housing occupied by tenants receiving HOME tenant-based rental assistance. The participating jurisdiction's property standards are not required to comply with 24 CFR 5.705 through 5.713.

* * * * *

(3) *Ongoing inspections of HOME-assisted rental housing.* During the

period of affordability, the participating jurisdiction must perform on-site inspections of HOME-assisted rental housing to determine compliance with the property standards in paragraph (f)(1) of this section and to verify the information submitted by owners in accordance with the requirements of § 92.252. The participating jurisdiction must perform inspections in accordance with its established inspection procedures. These procedures, at minimum, must include the following requirements:

(i) *Frequency of inspections.* The participating jurisdiction must perform an on-site inspection within 12 months after project completion and complete one of the following every 3 years during the period of affordability:

(A) Perform an on-site inspection in accordance with the participating jurisdiction's inspection procedures to determine compliance with the property standards; or

(B) Accept a determination made under another HUD program, made within the past 12 months, that the HOME-assisted project and units are decent, safe, sanitary, and in good repair in an inspection conducted under the National Standards for the Condition of HUD housing (24 CFR part 5, subpart G) or an alternative inspection standard, which HUD may establish through **Federal Register** notice. If a participating jurisdiction is accepting a determination made under another HUD program, then the participating jurisdiction must document the determination in accordance with § 92.508(a)(3)(iv) and is not required to perform an on-site HOME inspection of the project and the units for compliance with 24 CFR 5.703.

(ii) *Annual certification.* The owner must annually certify to the participating jurisdiction that each building and all HOME-assisted units in the project are suitable for occupancy, taking into account State and local health, safety, and other applicable codes, ordinances, and requirements, and the ongoing property standards established by the participating jurisdiction.

(iii) *Units inspected.* Inspections must be based on a random sample of 20 percent of the HOME-assisted units in the project with a mix of unit sizes (e.g., a mix of one-bedroom, two-bedroom, and three-bedroom units). For projects with one-to-four HOME-assisted units, the participating jurisdiction must inspect 100 percent of the HOME-assisted units and the inspectable areas for each building with HOME-assisted units.

(iv) *Financial oversight.* During the period of affordability, the participating jurisdiction must examine at least annually the financial condition of projects with 10 or more HOME-assisted units to determine the continued financial viability of the housing and must take actions to correct problems, to the extent feasible.

(4) *Annual inspections for housing with tenants receiving HOME tenant-based rental assistance.* All housing occupied by tenants receiving HOME tenant-based rental assistance must meet the property standards of paragraph (f)(1) of this section. The participating jurisdiction must annually determine the housing is decent, safe, sanitary, and in good repair through one of the following methods:

(i) An annual on-site inspection in accordance with its inspection procedures for annual inspections to determine the housing meets the property standards in paragraph (f)(1) of this section; or

(ii) An inspection by another HUD program conducted within the past 3 months under the National Standards for the Condition of HUD housing (24 CFR part 5, subpart G) or an alternative inspection standard, which HUD may establish through **Federal Register** notice. A participating jurisdiction may move its inspection cycle to align with an inspection covered by this paragraph. If a participating jurisdiction is accepting an inspection pursuant to this paragraph, then the participating jurisdiction must document the inspection's determination that the housing is decent, safe, sanitary, and in good repair in accordance with § 92.508(a)(3)(iv) and is not required to perform a HOME inspection of the project and units for compliance with 24 CFR 5.703.

(5) *Corrective and remedial actions.* The participating jurisdiction must have procedures for requiring that timely corrective and remedial actions are taken by the owner to address identified deficiencies.

(i) *Health and safety deficiencies.* Health and safety deficiencies must be corrected immediately. Except for small-scale housing, the participating jurisdiction must adopt a more frequent inspection schedule for properties that have been found to have health and safety deficiencies. For small-scale housing, the participating jurisdiction may adopt a more frequent inspection schedule if the small-scale housing is found to have health and safety deficiencies, as described in its inspection procedures.

(ii) *Other deficiencies.* If there are observed deficiencies for any of the

inspectable areas in the property standards established by the participating jurisdiction, in accordance with the inspection procedures, a follow-up on-site inspection to verify that deficiencies are corrected must occur within 12 months. The participating jurisdiction may establish a list of non-hazardous deficiencies for which correction can be verified by third party documentation (e.g., paid invoice for work order) rather than re-inspection.

(g) *Inspection procedures.* The participating jurisdiction must establish written inspection procedures. The procedures must include detailed inspection checklists, a description of how and by whom inspections will be carried out, and procedures for training and certifying qualified inspectors. For ongoing property inspections, the procedures must also describe how frequently the property will be inspected, consistent with this section and § 92.209.

■ 24. Revise § 92.252 to read as follows:

§ 92.252 Qualification as affordable housing: Rental housing.

The HOME-assisted units in a rental housing project must be occupied by households that are eligible as low-income families and must meet the requirements of this section to qualify as affordable housing. If the housing is not occupied by eligible tenants within six months following the date of project completion, the participating jurisdiction must revise its marketing plan to enable the project to reach required occupancy. The participating jurisdiction must repay HOME funds invested in any housing unit that has not been rented to eligible tenants within 18 months after the date of project completion. The affordability requirements in this section also apply to the HOME-assisted non-owner-occupied units in single family housing purchased with HOME funds in accordance with § 92.254. A tenant must have a written lease that complies with § 92.253.

(a) *HOME Rent Limits.* The rent for a HOME-assisted unit must not exceed the rent limits in this section. HUD will publish the HOME rent limits on an annual basis, with adjustments for number of bedrooms in the unit. The rent limits do not apply to any payment provided under a Federal or State rental assistance or subsidy program. Regardless of changes in fair market rents and in median income over time, the rents for a project are not required to be lower than the HOME rent limits for the project in effect at the time of project commitment. The participating

jurisdiction may designate (in its written agreement with the owner) more than the minimum HOME units in a rental housing project, regardless of project size. The rent limits apply to the rent plus the utilities or utility allowance:

(1) *High HOME Rent Limits.* The rent does not exceed the lesser of:

(i) The fair market rent for existing comparable units in the area as established by HUD under 24 CFR 888.111; or

(ii) 30 percent of the adjusted income of a family whose annual income equals 65 percent of the median income for the area, as determined by HUD.

(2) *Low HOME Rent Limits.* In rental projects with five or more HOME-assisted rental units, at least 20 percent of the HOME-assisted units must be occupied by very low-income families and meet one of the following:

(i) The rent does not exceed 30 percent of the annual income of a family whose income equals 50 percent of the median income for the area, as determined by HUD. If the rent determined under this paragraph is higher than the fair market rent under paragraph (a)(1) of this section, then the maximum rent for units under this paragraph is the fair market rent under paragraph (a)(1)(i) of this section; or

(ii) The rent contribution of the family is not more than 30 percent of the family's adjusted income.

(3) *HOME Rent Limits for SRO projects.*

(i) For SRO units that have both sanitary and food preparation facilities, the rent limit is the zero-bedroom fair market rent. The project must meet the requirements of paragraphs (a)(1) and (2) of this section.

(ii) For SRO units that have no sanitary or food preparation facilities or only one of the two, the rent limit is 75 percent of the zero-bedroom fair market rent. The project is not required to have Low HOME rent units but must meet the occupancy requirements of paragraph (a)(2) of this section.

(b) *Utility allowances.* The participating jurisdiction must establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. The participating jurisdiction may determine the utility allowance for the project based on the type of utilities and services paid by the tenant, including any energy efficiency measures. The participating jurisdiction may use any of the following for its maximum monthly allowances: the HUD Utility Schedule Model, the utility allowance established by the local

public housing authority, or other method approved by HUD.

(c) *Review and approval of rents.* The participating jurisdiction must review and approve rents proposed by the owner for units, subject to the rent limits in paragraph (a) of this section. For all units subject to the rent limits in paragraph (a) of this section for which the tenant is paying utilities and services, the participating jurisdiction must ensure that the rents do not exceed the rent limits in paragraph (a) of this section minus the monthly allowances for utilities and services in paragraph (b) of this section.

(d) *Period of affordability.* The HOME-assisted units must meet requirements under this part for the applicable period specified in the following table, beginning from project completion.

Rental housing activity	Minimum period of affordability in years
Rehabilitation or acquisition of existing housing per unit amount of HOME funds: Under \$15,000	5
\$15,000 to \$40,000	10
Over \$40,000 or rehabilitation involving refinancing	15
New construction or acquisition of newly constructed housing	20

(e) *Subsequent rents during the period of affordability.* (1) The HOME rent limits are recalculated on a periodic basis after HUD determines fair market rents and median incomes. HUD then publishes the updated HOME rent limits.

(2) The participating jurisdiction must provide project owners with information on updated HOME rent limits so that rents may be adjusted (not to exceed the rent limits in paragraph (a) of this section) in accordance with the written agreement between the participating jurisdiction and the owner. Owners must annually provide the participating jurisdiction with information on rents and occupancy of HOME-assisted units to demonstrate compliance with this section. The participating jurisdiction must review rents for compliance and approve or disapprove them every year.

(3) Any increase in rents for HOME-assisted units is subject to the provisions of outstanding leases, and in any event, the owner must provide tenants of those units not less than 60 days prior written notice before implementing any increase in rents.

(f) *Adjustment of HOME rent limits for an existing project.*

(1) Changes in fair market rents and in median income over time should be sufficient to maintain the financial

(1) The affordability requirements, including the applicable rent limits, period of affordability, and income requirements:

(i) Apply without regard to the term of any loan or mortgage, repayment of the HOME investment, or the transfer of ownership;

(ii) Must be imposed by a deed or use restriction, lien on real property, a covenant running with the land, a recorded agreement restricting the use of the property, or other mechanisms approved by HUD in writing, under which the participating jurisdiction has the right to require specific performance (except that the participating jurisdiction may provide that the affordability requirements may terminate upon foreclosure or transfer in lieu of foreclosure); and

(iii) Must be recorded in accordance with State recordation laws.

viability of a project within the HOME rent limits in this section.

(2) HUD may adjust the HOME rent limits for a project, only if HUD finds that an adjustment is necessary to support the continued financial viability of the project and only by an amount that HUD determines is necessary to maintain continued financial viability of the project. HUD expects that this authority will be used sparingly.

(g) *Tenant Income.* The income of each tenant must be determined initially in accordance with § 92.203(b)(1)(i) unless the participating jurisdiction accepts an annual income determination pursuant to § 92.203(a)(1) or § 92.203(a)(2) or determines income in accordance with § 92.203(b)(2). In addition, each year during the period of affordability, the participating jurisdiction must require the project owner to re-examine each tenant's annual income in accordance with the option in § 92.203(b)(1) selected by the participating jurisdiction and included in the written agreement, except as follows:

(1) A participating jurisdiction may permit an owner of small-scale housing to re-examine each tenant's annual income every third year, instead of annually, during the period of affordability.

(2) The participating jurisdiction may use purchase options, rights of first refusal, or other preemptive rights to purchase the housing before foreclosure or deed in lieu of foreclosure in order to preserve affordability.

(3) The affordability requirements shall be revived according to the original terms if, during the period of affordability, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(4) The termination of the affordability requirements on the project does not terminate the participating jurisdiction's repayment obligation under § 92.503(b).

(2) A participating jurisdiction that permits an owner of a multifamily project with a period of affordability of ten years or more to re-examine a tenant's annual income through a statement and certification in accordance with § 92.203(b)(1)(ii), must re-examine the income of each tenant in accordance with § 92.203(b)(1)(i), at minimum, every sixth year during the period of affordability; and,

(3) If the participating jurisdiction accepts an annual income determination pursuant to § 92.203(a)(1) or § 92.203(a)(2), an owner is not required to re-examine a tenant's annual income in accordance with § 92.203(b) for HOME.

(h) *Over-income tenants.*

(1) HOME-assisted units continue to qualify as affordable housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(2) A tenant who no longer qualifies as low-income must pay a rent amount equal to the lesser of the amount payable by the tenant under State or local law or 30 percent of the family's adjusted income, except that:

(i) A tenant of a HOME-assisted unit subject to rent restrictions under section

42 of the Internal Revenue Code of 1986 (26 U.S.C. 42) must pay a rent amount that complies with section 42 of the Internal Revenue Code of 1986; and

(ii) A tenant in a HOME-assisted unit designated as floating pursuant to paragraph (j) of this section shall pay a rent amount no greater than the fair market rent for comparable, unassisted units in the neighborhood.

(i) *Surety bonds.* Surety bonds or security deposit insurance and similar instruments may not be used in lieu of or in addition to a security deposit in HOME-assisted units.

(j) *Fixed and floating HOME units.* In a project containing HOME-assisted and other units, the participating jurisdiction may designate fixed or floating HOME units. This designation must be made at the time of project commitment in the written agreement between the participating jurisdiction and the owner, and the HOME units must be identified not later than the time of initial unit occupancy. Fixed units remain the same throughout the period of affordability. Floating units are changed to maintain conformity with the requirements of this section during the period of affordability so that the total number of housing units meeting the requirements of this section remains the same, and each substituted unit is comparable in terms of size, features, and number of bedrooms to the originally designated HOME-assisted unit.

(k) *Tenant selection.* The tenants must be selected in accordance with § 92.253(e).

(l) *Ongoing responsibilities.* The participating jurisdiction's responsibilities for on-site inspections and financial oversight of rental projects are set forth in § 92.251(f).

■ 25. Revise § 92.253 to read as follows:

§ 92.253 Tenant protections and selection.

(a) *Lease Contents.* For rental housing assisted with HOME funds and tenant-based rental assistance, there must be a written lease, in an accessible format if necessary due to a disability, between the tenant and owner that is for a period of not less than 1 year, unless by mutual agreement between the tenant and the owner, a shorter period is specified. Any changes to the lease must be in writing. The owner must provide the participating jurisdiction with a written lease or a revision to a written lease before it is executed. The lease shall contain:

(1) More than one convenient and accessible method to communicate directly with the owner or the property management staff, including in person,

by telephone, email, or through a web portal;

(2) The participating jurisdiction's contact information for the HOME program;

(3) The VAWA lease term/addendum required under § 92.359(e), except as otherwise provided by § 92.359(b); and

(4) The HOME tenancy addendum described in paragraph (b) of this section.

(b) *HOME tenancy addendum.* The terms of the HOME tenancy addendum shall prevail over any conflicting provisions of the lease. The terms and conditions of the written lease, the HOME tenancy addendum, the VAWA addendum listed in paragraph (a) of this section, and any addendum required by another Federal or State affordable housing program shall constitute and contain the sole and entire agreement between the owner and the tenant and no prior or contemporaneous oral or written representation or agreement between the owner or tenant shall have legal effect. The HOME tenancy addendum shall contain the following minimum requirements:

(1) *Physical condition of unit and project.*

(i) The owner shall maintain the physical condition of the unit and project so that it meets the participating jurisdiction's property standards and State and local code requirements in accordance with § 92.251(f);

(ii) With respect to maintenance and repairs to a housing unit, the owner shall:

(A) Provide tenants with the expected time frames for maintaining or repairing units as soon as practicable;

(B) Professionally maintain and repair units and the common areas of the project in accordance with the participating jurisdiction's property standards as soon as practicable; and

(C) Not charge a tenant for normal wear and tear or damage to the unit or common areas of a project unless due to negligence, recklessness, or intentional acts by the tenant.

(iii) If the owner is required to repair a life-threatening deficiency impacting the tenant, and the repairs cannot be completed on the day the life-threatening deficiency is identified, the tenant shall promptly be relocated into housing that is decent, safe, sanitary, and in good repair and that provides the same or a greater level of accessibility, or other physically suitable lodging, at no additional cost to the tenant, until the repairs are completed, and where it may be necessary, reasonable accommodations must continue to be provided during the relocation;

(iv) The owner shall provide tenants with continued, uninterrupted utility service in projects with owner-controlled utility services unless the interruption is not within the control of the owner (e.g., a general power outage).

(2) *Use and occupancy of the unit and project.*

(i) A family may reside in the unit with a foster child, foster adult, and/or live-in aide;

(ii) Except for shared housing in tenant-based rental assistance, the tenant's household shall have the right to exclusive use and occupancy of the leased unit;

(iii) The owner may only enter the dwelling unit:

(A) When the owner provides reasonable advance notification to the tenant and enters during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvement or repairs, or to show the dwelling unit for re-leasing. A written statement, or, where necessary due to disability, a statement that is accessible to the tenant, specifying the purpose of the owner's entry delivered to the dwelling unit at least 2 days before such entry shall be considered reasonable advance notification;

(B) At any time without advance notification when there is reasonable cause to believe that an emergency requiring entry to the unit exists; and

(C) If the tenant and all adult members of the household are absent from the dwelling unit at the time of entry, the owner shall provide the tenant with a written statement, or, where necessary due to disability, a statement that is accessible to the tenant, specifying the date, time, and purpose of entry.

(iv) The tenant's household shall have reasonable access and use of the common areas of the project;

(v) Tenants shall be able to organize, create tenant associations, convene meetings, distribute literature, and post information; and

(vi) A tenant may not be required to accept supportive services that are offered unless the tenant is living in transitional housing and such supportive services are required in connection with the transitional housing.

(3) *Notice.*

(i) A tenant must be notified in writing, or, where necessary due to disability, a statement that is accessible to the tenant, of the specific grounds for any proposed adverse action by the owner. Such adverse action includes, but is not limited to, imposition of

charges for damages that require maintenance and repair;

(ii) An owner must notify tenants within 5 business days of any changes of ownership, including foreclosure of the property, and provide at least 30 days notice before an impending sale or foreclosure of the property; and

(iii) The owner may not institute a lawsuit against the tenant without providing notice to the tenant.

(4) *A Tenant's rights to available legal proceedings and remedies.*

(i) The tenant shall not be required by the owner to agree to be sued, admit guilt, or agree to a judgment in favor of the owner in a lawsuit brought in connection with the lease;

(ii) The owner may not take, hold, or sell personal property of a household member without notice to the tenant and a court decision on the rights of the parties. This prohibition, however, does not apply to an agreement by the tenant concerning disposition of personal property remaining in the housing unit after the tenant has moved out of the unit. The owner may dispose of this personal property in accordance with State law;

(iii) The tenant may hold the owner or the owner's agents legally responsible for any action or failure to act, whether intentional or negligent;

(iv) In any legal proceedings involving tenant and owner, the owner and tenant agree that the tenant shall be able to exercise the tenant's right to:

(A) Obtain independent legal representation in any legal proceedings in connection with the lease, including in any non-binding arbitration or alternative dispute resolution process;

(B) Have a trial by jury where such right is available to a tenant under Federal, State, or local law; and

(C) Appeal, or to otherwise challenge in court, a court decision in connection with the lease where such right is available to the tenant under Federal, State, or local law;

(v) The tenant may only be required to pay the owner's attorney's fees or other legal costs if the tenant loses in a court proceeding between the owner and the tenant.

(5) *Protection against retaliation.*

(i) An owner may not unreasonably interfere with the tenant's comfort, safety, or enjoyment of a rental unit or retaliate against a tenant, whether for the purpose of causing the housing to become vacant or otherwise, including but not limited to:

(A) Recovery of, or attempt to recover, possession of the housing unit in a manner that is not in accordance with paragraph (d) of this section;

(B) Decreasing services to the housing unit (e.g., trash removal, maintenance) or increasing the obligations of a tenant in a manner that is not in accordance with the requirements of this part;

(C) Interfering with a tenant's right to privacy under applicable State or local law;

(D) Harassing a household or their lawful guests; and

(E) Refusing to honor the terms of the lease.

(ii) A tenant may exercise any right of tenancy without fear of an owner unreasonably interfering with the tenant's comfort, safety, or enjoyment of a rental unit or retaliating against a tenant, including but not limited to:

(A) Reporting of inadequate housing conditions of the housing unit or project to the owner, the participating jurisdiction, code enforcement officials, or HUD;

(B) Requesting enforcement of the written lease or any protections guaranteed under this part; and

(C) Requesting or obtaining enforcement of any applicable protections under Federal, State, or local law.

(6) *Confidentiality.* An owner will keep all records containing personally identifying information of any individual or family who applies for or lives in a HOME-assisted rental unit secure and confidential.

(7) *Prohibition on Discrimination.* The owner shall operate housing assisted under this part in accordance with all applicable nondiscrimination and equal opportunity requirements pursuant to § 92.350 and the VAWA requirements at § 92.359;

(c) *Security deposits.* Security deposits must be refundable and no greater than two months' rent. Surety bonds or security deposit insurance and similar instruments may not be used in lieu of or in addition to a security deposit. Upon termination of tenancy by the owner or tenant, if the owner charges any amount against a tenant's security deposit, the owner must give the tenant a list of all items charged against the security deposit and the amount of each item. After deducting the amount, if any, used to reimburse the owner, the owner must promptly refund the full amount of the unused balance to the tenant.

(d) *Termination of tenancy.*

(1) *Rental housing assisted with HOME funds.*

(i) An owner may not terminate the tenancy of any tenant or household member or refuse to renew the lease of a tenant of rental housing assisted with HOME funds, except for serious or repeated violation of the terms and

conditions of the lease; for violation of applicable Federal, State, or local law; for completion of the tenancy period for transitional housing or failure to follow any required transitional housing supportive services plan; or for other good cause.

(A) Other good cause does not include an increase in the tenant's income or assets, the amount or type of income or assets the tenant possesses, or refusal of the tenant to purchase the housing.

(B) Other good cause may include when a tenant creates a documented nuisance under applicable state or local law or when a tenant unreasonably refuses to provide the owner access to the unit to allow the owner to repair the unit; and

(C) Other good cause may also include when an owner must terminate a tenancy to comply with:

(1) An order issued by a governmental entity or court that requires the tenant vacate the project or unit; or

(2) A local ordinance that necessitates vacating the project or unit.

(D) An owner may establish good cause for a violation of an applicable Federal, State, or local law through a record of conviction of a crime that bears directly on the tenant's continued tenancy, such as a violation of law that affects the safety of persons or property. The owner shall not use a record of arrest, parole or probation, or current indictment to establish such a violation.

(ii) To terminate or refuse to renew tenancy, the owner must serve a written notice to vacate upon the tenant specifying the grounds for the action at least 60 days before the termination of tenancy and provide a copy of the notice to vacate to the participating jurisdiction within 5 business days of issuing notice to the tenant. The minimum 60-day period is not required if the termination of tenancy or refusal to renew is due to a direct threat to the safety of the tenants or employees of the housing or an imminent and serious threat to the property and the termination of tenancy or refusal to renew is in accordance with the requirements of § 92.253(d)(1)(iii).

(iii) The termination of tenancy or refusal to renew must be in accordance with Federal, State, local law, and the requirements of this part, including but not limited to requirements regarding fair housing, nondiscrimination, and VAWA;

(iv) An owner may not terminate the tenancy or evict the tenant or household members without instituting a civil court proceeding in which the tenant or household member has the opportunity to present a defense, or before a court decision on the rights of the parties; and

(v) An owner may not perform a constructive eviction such as locking a tenant out of their unit or stopping service on utilities servicing the tenant's unit. An owner may not create a hostile living environment or refuse to make a reasonable accommodation in order to cause a tenant to terminate their tenancy in a HOME-assisted unit.

(2) *Tenant-based rental assistance.*

(i) The participating jurisdiction must establish written standards for termination or refusal to renew a tenancy. The written standards must be included in the lease and/or rental assistance contract between the participating jurisdiction and the tenant. The participating jurisdiction's written standards must require that termination or refusal to renew a tenancy be for good cause. At a minimum, good cause shall include:

(A) Serious or repeated violation of the terms and conditions of the lease;

(B) Violation of applicable Federal, State, or local law through a tenant's record of conviction of a crime that bears directly on continued tenancy, such as the violation of a law that affects the safety of persons or property. The owner shall not use a record of arrest, parole or probation, or current indictment to establish such a violation;

(C) When a tenant creates a documented nuisance under applicable state or local law or when a tenant unreasonably refuses to provide the owner access to the unit to allow the owner to repair the unit;

(D) When an owner intends to withdraw the unit from the rental market to occupy the unit; allow an owner's family member to occupy the unit; or demolish or substantially rehabilitate the unit;

(E) Termination of the rental assistance contract; or

(F) When an owner must terminate a tenancy to comply with:

(1) An order issued by a governmental entity or court that requires the tenant vacate the project or unit; or

(2) A local ordinance that necessitates vacating the residential real property.

(ii) To terminate or refuse to renew tenancy, the owner must serve a written notice to vacate upon the tenant specifying the grounds for the action at least 30 days before the termination of tenancy and provide a copy of the notice to vacate to the participating jurisdiction within 5 business days of issuing notice to the tenant. The minimum 30-day period is not required if the termination of tenancy or refusal to renew is due to a direct threat to the safety of the tenants or employees of the housing or an imminent and serious threat to the property and the

termination of tenancy or refusal to renew is in accordance with the requirements of § 92.253(d)(2)(iii).

(iii) The termination of tenancy or refusal to renew must be in accordance with Federal, State, local law, and the requirements of this part, including but not limited to requirements regarding fair housing, nondiscrimination, and VAWA.

(iv) An owner may not perform a constructive eviction such as locking a tenant out of their unit or stopping service on utilities servicing the tenant's unit. An owner may not create a hostile living environment or refuse to allow for a reasonable accommodation in order to cause a tenant to terminate their tenancy in a HOME-assisted unit.

(e) *Tenant selection.* An owner of rental housing assisted with HOME funds must comply with the affirmative marketing requirements established by the participating jurisdiction pursuant to § 92.351(a). The owner must adopt and follow written tenant selection policies and criteria that:

(1) Limit the housing to very low-income and low-income families;

(2) Are reasonably related to the applicants' ability to perform the obligations of the lease (*i.e.*, to pay the rent, not to damage the housing, not to interfere with the rights and quiet enjoyment of other tenants);

(3) Limit eligibility or give a preference to a particular segment of the population if permitted in its written agreement with the participating jurisdiction (and only if the limitation or preference is described in the participating jurisdiction's consolidated plan);

(i) Any limitation or preference must not violate nondiscrimination requirements in § 92.350. A limitation or preference does not violate nondiscrimination requirements if the housing also receives funding from a Federal program that limits eligibility to a particular segment of the population (*e.g.*, the Housing Opportunity for Persons with AIDS program under 24 CFR part 574, the Shelter Plus Care program under 24 CFR part 582, the Supportive Housing program under 24 CFR part 583, supportive housing for the elderly or persons with disabilities under 24 CFR part 891) and the limit or preference is tailored to serve that segment of the population; and

(ii) If a project does not receive funding from a Federal program that limits eligibility to a particular segment of the population, the project may have a limitation or preference for persons with disabilities who need services offered at a project only if:

(A) The limitation or preference is limited to the population of families (including individuals) with disabilities that significantly interfere with their ability to obtain and maintain housing;

(B) Such families will not be able to obtain or maintain themselves in housing without appropriate supportive services; and

(C) The families must not be required to accept the services offered at the project. The owner may advertise the project as offering various supportive services, including a description of the specific supportive services available. The project must be open to all eligible persons with disabilities;

(4) Do not exclude an applicant with Federal or State tenant-based rental assistance, such as an applicant with a voucher under the Housing Choice Voucher Program (24 CFR part 982) or an applicant participating in a HOME tenant-based rental assistance program, because of the status of the applicant as a holder of such type of assistance;

(5) Except for small-scale housing, provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable. The participating jurisdiction, upon request by an owner of a small-scale housing project, may establish alternative procedures to a written waiting list for the selection of tenants in small-scale housing, subject to a determination that the selection of tenants from a waiting list in chronological order by the owner is impracticable and approval of the procedures in writing by HUD;

(6) Give prompt written notification to any rejected applicant of the grounds for any rejection;

(7) Comply with the VAWA requirements prescribed in § 92.359; and

(8) Comply with the nondiscrimination requirements prescribed in § 92.350.

(f) *Health and Safety.* In addition to the requirements in § 92.355, if a participating jurisdiction has actual knowledge of an environmental, health, or safety hazard affecting a project, unit, or HOME tenants, the participating jurisdiction must contact the affected owner and tenants and provide them with a summary of the nature, date, and scope of such hazards. If an owner has actual knowledge of an environmental, health, or safety hazard affecting their project, units within their project, or tenants residing within their projects, the owner must inform the participating jurisdiction and provide them with a summary of the nature, date, and scope of such hazards. This notification requirement only applies to

environmental, health, and safety hazards that are discovered after an environmental review performed pursuant to § 92.352 has already taken place.

■ 26. In § 92.254:

- a. Amend paragraph (a)(2)(iii) by removing the words “single- family” and adding, in their place, the words “single family”;
- b. Revise paragraph (a)(2)(iii);
- c. Add paragraph (a)(2)(iv);
- d. Revise the second sentence of paragraph (a)(3);
- e. Amend paragraph (a)(4) by removing the words “affordability period” and adding, in their place, the words “period of affordability”;
- f. Revise paragraphs (a)(5)(i), (a)(5)(ii), (a)(6), and (a)(7);
- g. Redesignate paragraphs (b) through (f) as paragraphs (c) through (g) and redesignate paragraph (a)(9) as paragraph (b);
- h. Revise newly redesignated paragraph (b); and
- i. Revise the introductory text to newly redesignated paragraph (f), and newly redesignated paragraph (g)(1).

The revisions and additions read as follows:

§ 92.254 Qualification as affordable housing: Homeownership.

(a) * * *

(2) * * *

(iii) If a participating jurisdiction intends to use HOME funds for homebuyer assistance or for the rehabilitation of owner-occupied single family properties, the participating jurisdiction must use the HOME affordable homeownership limits provided by HUD for newly constructed housing and for existing housing.

(A) HUD will provide limits for affordable newly constructed housing based on 95 percent of the median purchase price for the area using Federal Housing Administration (FHA) single family mortgage program data for newly constructed housing, with a minimum limit based on 95 percent of the U.S. median purchase price for new construction for nonmetropolitan areas.

(B) HUD will provide limits for affordable existing housing based on 95 percent of the median purchase price for the area using FHA single family mortgage program data for existing housing and other appropriate data that are available Nation-wide for sales of existing housing, with a minimum limit based on 95 percent of the State-wide nonmetropolitan area median purchase price using this data.

(iv) In lieu of the limits provided by HUD, the participating jurisdiction may

determine 95 percent of the median area purchase price for single family housing in the jurisdiction annually, as follows.

(A) The participating jurisdiction must set forth the limits for single family housing of one, two, three, and four units, for the jurisdiction. The participating jurisdiction may determine separate limits for existing housing and newly constructed housing.

(B) For the limits on housing located outside of metropolitan areas, a State may aggregate sales data from more than one county if the counties are contiguous and similarly situated.

(C) The participating jurisdiction must include the following information in the annual action plan of the Consolidated Plan submitted to HUD for review and must update the information in each action plan.

(1) The 95 percent of median area purchase price must be established in accordance with a market analysis that ensured that a sufficient number of recent housing sales are included in the survey;

(2) Sales must cover the requisite number of months based on volume: For 500 or more sales per month, a 1-month reporting period; for 250 through 499 sales per month, a 2-month reporting period; for less than 250 sales per month, at least a 3-month reporting period. The data must be listed in ascending order of sales price;

(3) The address of the listed properties must include the location within the participating jurisdiction. Lot, square, and subdivision data may be substituted for the street address;

(4) The housing sales data must reflect all, or nearly all, of the single family housing sales in the entire participating jurisdiction; and

(5) To determine the median, a participating jurisdiction must take the middle sale on the list if an odd number of sales, and if an even number, take the higher of the middle numbers and consider it the median. After identifying the median sales price, the amount should be multiplied by 0.95 to determine the 95 percent of the median area purchase price.

* * * * *

(3) * * * If there is no ratified sales contract with an eligible homebuyer for the housing within 12 months of the date of completion of construction or rehabilitation, the housing must be rented to an eligible tenant as affordable rental housing and must comply with the requirements in § 92.252, including the period of affordability in § 92.252(d).

* * *

* * * * *

(5) * * *

(i) *Resale*. Resale requirements must ensure, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability, that the housing is made available for subsequent purchase only to a buyer whose family qualifies as a low-income family and will use the property as the family's principal residence. The resale requirement must also ensure that the price at resale provides the HOME-assisted homeowner a fair return on investment (including the homeowner's investment and any improvements) and ensure the housing will remain affordable to a reasonable range of low-income homebuyers. The resale price is the fair return on investment added to the original sales price of the property, subject to market conditions. The participating jurisdiction must specifically define “fair return on investment” and “affordability to a reasonable range of low-income homebuyers,” and specifically address how it will make the housing affordable to a low-income homebuyer in the event that the resale price necessary to provide a fair return is not affordable to the subsequent homebuyer. The period of affordability is based on the total amount of HOME funds invested in the housing.

(A) Permissible methods of determining fair return and the resale price include but are not limited to the following:

(1) *Itemized Formula*. To determine fair return on investment and resale price, the participating jurisdiction may use an itemized formula to add or subtract common, clearly defined factors that increase or decrease the value of a homeowner's investment in the property over the term of ownership. This formula must include the value of capital improvements and the sum of the downpayment and all principal payments by the homeowner on the loan secured by the property. The formula may depreciate the value of the capital improvements and may take into consideration any reduction in value due to property damage or delayed or deferred maintenance of the property condition. The fair return on a homeowner's investment under this formula would be calculated by taking the sum of the defined factors for the homeowner's investment in the property over the term of ownership and multiplying this amount by a clearly defined, publicly accessible index or standard.

Change in clearly defined, publicly accessible index or standard

MULTIPLIED BY

$$\left(\begin{array}{l} \text{(Homeowner's downpayment + sum of all homeowner principal payments + value of capital improvements)} \\ \text{MINUS} \\ \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \end{array} \right)$$

EQUALS

Fair return

Original sales price + Fair return = Resale price

(2) *Appraisal Formula.* The participating jurisdiction may use an appraisal formula to determine fair return on investment and resale price based on the amount of market appreciation, if any, over the term of ownership. Under this method, the appraisals must be conducted by a State

licensed or certified third-party appraiser. The amount of market appreciation over the term of ownership is determined by subtracting the appraised value at the time of initial purchase from the appraised value of the property at the time of resale. The fair return on a homeowner's

investment under this formula is calculated by multiplying a clearly defined, publicly accessible standard or index by the amount of market appreciation over the term of homeownership.

Clearly defined, publicly accessible index or standard x (New appraisal – initial appraisal) = Fair return

Original sales price + Fair return = Resale price

(3) *Index Formula.* The participating jurisdiction may use an index formula to determine fair return on investment and resale price based on the change in value of a homeowner's investment over the term of ownership. Index formulas adjust the value of the homeowner's investment in proportion to changes in

an index, such as the change in median household income. To determine the homeowner's fair return using this model, the sum of the property's original purchase price and the value of any capital improvements to the property is multiplied by the change in the specified index during the term of

ownership. The formula may also depreciate the value of the capital improvements and may take into consideration any reduction in value due to property damage or delayed or deferred maintenance of the property condition.

Change in clearly defined, publicly accessible index

MULTIPLIED BY

$$\left(\begin{array}{l} \text{(Original purchase price + value of capital improvements)} \\ \text{MINUS} \\ \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \end{array} \right)$$

EQUALS

Fair return

Original sales price + Fair return = Resale price

(4) *Fixed-Rate Formula.* The participating jurisdiction may use a fixed-rate formula to determine the homeowner's fair return on investment. Fixed-rate formulas adjust the value of the homeowner's investment by a fixed percentage (rate) per year (e.g., 3.5 percent). To determine the fair return on

investment using this model, the fixed rate is multiplied by the number of years the homeowner owned and occupied the home (e.g., 3.5% × 10 years = 35%). The resulting rate is then multiplied by the sum of the original purchase price of the home and the value of any capital improvements to

the property to calculate the fair return to the homeowner. The formula may also depreciate the value of the capital improvements and may take into consideration any reduction in value due to property damage or delayed or deferred maintenance of the property condition.

(Fixed rate x length of homeownership)

MULTIPLIED BY

$$\left(\frac{\begin{array}{c} \text{(Original purchase price + value of capital improvements)} \\ \text{MINUS} \\ \text{OPTIONAL (Depreciation of capital improvements + property damage + delayed or deferred maintenance)} \end{array}}{\begin{array}{c} \text{EQUALS} \\ \text{Fair return} \end{array}} \right)$$

$$\text{Original sales price} + \text{Fair return} = \text{Resale price}$$

(B) Except as provided in paragraph (a)(5)(i)(C) of this section, deed or use restrictions, a recorded agreement restricting the use of the property, liens on real property, covenants running with the land, or other similar mechanisms approved by HUD in writing must be used to impose the resale requirements.

(C) The affordability restrictions may terminate upon occurrence of any of the following termination events: foreclosure, transfer in lieu of foreclosure, or assignment of an FHA insured mortgage to HUD. If the owner of record before the termination event obtains an ownership interest in the property after the termination event, then the affordability restrictions shall be revived under the same terms prior to the termination event, including a minimum period of affordability equal to the terminated period of affordability.

(D) Certain housing may be presumed to meet the resale restrictions (*i.e.*, the housing will be available and affordable to a reasonable range of low-income homebuyers; a low-income homebuyer will occupy the housing as the family's principal residence; and the original owner will be afforded a fair return on investment) during the period of affordability without the imposition of enforcement mechanisms by the participating jurisdiction. The presumption must be based upon a market analysis of the neighborhood in which the housing is located. The market analysis must include an evaluation of the location and characteristics of the housing and residents in the neighborhood (*e.g.*, sale prices, age and amenities of the housing stock, incomes of residents, percentage of owner-occupants) in relation to housing and incomes in the housing market area. An analysis of the current and projected incomes of neighborhood residents for an average period of affordability for homebuyers in the neighborhood must support the conclusion that a reasonable range of low-income families will continue to qualify for mortgage financing. For example, an analysis shows that the housing is modestly priced within the

housing market area and that families with incomes of 65 percent to 80 percent of the area median income can afford monthly payments under average FHA terms without other government assistance and housing will remain affordable at least during the next five to seven years compared to other housing in the market area; the size and amenities of the housing are modest and substantial rehabilitation will not significantly increase the market value; the neighborhood has housing that is not currently owned by the occupants, but the participating jurisdiction is encouraging homeownership in the neighborhood by providing homeownership assistance and by making improvements to the streets, sidewalks, and other public facilities and services. If a participating jurisdiction in preparing a neighborhood revitalization strategy under § 91.215(e)(2) of its consolidated plan has incorporated the type of market data described above, that submission may serve as the required analysis under this section. If the participating jurisdiction continues to provide homeownership assistance for housing in the neighborhood, it must periodically update the market analysis to verify the original presumption of continued affordability.

(ii) Recapture.

(A) Recapture provisions must ensure that the participating jurisdiction recoups all or a portion of the HOME assistance provided to the homebuyers if the housing does not continue to be the principal residence of the family for the duration of the period of affordability. The participating jurisdiction may structure its recapture provisions based on its program design and market conditions. The period of affordability is based upon the amount of HOME funds that directly assisted the homebuyer to buy the dwelling unit. This amount includes any HOME assistance that assisted the homebuyer to purchase the housing or reduced the purchase price paid by the homebuyer from fair market value to an affordable price but excludes the amount of HOME assistance provided to develop the unit

that does not assist the homebuyer or reduce the purchase price paid by the homebuyer. Recapture provisions may permit the subsequent homebuyer to assume the HOME assistance (subject to the HOME requirements for the remainder of the period of affordability) if the subsequent homebuyer is low-income, and no additional HOME assistance is provided.

(B) The following options for recapture requirements are acceptable to HUD. The participating jurisdiction may adopt, modify, or develop its own recapture requirements for HUD approval. In establishing its recapture requirements, the participating jurisdiction is subject to the limitation that when the recapture requirement is triggered by a sale (voluntary or involuntary) of the housing unit, the amount recaptured cannot exceed the net proceeds, if any. The net proceeds are the sales price minus superior loan repayment (other than HOME funds) and any closing costs.

(1) *Recapture entire amount.* The participating jurisdiction may recapture the entire amount of the HOME investment from the homeowner.

(2) *Reduction during period of affordability.* The participating jurisdiction may reduce the HOME investment amount to be recaptured on a pro rata basis for the time the homeowner has owned and occupied the housing measured against the required period of affordability.

(3) *Shared net proceeds.* If the net proceeds are not sufficient to recapture the full HOME investment (or a reduced amount as provided for in paragraph (a)(5)(ii)(A)(2) of this section) plus enable the homeowner to recover the amount of the homeowner's downpayment and any capital improvement investment made by the owner since purchase, the participating jurisdiction may share the net proceeds. The net proceeds are the sales price minus loan repayment (other than HOME funds) and closing costs. The net proceeds may be divided proportionally as set forth in the following mathematical formulas:

$$\frac{\text{HOME investment}}{\text{HOME investment} + \text{homeowner investment}} \times \text{Net proceeds} = \text{HOME amount to be recaptured}$$

$$\frac{\text{homeowner investment}}{\text{HOME investment} + \text{homeowner investment}} \times \text{Net proceeds} = \text{amount to homeowner}$$

(4) *Owner investment returned first.* The participating jurisdiction may permit the homebuyer to recover the homebuyer's entire investment (downpayment and capital improvements made by the owner since purchase) before recapturing the HOME investment.

(5) *Amount subject to recapture.* The HOME investment subject to recapture is the amount of HOME funds that directly assisted the homebuyer to buy the housing. This includes the amount that assisted the homebuyer to purchase the housing or reduced the purchase price paid by the homebuyer from fair market value to an affordable price but excludes the amount of HOME assistance provided to develop the unit that did not assist the homebuyer or reduce the purchase price paid by the homebuyer. The recaptured funds must be used to carry out HOME-eligible activities in accordance with the requirements of this part. If the HOME assistance is only used for the development subsidy and therefore not subject to recapture, the resale option must be used.

(6) *Special considerations for single family properties with more than one unit.* If the HOME funds are only used to assist a low-income homebuyer to acquire one unit in single family housing containing more than one unit and the assisted unit will be the principal residence of the homebuyer, the affordability requirements of this section apply only to the assisted unit. If HOME funds are also used to assist the low-income homebuyer to acquire one or more rental units in the single family housing, the affordability requirements of § 92.252 apply to the assisted rental units, except that the participating jurisdiction may impose resale or recapture restrictions on all assisted units (owner-occupied and rental units) in the single family housing. If resale restrictions are used, the affordability requirements on all assisted units continue for the period of affordability. If recapture restrictions are used, the affordability requirements on the assisted rental units may be terminated, at the discretion of the participating jurisdiction, upon recapture of the HOME investment. If HOME funds are used to assist only the rental units in a single family property,

then the requirements of § 92.252 would apply and the owner-occupied unit would not be subject to the income targeting or affordability provisions of § 92.254.

(7) *Homebuyer assistance for Lease-purchase.* In homeownership projects that receive HOME funds for acquisition, rehabilitation, or new construction, HOME funds may be used to assist homebuyers through lease-purchase programs. The owner and homebuyer must execute a lease-purchase agreement under an existing lease-purchase program prior to the date of completion of acquisition, construction, or rehabilitation and the homebuyer must qualify as a low-income family at the time of signing the lease-purchase agreement. If HOME funds are used for rehabilitation or new construction, the housing must be purchased by the homebuyer within 36 months of signing the lease-purchase agreement. If HOME funds are used to acquire housing that will be resold to a homebuyer, the housing must be purchased by the homebuyer within 42 months of signing the lease-purchase agreement. Owners and homebuyers that have entered into a lease-purchase agreement pursuant to the requirements in this paragraph are subject to the affordability requirements in this section unless the housing is not purchased within the required timeframes in this paragraph. If the housing is not purchased within the required timeframes in this paragraph, the housing is subject to the requirements for affordable rental housing in § 92.252. In determining the income eligibility of the family, the participating jurisdiction must include the income of all persons living in the housing.

(b) *Preserving affordability of housing assisted with HOME funds.* When there is a termination event for affordability restrictions, a participating jurisdiction may take the following actions to preserve the affordability of the property:

(1) The participating jurisdiction may exercise purchase options, rights of first refusal, or other preemptive rights to obtain ownership of the housing before foreclosure to preserve affordability, subject to the following requirements:

(i) The housing must be sold to an eligible homebuyer in accordance with paragraph (a)(3) of this section within 6 months of the date the participating jurisdiction obtains ownership;

(ii) The period of affordability for the eligible homebuyer must be equal to the remaining period of affordability of the former homeowner unless additional HOME funds are used to directly assist the eligible homebuyer (*i.e.*, down payment assistance);

(iii) If the participating jurisdiction directly assists the eligible homebuyer with additional HOME funds, then the period of affordability must be recalculated in accordance with the table in § 92.254(a)(4) based on the total amount of additional HOME funds invested. The additional investment must be treated as a new project; and

(iv) The total HOME funds for a project (original investment plus additional investment) must not exceed the per-unit subsidy limit in § 92.250(a) in effect at the time of the additional investment, subject to HUD approval.

(2) The participating jurisdiction may use additional HOME funds for the following costs:

(i) The cost for the participating jurisdiction to obtain ownership of the HOME-assisted housing through a purchase option, right of first refusal, or other preemptive right before foreclosure or at the foreclosure sale. This cost must be treated as an amendment to the original project. The foreclosure costs to acquire housing with a HOME loan in default is an eligible cost; however, HOME funds may not be used to repay a loan made with HOME funds.

(ii) The cost of the participating jurisdiction to undertake any necessary rehabilitation for the housing acquired. This includes the rehabilitation required for the housing to meet applicable property standards in § 92.251. This cost must be treated as an amendment to the original project.

(iii) The cost to the participating jurisdiction of owning the housing pending resale to another homebuyer. This cost must be treated as an amendment to the original project.

(iv) The cost to assist an eligible homebuyer in purchasing the housing. This cost must be treated as a cost for a new project and not as an amendment to the original project.

(v) As an alternative to charging costs to the HOME program under § 92.206, the participating jurisdiction may charge the costs to the HOME program under § 92.207 as a reasonable administrative cost of its HOME program. To the extent administrative funds are used, they may be reimbursed, in whole or in part, when the housing is sold to a new eligible homebuyer.

(3) The participating jurisdiction may permit the Community Land Trust, as defined in § 92.2, that originally developed the HOME-assisted housing, to exercise a purchase option, right of first refusal, or other preemptive right to obtain ownership of the housing to preserve affordability, including but not limited to the right to purchase the housing in lieu of foreclosure, under the following conditions:

(i) The Community Land Trust obtains ownership of the housing, subject to existing HOME affordability restrictions;

(ii) The housing must be resold to an eligible homebuyer in accordance with paragraph (a)(3) of this section within 6 months;

(iii) The period of affordability for the eligible homebuyer is equal to the remaining period of affordability of the former homeowner; and

(iv) The participating jurisdiction may not provide additional HOME funds to the Community Land Trust to obtain ownership, rehabilitate the housing, own/hold the housing pending resale to the next homebuyer, or provide down payment assistance to the next eligible homebuyer.

* * * * *

(f) *Providing homeownership assistance through lenders.* Subject to the requirements of paragraph (f) of this section, the participating jurisdiction may provide homeownership assistance through a lending institution that is a contractor or nonprofit lending institution that is a subrecipient that also provides the first mortgage loan to a low-income family.

* * * * *

(g) * * *

(1) Underwriting standards for homeownership assistance to determine the amount of assistance necessary to achieve sustainable homeownership. These standards must evaluate the projected overall debt of the family after the purchase of the housing, the maximum amount that a participating jurisdiction may provide a family, the appropriateness of the amount of assistance, assets available to a family to acquire the housing, and financial resources to sustain homeownership. A participating jurisdiction may not

provide a single, fixed amount of assistance to each homebuyer that participates in the participating jurisdiction's homebuyer program;

* * * * *

■ 27. Revise § 92.255 to read as follows:

§ 92.255 Purchase of HOME units by in-place tenants.

(a) During a HOME-assisted rental unit's period of affordability, the participating jurisdiction may permit an owner to sell or otherwise convey a HOME-assisted rental unit to an existing tenant in accordance with the requirements of § 92.254. However, refusal by the tenant to purchase the housing does not constitute good cause for termination of tenancy or failure to renew the lease. The participating jurisdiction may not permit the use of a lease-purchase program under this section.

(b) If no additional HOME funds are used to enable the tenants to become homeowners, the homeownership units are subject to a period of affordability equal to the remaining period of affordability if the units continued as rental units. The participating jurisdiction must impose resale requirements that comply with § 92.254(a) for the required period of affordability.

(c) If additional HOME funds are used to directly assist the tenants to become homeowners, the period of affordability is the remaining period of affordability if the unit had remained a rental unit or the required period under § 92.254(a)(4) for the amount of direct homeownership assistance provided, whichever is longer.

§ 92.258 [Amended]

■ 28. In § 92.258:

■ a. Amend paragraphs (a) and (b)(1) by removing the words "single-family" and adding, in their place, the words "single family"; and

■ b. Amend the introductory text to paragraph (d)(3) by removing the citation "§ 92.252(e)" and adding, in its place, the citation "§ 92.252(d).

■ 29. In § 92.300:

■ a. Amend the introductory text of paragraph (a) by removing the words "developed or sponsored" and adding, in their place, the words "developed, or sponsored";

■ b. Revise paragraphs (a)(2) through (4) and the introductory text of paragraph (a)(5);

■ c. Amend the introductory text of paragraph (a)(5)(iii) by removing the word "nonprofit" and adding, in its place, the words "private nonprofit";

■ d. Amend the introductory text of paragraph (a)(6) by replacing

"community development housing organization" with "community housing development organization" and by removing the word "new";

■ e. Revise paragraphs (a)(6)(i) and (ii)(A), paragraph (a)(7), and the last sentence of paragraph (b);

■ f. Amend paragraph (e) by removing the words "developed or sponsored" and adding, in their place, the words "developed, or sponsored" and by removing the words "and specifies" and adding, in their place, the words "and must specify"; and

■ g. Revise the first sentence of paragraph (f).

The revisions read as follows:

§ 92.300 Set-aside for community housing development organizations (CHDOs).

(a) * * *

(2) Rental housing is "owned" by the community housing development organization if the community housing development organization is the owner in fee simple absolute of rental housing (or has a long term ground lease) to low-income families in accordance with § 92.252. If the housing is to be rehabilitated or constructed, the community housing development organization hires and oversees the developer that rehabilitates or constructs the housing. The community housing development organization must oversee or hire and contract with an experienced project manager to oversee all aspects of the development, including obtaining zoning, securing non-HOME financing, selecting a developer or general contractor, overseeing the progress of the work, and determining the reasonableness of costs. The community housing development organization must own the rental housing during development and for a period at least equal to the period of affordability in § 92.252. If the CHDO acquires housing that meets the property standards in § 92.251, the CHDO must own the rental housing for a period at least equal to the period of affordability in § 92.252.

(3) Rental housing is "developed" by the community housing development organization if the community housing development organization is the owner in fee simple absolute (or has a long term ground lease) and the developer of housing that will be constructed or existing substandard housing that will be rehabilitated for rent to low-income families in accordance with § 92.252. To be the "developer," the community housing development organization may share developer responsibilities with another entity but must be in charge of all aspects of the development process, including selecting the site, obtaining

permit approvals and all project financing, selecting architects, engineers, and general contractors, overseeing project progress, and determining the reasonableness of costs. At a minimum, the community housing development organization must own the housing until project completion.

(4) Rental housing is “sponsored” by the community housing development organization if it is rental housing “owned” or “developed” in accordance with paragraph (a)(2) or (3) of this section, as applicable, by a subsidiary of a community housing development organization, a limited partnership of which the community housing development organization or its subsidiary is the managing general partner, or a limited liability company of which the community housing development organization or its subsidiary is the managing member.

(i) The subsidiary of the community housing development organization must be a nonprofit organization and must be wholly owned by the community housing development organization. If the limited partnership or limited liability company agreement permits the community housing development organization to be removed as the managing general partner or managing member, the agreement must provide that the removal must be for cause and that the community housing development organization must be replaced with another community housing development organization.

(ii) The HOME funds must be provided by the participating jurisdiction directly to the entity that owns the project.

(5) HOME-assisted rental housing is also “sponsored” by a community housing development organization if the community housing development organization “developed” the rental housing project in accordance with paragraph (a)(3) of this section and agrees to convey the project to an identified private nonprofit organization at a predetermined time after completion of the project. Sponsored rental housing, as provided in this paragraph (a)(5), is subject to the following requirements:

* * *

(6) * * *

(i) To be the “developer,” the community housing development organization may share the developer role with another entity but must be in charge of all aspects of the development process, including selecting the site, obtaining permit approvals and all project financing, selecting architects, engineers, and general contractors,

overseeing project progress, determining the reasonableness of costs, identifying eligible homebuyers, and overseeing the sale of homeownership units. The community housing development organization may provide direct homeownership assistance (e.g., downpayment assistance) when it sells the housing to low-income families and the community housing development organization will not be considered a subrecipient. The HOME funds for downpayment assistance shall not be greater than 10 percent of the amount of HOME funds for development of the housing.

(ii) * * *

(A) While proceeds retained by the community housing development organization are not subject to the requirements of this part, the participating jurisdiction must specify in the written agreement with the community housing development organization whether the proceeds are to be used for HOME-eligible activities or other housing activities to benefit low-income families.

* * *

(7) The participating jurisdiction must determine the form of assistance (e.g., grant or loan) in accordance with § 92.205(b) that it will provide to the community housing development organization for a rental housing project under paragraph (a)(4) of this section and must provide the assistance directly to the entity that owns the project.

(b) * * * If during the first 24 months of its participation in the HOME Program a participating jurisdiction cannot identify a sufficient number of capable community housing development organizations, up to 20 percent of the minimum community housing development organization set aside specified in paragraph (a) of this section (but not more than \$150,000 during the 24 month period) may be committed to an organization that meets the definition of “community housing development organization” in § 92.2, except for the requirements in paragraph (9) of the definition, in order to develop demonstrated capacity and qualify as a community housing development organization in the jurisdiction.

* * *

(f) The participating jurisdiction must ensure that a community housing development organization does not receive HOME funding for any fiscal year in an amount that provides more than \$50,000 or 50 percent of the community housing development organization’s total operating expenses

in that fiscal year, whichever is greater.

* * *

■ 30. Revise § 92.302 to read as follows:

§ 92.302 Housing education and organizational support.

HUD is authorized to provide education and organizational support assistance, in conjunction with HOME funds made available to community housing development organizations in accordance with section 233 of the Act.

(a) HUD will publish a notice in the **Federal Register** announcing the availability of funding under this section, as appropriate. The notice need not include funding for each of the eligible activities but may target funding from among the eligible activities.

(b) Notwithstanding the definition of “community land trust” in § 92.2, HUD may provide housing education and organizational support assistance under this section to a community land trust only if the following requirements are met:

(1) The community land trust meets the definition of a “community housing development organization” at § 92.2, except for the requirements in paragraphs (9) and (10) of the definition.

(2) The community land trust is established to complete the activities in paragraph (b)(3) of this section.

(3) The community land trust:

(i) Acquires land to hold in perpetuity and primarily for conveyance under long-term ground leases;

(ii) Transfers ownership of any structural improvements located on such leased land to the lessees; and

(iii) Retains a preemptive option to purchase any such structural improvement at a price determined by formula that is designed to ensure that the improvement remains affordable to low- and moderate-income families in perpetuity;

(4) The community land trust’s corporate membership is open to residents of a particular geographic area, as specified in the organization’s bylaws; and

(5) The board of directors:

(i) Includes a majority of members who are elected by the corporate membership; and

(ii) Is composed of equal numbers of lessees pursuant to paragraph (b)(2)(ii), members who are not lessees, and any other category of persons described in the organization’s bylaws.

§ 92.351 [Amended]

■ 31. Amend the last sentence of § 92.351(a)(1) by removing the words “If participating” and adding, in their place, the words “If the participating” and by removing the citation

“§ 92.253(d)(3)” and adding, in its place, the citation “§ 92.253(e)(3)”.

§ 92.352 [Amended]

■ 32. In § 92.352:

■ a. Amend paragraph (a) by removing the words “the cost” and adding, in their place, the word “cost”; and

■ b. Amend paragraph (b)(1) by removing the word “decisionmaking” and adding, in its place, the words “decision making”.

■ 33. In § 92.353:

■ a. Revise paragraph (c)(2)(ii)(A) by removing the words “preceded by at least 30 days advance written notice to the tenant specifying the grounds for the action” and adding, in their place, the words “in accordance with § 92.253(d)”; and

■ b. Revise paragraph (c)(2)(ii)(C).

The revision to read as follows:

§ 92.353 Displacement, relocation, and acquisition.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(C) For purposes of the URA, the person meets the definition of “persons not displaced” as defined in 49 CFR 24.2; or

* * * * *

§ 92.354 [Amended]

■ 34. Amend § 92.354, in paragraph (a)(2) by removing the word “single-family” and adding, in its place, the words “single family”.

■ 35. In § 92.356:

■ a. Revise paragraph (d)(1);

■ b. Redesignate paragraphs (e)(2) through (6) as paragraphs (e)(3) through (7), respectively;

■ c. Add new paragraph (e)(2); and

■ d. Amend paragraph (f)(1) by removing the citation “§ 92.252(e)” and adding, in its place, the citation “§ 92.252(d)”.

The revisions and additions read as follows:

§ 92.356 Conflict of interest.

* * * * *

(d) * * *

(1) A disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict (public disclosure is considered a combination of any of the following: publication on the recipient’s website, including social media; electronic mailings; media advertisements; public service announcements; and display in public areas such as libraries, grocery store bulletin boards, and neighborhood centers), evidence of the public

disclosure, and a description of how the public disclosure was made; and

* * * * *

(e) * * *

(2) Whether an opportunity was provided for open competitive bidding or negotiation;

* * * * *

■ 36. In § 92.454:

■ a. Amend paragraph (a)(3) by removing the word “and”;

■ b. Amend paragraph (a)(4) by removing the text “participating jurisdiction.” and adding, in its place, the text “participating jurisdiction; and”;

■ c. Add paragraph (a)(5); and

■ d. Amend paragraph (b) by removing the words “participating jurisdictions that” and adding, in their place, the words “participating jurisdictions whose funds were reduced under § 92.551 or that”.

The addition reads as follows:

§ 92.454 Reallocations by formula.

(a) * * *

(5) Any HOME funds available for reallocation as a result of any reductions under 24 CFR 92.551 or 92.552.

* * * * *

■ 37. Amending § 92.500 by revising paragraph (c)(2)(ii) to read as follows:

§ 92.500 The HOME Investment Trust Fund.

* * * * *

(c) * * *

(2) * * *

(ii) The statute or local ordinance requires repayments from its own affordable housing trust fund to be made to the local account;

* * * * *

■ 38. In § 92.502:

■ a. Revise paragraph (b);

■ b. Amend paragraph (c)(1) by removing the words “set-up”; and

■ c. Revise paragraphs (d)(1) and (2).

The revisions read as follows:

§ 92.502 Program disbursement and information system.

* * * * *

(b) *Project funding.* After the participating jurisdiction executes the HOME Investment Partnership Agreement, submits the applicable banking and security documents, complies with the environmental requirements under 24 CFR part 58 for release of funds, and commits funds to a specific local project, the participating jurisdiction may provide funding to an activity by identifying specific investments in the disbursement and information system. The participating jurisdiction is required to enter

complete project set-up information before providing funding to the project.

* * * * *

(d) * * *

(1) Complete project completion information must be entered into the disbursement and information system, or otherwise provided to HUD.

(2) Additional HOME funds may be committed to a project up to one year after project completion, but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250 at the time of underwriting.

* * * * *

■ 39. In § 92.504:

■ a. Revise the section heading and paragraph (b), and revise and republish paragraph (c); and

■ b. Remove paragraph (d).

The revisions read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements.

* * * * *

(b) *Executing a written agreement.*

Before disbursing any HOME funds to any entity, the participating jurisdiction must enter into a legally binding written agreement with that entity. Before disbursing any HOME funds to any entity, a State recipient, subrecipient, or contractor that is administering all or a part of the HOME program on behalf of the participating jurisdiction must also enter into a legally binding written agreement with that entity. The written agreement must ensure compliance with the requirements of this part and be a separate agreement from project financing documents (*e.g.*, mortgage or deed of trust, regulatory agreement, or promissory note).

(c) *Provisions in written agreements.*

The contents of the agreement may vary depending upon the role the entity is asked to assume or the type of project undertaken. This section details basic requirements and the minimum provisions by role and type of entity that must be included in a written agreement.

(1) *State recipient.* The provisions in the written agreement between the State and a State recipient will depend on the program functions that the State specifies the State recipient will carry out in accordance with § 92.201(b). In accordance with § 92.201, the written agreement must either require the State recipient to comply with the requirements established by the State or require the State recipient to establish its own requirements to comply with this part, including requirements for income determinations and underwriting subsidy layering guidelines, rehabilitation standards,

refinancing guidelines, homebuyer program policies, and affordability.

(i) *Use of the HOME funds.* The agreement must describe the amount and use of the HOME funds to administer one or more programs to produce affordable housing, provide downpayment assistance, or provide tenant-based rental assistance, including the anticipated type and number of housing projects to be funded (e.g. the number of single family homeowner loans to be made or number of homebuyers to receive downpayment assistance), tasks to be performed, a schedule for completing the tasks (including a schedule for committing funds to projects that meet the deadlines established by this part), a budget for each program, and any requirement for matching contributions. These items must be in sufficient detail to provide a sound basis for the State to effectively monitor performance under the agreement.

(ii) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.252 or § 92.254, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the period of affordability. The agreement must require a means of enforcement of the affordability requirements by the State participating jurisdiction or, if the State recipient will be the owner at project completion of the affordable housing, the intended beneficiaries. The means of enforcement may include liens on real property, deed or use restrictions, a recorded agreement restricting the use of the property, covenants running with the land, or other mechanisms approved by HUD in writing, under which the participating jurisdiction has the right to require specific performance. The agreement must establish whether repayment of HOME funds must be remitted to the State or retained by the State recipient for additional eligible activities.

(iii) *Program income.* The agreement must state whether program income is to be remitted to the State or retained by the State recipient for additional eligible activities.

(iv) *Uniform administrative requirements.* The agreement must require the State recipient to comply with applicable uniform administrative requirements, as described in § 92.505.

(v) *Project requirements.* The agreement must require compliance with project requirements in subpart F of this part, as applicable in accordance with the type of project assisted. For any projects involving HOME rental housing, the agreement must require

that the HOME tenancy addendum is used in accordance with § 92.253 for all HOME-assisted units. For tenant-based rental assistance, the agreement must require compliance with the requirements at § 92.253(a)–(c) and (d)(2).

(vi) *Other program requirements.* The agreement must require the State recipient to carry out each activity in compliance with all Federal laws and regulations described in subpart H of this part, except that the State recipient does not assume the State's responsibilities for release of funds under § 92.352 and the intergovernmental review process in § 92.357 does not apply to the State recipient. If HOME funds are provided for development of rental housing or provision of tenant-based rental assistance, the agreement must set forth all obligations the State imposes on the State recipient in order to meet the VAWA requirements under § 92.359, including notice obligations and any obligations with respect to the emergency transfer plan (including whether the State recipient must develop its own plan or follow the State's plan).

(vii) *Affirmative marketing.* The agreement must specify the State recipient's affirmative marketing responsibilities in accordance with § 92.351.

(viii) *Requests for disbursement of funds.* The agreement must specify that the State recipient may not request disbursement of HOME funds under this agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed. Program income must be disbursed before the State recipient requests funds from the State.

(ix) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted in order to assist the State in meeting its recordkeeping and reporting requirements.

(x) *Enforcement of the written agreement.* The agreement must specify remedies for breach of the provisions of the written agreement. The agreement must specify that, in accordance with 2 CFR 200.339, suspension or termination may occur if the State recipient materially fails to comply with any term of the agreement. The State may permit the agreement to be terminated in whole or in part in accordance with 2 CFR 200.340.

(xi) *Written agreement.* Before providing HOME funds to any owner, community housing development organization, subrecipient, homeowner,

homebuyer, tenant (or landlord) receiving tenant-based rental assistance, or contractor providing services to or on behalf of the State recipient, the State recipient must have a fully executed written agreement with such person or entity that meets the requirements of this section. For affordable housing assisted with HOME funds, the State recipient must provide HOME funds directly to the owner under the terms and conditions of the written agreement. The agreement must establish that any repayment on any form of assistance of HOME funds must be remitted to the State or, if permitted by the State, retained by the State recipient for additional eligible activities.

(xii) *Duration of the agreement.* The duration of the agreement will depend on which functions the State recipient performs (e.g., whether the State recipient or the State has responsibility for monitoring rental projects for the period of affordability) and which activities are funded under the agreement.

(xiii) *Fees.* The agreement must prohibit the State recipient and its subrecipients and community housing development organizations from charging for any of the prohibited costs listed in § 92.214, including but not limited to servicing, origination, processing, inspection, or other fees for the costs of administering a HOME program.

(2) *Subrecipient.* The agreement must set forth and require the subrecipient to follow the participating jurisdiction's requirements, including requirements for income determinations, underwriting and subsidy layering guidelines, rehabilitation standards, refinancing guidelines, homebuyer program policies, and affordability requirements. The agreement between the participating jurisdiction and the subrecipient must include the following:

(i) *Use of the HOME funds.* The agreement must describe the amount and use of the HOME funds for one or more programs, including the anticipated type and number of housing projects to be funded (e.g., the number of single family homeowners loans to be made or the number of homebuyers to receive downpayment assistance), tasks to be performed, a schedule for completing the tasks (including a schedule for committing funds to projects in accordance with deadlines established by this part), a budget, any requirement for matching contributions, and the period of the agreement. These items must be in sufficient detail to provide a sound basis for the participating jurisdiction to effectively

monitor performance under the agreement.

(ii) *Program income.* The agreement must state if program income is to be remitted to the participating jurisdiction or retained by the subrecipient for additional eligible activities.

(iii) *Uniform administrative requirements.* The agreement must require the subrecipient to comply with applicable uniform administrative requirements, as described in § 92.505.

(iv) *Other program requirements.* The agreement must require the subrecipient to carry out each activity in compliance with all Federal laws and regulations described in subpart H of this part, except that the subrecipient does not assume the participating jurisdiction's responsibilities for environmental review under § 92.352 and the intergovernmental review process in § 92.357 does not apply. The agreement must set forth the requirements the subrecipient must follow to enable the participating jurisdiction to carry out environmental review responsibilities before HOME funds are committed to a project. If the subrecipient is administering a HOME rental housing program or tenant-based rental assistance program on behalf of the participating jurisdiction, the participating jurisdiction must set forth in the written agreement all obligations on the subrecipient in order to meet the VAWA requirements under § 92.359, including notice obligations and obligations under the emergency transfer plan.

(v) *Affirmative marketing.* The agreement must specify the subrecipient's affirmative marketing responsibilities in accordance with § 92.351.

(vi) *Requests for disbursement of funds.* The agreement must specify that the subrecipient may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed. Program income must be disbursed before the subrecipient requests funds from the participating jurisdiction.

(vii) *Reversion of assets.* The agreement must specify that upon expiration of the agreement, the subrecipient must transfer to the participating jurisdiction any HOME funds on hand at the time of expiration and any accounts receivable attributable to the use of HOME funds.

(viii) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted in order to assist the

participating jurisdiction in meeting its recordkeeping and reporting requirements.

(ix) *Enforcement of the written agreement.* The agreement must specify remedies for breach of the provisions of the written agreement. The agreement must specify that, in accordance with 2 CFR 200.339, suspension or termination may occur if the subrecipient materially fails to comply with any term of the agreement. The participating jurisdiction may permit the agreement to be terminated in whole or in part in accordance with 2 CFR 200.340.

(x) *Written agreement.* Before the subrecipient provides HOME funds to any owner, community housing development organization, subrecipient, homeowner, homebuyer, tenant (or landlord) receiving tenant-based rental assistance, or contractor providing services to or on behalf of the subrecipient, the subrecipient must have a fully executed written agreement with such entity that meets the requirements of this section. For housing projects assisted with HOME funds, the subrecipient must provide HOME funds directly to the owner under the terms and conditions of the written agreement. The agreement must establish whether repayment of HOME funds must be remitted to the participating jurisdiction or may be retained by the subrecipient for additional eligible activities.

(xi) *Fees.* The agreement must prohibit the subrecipient from charging for any of the prohibited costs listed in § 92.214, including but not limited to servicing, origination, or other fees for the costs of administering the HOME program.

(xii) *Project requirements.* The agreement must require enforcement of project requirements in subpart F of this part, as applicable in accordance with the type of project assisted. For any projects involving HOME rental housing, the agreement must require that the HOME tenancy addendum is used in accordance with § 92.253 for all HOME-assisted units. For tenant-based rental assistance, the agreement must require compliance with the requirements at § 92.253(a)–(c) and (d)(2).

(3) *For-profit or nonprofit housing owner (other than a community housing development organization or single family owner-occupant).* The participating jurisdiction may preliminarily award HOME funds for a proposed project, contingent on conditions such as obtaining other financing for the project. This preliminary award is not a commitment to a project. The written agreement

committing the HOME funds to the project must meet the requirements of “commit to a specific local project” in the definition of “commitment” in § 92.2. The HOME assistance must be provided directly to the owner under the terms and conditions of a written agreement that complies with the requirements of this part and contains the following:

(i) *Use of the HOME funds.* The agreement between the participating jurisdiction and a for-profit or nonprofit housing owner must include the address of the project or the legal description of the property if a street address has not been assigned to the property, the specific amount and use of the HOME funds and other funds for the project, including the tasks to be performed for the project, a schedule for completing the tasks and the project, and a complete budget. These items must be in sufficient detail to provide a sound basis for the participating jurisdiction to effectively monitor performance under the agreement to achieve project completion and compliance with the HOME requirements. The agreement must state that any and all repayments made by the owner on HOME assistance (e.g., grants or loans) must be remitted to the participating jurisdiction, unless the participating jurisdiction permits a subrecipient or State recipient to retain the funds.

(ii) *Affordability.* The agreement must require housing assisted with HOME funds to meet the affordability requirements of § 92.252 or § 92.254, as applicable, and must require repayment of the funds if the housing does not meet the affordability requirements for the specified period of affordability. The agreement must require a means of enforcement of the affordability requirements by the participating jurisdiction and the intended beneficiaries. The means of enforcement may include liens on real property, deed or use restrictions, a recorded agreement restricting the use of the property, covenants running with the land, or other mechanisms approved by HUD in writing, under which the participating jurisdiction has the right to require specific performance.

(A) If an owner is undertaking rental projects, the agreement must establish the initial rents, the procedures for rent increases pursuant to § 92.252(e)(2), the number of HOME units, the size of the HOME units, the designation of the HOME units as fixed or floating, and include the requirement that the owner provide the address (e.g., street address and apartment number) of each HOME unit no later than the time of initial occupancy.

(B) If the owner is undertaking a homeownership project for sale to homebuyers in accordance with § 92.254(a), the agreement must set forth the resale or recapture requirements that must be imposed on the housing, the sales price or the basis upon which the sales price will be determined, and the disposition of the sales proceeds. Recaptured funds must be returned to the participating jurisdiction.

(iii) *Project requirements.* As applicable and in accordance with the type of project assisted, the agreement must require compliance with the project requirements in subpart F of this part, including compliance with tenant protections in 24 CFR 92.253. The agreement may permit the owner to limit eligibility or give a preference to a particular segment of the population in accordance with § 92.253(e).

(iv) *Property standards.* The agreement must require the housing to meet the property requirements as specified in § 92.251. The agreement must also require owners of rental housing assisted with HOME funds to maintain the housing in compliance with § 92.251 for the duration of the period of affordability.

(v) *Other program requirements.* The agreement must require the owner to carry out each project in compliance with the following requirements of subpart H of this part:

(A) The agreement must specify the owner's affirmative marketing responsibilities as enumerated by the participating jurisdiction in accordance with § 92.351.

(B) The federal and nondiscrimination requirements in § 92.350.

(C) Any displacement, relocation, and acquisition requirements imposed by the participating jurisdiction consistent with § 92.353.

(D) The labor requirements in § 92.354.

(E) The conflict of interest provisions prescribed in § 92.356(f).

(F) If HOME funds are being provided to develop rental housing, the agreement must set forth all obligations the participating jurisdiction imposes on the owner in order to meet the VAWA requirements under § 92.359, including the owner's notice obligations and owner obligations under the emergency transfer plan.

(vi) *Records and reports.* The agreement must specify the particular records that must be maintained and the information or reports that must be submitted in order to assist the participating jurisdiction in meeting its recordkeeping and reporting requirements. The written agreement must require the owner of rental

housing to annually provide the participating jurisdiction with information on rents (including rental amounts charged to the tenant), and occupancy of HOME-assisted units to demonstrate compliance with § 92.252. If the rental housing project has floating HOME units, the written agreement must require that the owner provide the participating jurisdiction with information regarding unit substitution and filling vacancies so that the project remains in compliance with § 92.252.

The agreement must specify the reporting requirements (including copies of financial statements) to enable the participating jurisdiction to determine the financial condition (and continued financial viability) of the rental project.

(vii) *Enforcement of the written agreement.* The agreement must specify remedies for breach of the provisions of the written agreement. The agreement must require a means of enforcement of the affordability requirements by the participating jurisdiction and the intended beneficiaries. The means of enforcement may include liens on real property, deed or use restrictions, a recorded agreement restricting the use of the property, covenants running with the land, or other mechanisms approved by HUD in writing, under which the participating jurisdiction has the right to require specific performance.

(viii) *Requests for disbursement of funds.* The agreement must specify that the owner may not request disbursement of funds under the agreement until the funds are needed for payment of eligible costs. The amount of each request must be limited to the amount needed.

(ix) *Duration of the agreement.* The agreement must specify the duration of the agreement. If the housing assisted under this agreement is rental housing, the agreement must be in effect through the period of affordability required by the participating jurisdiction under § 92.252. If the housing assisted under this agreement is homeownership housing, the agreement must be in effect at least until completion of the project and ownership by the low-income family.

(x) *Fees.* The agreement must state the fees that may be charged by the owner in accordance with § 92.214(b)(4) and prohibit owners from charging tenants for any of the prohibited charges listed in § 92.214(b), including but not limited to fees that are not customarily charged in rental housing, such as laundry room access fees. The agreement must also prohibit the owner undertaking a homeownership project from charging servicing, origination, processing,

inspection, or other fees for the costs of providing homeownership assistance.

(4) *Contractor.* The participating jurisdiction selects a contractor through applicable procurement procedures and requirements. The contractor provides goods or services in accordance with a written agreement (the contract). For contractors who are administering any of the participating jurisdiction's HOME programs or specific services for one or more programs, the contract must include at a minimum the following provisions:

(i) *Use of the HOME funds.* The agreement must describe the use of the HOME funds, including the tasks to be performed, a schedule for completing the tasks, and budget.

(ii) *Program requirements.* The agreement must provide that the contractor is subject to the requirements in part 92 that are applicable to the participating jurisdiction, except for §§ 92.505 and 92.506, and the contractor cannot assume the participating jurisdiction responsibilities for environmental review, decision making, and action under § 92.352. The agreement must provide that the requirements at 2 CFR part 200 applicable to a contractor apply. The agreement must list the requirements applicable to the activities the contractor is administering. If applicable to the work under the contract, the agreement must set forth all obligations the participating jurisdiction imposes on the contractor in order to meet the VAWA requirements under § 92.359, including any notice obligations and any obligations under the emergency transfer plan.

(iii) *Duration of agreement.* The agreement must specify the duration of the contract.

(5) *Homebuyer, homeowner, or tenant or owner receiving tenant-based rental or security deposit assistance.* When a participating jurisdiction provides assistance to a homebuyer, homeowner, or tenant or owner for tenant-based rental assistance, the written agreement may take many forms depending upon the nature of assistance. At minimum, it must include the following:

(i) For homebuyers, the agreement must contain the requirements in § 92.254(a), the value of the property, principal residence, lease-purchase, if applicable, and the resale or recapture provisions.

(A) The agreement must specify the amount of HOME funds, the form of assistance, e.g., grant, amortizing loan, deferred payment loan, the use of the funds (e.g., down-payment, closing costs, rehabilitation), and the time by which the housing must be acquired.

(B) For existing housing that is acquired for homeownership, the agreement must require the participating jurisdiction to inspect the housing to determine that the project meets the property standards in § 92.251 and require compliance with the requirements in § 92.251(c)(3).

(ii) For homeowners, the agreement must contain the requirements in § 92.254(b) and specify the amount and form of HOME assistance, rehabilitation work to be undertaken, date for completion, and property standards to be met.

(iii) For tenants or owners receiving payments under a HOME tenant-based rental assistance program, the rental assistance contract or the security deposit contract must meet the requirements in § 92.209 and applicable requirements in § 92.253.

(6) *Community housing development organization*: When HOME funds are provided to a community housing development organization, the requirements in the written agreement depend upon the type of HOME assistance. At minimum, the agreement must comply with the following requirements for the type of HOME assistance:

(i) *Using set-aside funds under § 92.300 for affordable housing*. The written agreement must contain the requirements described in paragraph (c)(3) of this section and the following additional requirements:

(A) *Role of community housing development organization*. The agreement must state whether the community housing development organization will own, develop, or sponsor rental housing, as described in § 92.300(a)(2)–(5) and require the community housing development organization to comply with the applicable requirements in § 92.300(a), based on its role.

(B) *Developer of homeownership housing*. If the community development organization is a “developer” of homeownership housing, as defined in § 92.300(a)(6), the agreement must specify whether the organization may retain proceeds from the sale of the housing and whether the proceeds are to be used for HOME-eligible or other housing activities to benefit low-income families.

(C) *Sharing of developer responsibilities*. If the community housing development organization will share developer responsibilities with another entity pursuant to § 92.300(a)(3) or (6), the participating jurisdiction must enter into a written agreement only with the community housing development organization. The written

agreement must require the community housing development organization to enter into a separate agreement with the co-developer. At minimum, the agreement between the community housing development organization and its co-developer must contain the following:

(1) The responsibilities of the community housing development organization and co-developer with descriptions of the responsibilities in sufficient detail to demonstrate compliance with § 92.300(a)(3) or (a)(6), as applicable;

(2) A description of the amount of developer fee and other compensation, if any, to be paid to the co-developer;

(3) A description of any ownership interest in the community housing development organization and if applicable, any membership or partnership interest in the owner held by the co-developer; and

(4) A provision that the agreement’s terms and conditions are subject to review by the participating jurisdiction and if such terms and conditions affect a project’s compliance with HOME requirements, the terms and conditions are subject to approval by the participating jurisdiction.

(ii) *Receiving assistance for operating expenses*. The agreement must describe the use of HOME funds for operating expenses (e.g., salaries, wages, and other employee compensation and benefits); employee education, training, and travel; rent; utilities; communication costs; taxes; insurance; equipment; and materials and supplies. If the community housing development organization is not also receiving funds for a housing project to be developed, sponsored, or owned by the community housing development organization, the agreement must provide that the community housing development organization is expected to receive funds for a project within 24 months of the date of receiving the funds for operating expenses, and must specify the terms and conditions upon which this expectation is based and the consequences of failure to receive funding for a project. If the community housing development organization is also receiving funds for a project, there must be a separate written agreement that complies with this section for the use of HOME funds for the project and the agreement must contain the applicable requirements in paragraph (c)(6)(i) of this section.

(iii) *Receiving assistance for project-specific technical assistance and site control loans or project-specific seed money loans*. The agreement must identify the specific site or sites and

describe the amount and use of the HOME funds (in accordance with § 92.301), including a budget for work, a period of performance, and a schedule for completion. The agreement must also set forth the basis upon which the participating jurisdiction may waive repayment of the loans, consistent with § 92.301, if applicable.

(7) *Technical assistance provider to develop the capacity of community housing development organizations in the jurisdiction*. The agreement must identify the specific nonprofit organization(s) to receive capacity building assistance. The agreement must describe the amount and use (scope of work) of the HOME funds, including a budget, a period of performance, and a schedule for completion.

■ 40. Amend § 92.505 by revising the first sentence to read as follows:

§ 92.505 Applicability of uniform administrative requirements.

The requirements of 2 CFR part 200 apply to participating jurisdictions, State recipients, and subrecipients receiving HOME funds, except for the following provisions: §§ 200.306, 200.307, 200.308 (not applicable to participating jurisdictions), 200.311 (except as provided in § 92.257), 200.312, 200.328, 200.330, 200.334, 200.335, and 200.344. * * *

■ 41. Revise § 92.507 to read as follows:

§ 92.507 Closeout.

This section specifies the procedure and actions that must be completed by a participating jurisdiction and HUD to closeout a grant.

(a) *Closeout process*.

(1) HUD will close out a grant when it determines that the participating jurisdiction has completed all required activities and closeout actions for the grant. If the participating jurisdiction fails to complete the requirements in accordance with this section, HUD may close out the Federal award with the information available. HUD may closeout individual grants or multiple grants simultaneously.

(2) The participating jurisdiction must complete requirements in paragraph (b) of this section to closeout a grant.

(3) Before the end of the budget period of the grant, the participating jurisdiction shall draw down funds for all financial obligations incurred under the grant from the U.S. Treasury account by electronic funds transfer.

(i) At closeout, the participating jurisdiction must promptly refund any balances of unobligated cash paid in advance. All such refunds must be completed prior to submission of the information and reports required in paragraph (b) of this section.

(ii) At the end of the budget period, all remaining balance of funds in the U.S. Treasury account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose, as required by 31 U.S.C. 1552(a). Any unused grant funds disbursed from the U.S. Treasury account which are in the possession of the participating jurisdiction shall be refunded to HUD or recaptured by the U.S. Treasury.

(4) HUD will initiate closeout actions in the computerized disbursement and information system when the participating jurisdiction has met the requirements established in paragraph (b) of this section.

(i) If the participating jurisdiction does not submit and enter all required data, information, and reports or complete the actions described in paragraph (b) of this section, HUD will proceed to close out the grant with the information available within one year of the period of performance end date.

(ii) HUD may report the participating jurisdiction's material failure to comply with the terms and conditions of the award or requirements in this section to the OMB-designated integrity and performance system (currently FAPIIS). HUD may also pursue other enforcement actions in 2 CFR 200.339.

(5) A participating jurisdiction may request, and HUD may provide an extension of the period of performance or closeout deadlines provided good cause is demonstrated.

(b) *Actions required for closeout.* A participating jurisdiction must complete the following actions for closeout of the grant:

(1) Submit a complete and final Federal Financial Report for the grant to HUD within 120 days of the end date of the period of performance, as indicated in the grant agreement;

(2) Complete all activities for which funds were expended;

(3) Enter all data for activities in the computerized disbursement and information system established by HUD, within one year from the end of the period of performance as required by the grant agreement;

(4) Demonstrate that all HOME-assisted units are occupied by eligible occupants by entering accurate beneficiary data in the computerized disbursement and information system established by HUD, within one year from the end of the period of performance, as required by the grant agreement;

(5) The participating jurisdiction must comply with the requirements in 2 CFR 200.313(e) for the disposition of any equipment acquired under one or more

HOME grants, that is no longer needed for the HOME program, or for other activities previously supported by a Federal agency;

(6) Resolve and close all HOME monitoring findings for the grant (if applicable);

(7) Resolve and close all OIG audit findings for the grant (if applicable);

(8) Resolve and close all Single Audit findings for the grant (if applicable);

(9) Carry out all other responsibilities under the grant agreement and applicable laws and regulations satisfactorily; and

(10) The participating jurisdiction must complete a closeout certification prepared by HUD. The certification shall identify the grant being closed out and include provisions with respect to the following:

(i) Identification of any unused grant funds that were canceled by HUD;

(ii) Compliance with the recordkeeping requirements in § 92.508, including maintaining program, project, financial, program administration, community housing development organization records, records concerning other Federal requirements, and such other records as necessary to carry out responsibilities for the grant by the participating jurisdiction, its State recipients, and subrecipients;

(iii) Monitoring and enforcement of the requirements for all HOME-assisted units set forth in 24 CFR part 92 for the period specified in the HOME written agreement with the property owner;

(iv) Compliance with use of program income, recaptured funds, and repayments in accordance with § 92.503. If the jurisdiction is not a participating jurisdiction (as a metropolitan city, urban county, or consortium member) when it receives funds, the funds are not subject to the requirements of 24 CFR part 92;

(v) All actions required in 2 CFR 200.344 applicable to the grant have been taken by the participating jurisdiction;

(vi) All actions required in 2 CFR 200.344 applicable to the participating jurisdiction's subrecipients have been taken;

(vii) Other provisions appropriate to any special circumstances of the grant closeout, in modification of or in addition to the obligations in paragraphs (c)(1) and (2) of this section;

(viii) Acknowledge future monitoring by HUD and that findings of noncompliance may be taken into account by HUD as unsatisfactory performance of the participating jurisdiction and in any risk-based assessment of a future grant award under this part; and

(ix) Unless otherwise provided in a closeout certification, the Consolidated Plan will remain in effect after closeout until the expiration of the program year covered by the most recent Consolidated Plan.

(c) *Post closeout adjustments and continuing responsibilities.* The closeout of a grant does not affect any of the obligations required under this part and under 2 CFR 200.345, including:

(1) The right of HUD to disallow costs and recover funds on the basis of a later audit or other review. HUD must make any cost disallowance determination and notify the participating jurisdiction within the record retention period;

(2) Compliance with the requirements in § 92.508;

(3) Compliance with the requirements in § 92.509;

(4) Records retention as required in 2 CFR 200.345, as applicable;

(5) Monitoring and enforcement of the requirements for all HOME-assisted units set forth in 24 CFR part 92 for the period of affordability specified in the HOME written agreement with the property owner;

(6) Compliance with use of program income, recaptured funds, and repayments in accordance with § 92.503. If the jurisdiction is not a participating jurisdiction (as a metropolitan city, urban county, or consortium member) when it receives funds, the funds are not subject to the requirements of 24 CFR part 92;

(7) Compliance with the requirement in 2 CFR 200.345(a)(2) that the participating jurisdiction return any funds due as a result of a later refund, corrections, or other transactions including final indirect cost rate adjustments; and

(8) Compliance with the audit requirements at 2 CFR part 200, subpart F (2 CFR 200.345(a)(4)).

■ 42. In § 92.508:

■ a. Add a sentence to the end of paragraph (a)(2)(ix);

■ b. Revise paragraph (a)(3)(iii);

■ c. Amend paragraph (a)(3)(iv) by removing the citation “§ 92.504(d)” and adding, in its place, the citation “§ 92.251(f)”;

■ d. Revise paragraph (a)(3)(vi);

■ e. Amend paragraph (a)(3)(ix) by removing the words “the tenant” and adding, in their place, the words “the applicable tenant”; and

■ f. Amend paragraph (a)(5)(iv) by removing the citation to “2 CFR 200.302” and adding, in its place, a citation to “2 CFR 200.302 and 2 CFR 200.303”.

The revisions and additions read as follows:

§ 92.508 Recordkeeping.

(a) * * *

(2) * * *

(ix) * * * If the participating jurisdiction will apply excess matching contribution to a future fiscal year's liability, records demonstrating compliance with the matching requirements of § 92.218 through § 92.221 for the excess amount applied, as described in § 92.221(b)(1), must be provided at the time of application, and maintained for five years from the date of application.

* * * * *

(3) * * *

(iii) Records demonstrating that each rental housing or homeownership project meets the minimum per-unit subsidy amount of § 92.205(c), the maximum per-unit subsidy amount in accordance with the requirement in § 92.250(a), the subsidy layering and underwriting evaluation adopted in accordance with § 92.250(b), and, if applicable, compliance with a green building standard established by HUD in accordance with the requirements in § 92.250(c).

* * * * *

(vi) Records demonstrating that each tenant-based rental assistance project meets the written tenant selection policies and criteria of § 92.209(c), including any targeting requirements, the rent reasonableness requirements of § 92.209(f), the maximum subsidy provisions of § 92.209(h), housing standards of § 92.209(i) (including property inspection reports), security deposit requirements of § 92.209(j), and calculation of the HOME subsidy.

* * * * *

■ 43. Amend § 92.551 by adding paragraph (c)(3) to read as follows:

§ 92.551 Corrective and remedial actions.

* * * * *

(c) * * *

(3) A participating jurisdiction may request HUD reduce grant payments by an amount equal to the amount of expenditures that did not comply with the requirements of this part. The amount of a reduction may be for the entire grant amount.

■ 44. Amend § 92.552 by removing the period at the end of paragraph (a)(2)(iv) and adding, in its place, a semicolon, and adding paragraphs (a)(2)(v) through (vii) to read as follows:

§ 92.552 Notice and opportunity for hearing; sanctions.

(a) * * *

(2) * * *

(v) Reduce grant amounts paid to the participating jurisdiction by an amount equal to the amount of any expenditures that did not comply with the requirements of this part. The amount of a reduction may be for the entire grant amount;

(vi) Revoke a jurisdiction's designation as a participating jurisdiction; and

(vii) Terminate the assistance in whole or in part in accordance with 2 CFR 200.340.

* * * * *

Subpart M [Removed]

■ 45. Remove subpart M (§ 92.600 through § 92.618).

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 46. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 47. Amend § 570.200 by revising paragraph (h) introductory text to read as follows:

§ 570.200 General policies.

* * * * *

(h) *Reimbursement for pre-award costs.* The effective date of the grant

agreement is the date of HUD execution of the grant agreement. For a Section 108 loan guarantee, the effective date of the grant agreement is the date of HUD execution of the grant agreement amendment for the particular loan guarantee commitment.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 48. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 49. Amend § 982.507 by revising paragraphs (c)(2) and (3) to read as follows:

§ 982.507 Rent to owner: Reasonable rent.

* * * * *

(c) * * *

(2) *LIHTC.* If the rent requested by the owner exceeds the LIHTC rents for non-voucher families, the PHA must determine the rent to owner is a reasonable rent in accordance with paragraph (b) of this section and the rent shall not exceed the lesser of the:

(i) Reasonable rent; and

(ii) The payment standard established by the PHA for the unit size involved.

(3) *HOME Program.* If the rent requested by the owner exceeds the HOME rents for non-voucher families, the PHA must determine the rent to owner is a reasonable rent in accordance with paragraph (b) of this section and the rent shall not exceed the lesser of the:

(i) Reasonable rent; and

(ii) The payment standard established by the PHA for the unit size involved.

* * * * *

Adrianne Todman,

Acting Secretary.

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Part IV

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 50 and 380

Applications for Permits To Site Interstate Electric Transmission Facilities;
Final Rule

DEPARTMENT OF ENERGY**Federal Energy Regulatory
Commission****18 CFR Parts 50 and 380**

[Docket No. RM22–7–000; Order No. 1977]

**Applications for Permits To Site
Interstate Electric Transmission
Facilities****AGENCY:** Federal Energy Regulatory
Commission.**ACTION:** Final rule.**SUMMARY:** The Federal Energy
Regulatory Commission amends its
regulations governing applications for
permits to site electric transmission
facilities under the Federal Power Act,
as amended by the Infrastructure
Investment and Jobs Act of 2021, and
amends its National Environmental
Policy Act procedures.**DATES:** This rule is effective July 29,
2024.**FOR FURTHER INFORMATION CONTACT:**Maggie Suter (Technical Information),
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20426, (202) 502–8671, tara.bruce@ferc.gov.**SUPPLEMENTARY INFORMATION:****Table of Contents**

	Paragraph Nos.
I. Background	2
A. Energy Policy Act of 2005 and FPA Section 216	2
B. Order No. 689	9
C. <i>Piedmont & California Wilderness</i> Judicial Decisions	11
D. IJJA Amendments to FPA Section 216	14
E. Notice of Proposed Rulemaking	17
II. Discussion	26
A. Commission Jurisdiction and State Siting Proceedings	26
1. IJJA Amendments and Commission Jurisdiction Under FPA Section 216(b)(1)	27
2. Commencement of Pre-Filing	38
B. Eminent Domain Authority and Applicant Efforts To Engage With Landowners and Other Stakeholders	55
1. NOPR Proposal	56
2. Comments	60
3. Commission Determination	73
C. Environmental Justice Public Engagement Plan	98
1. NOPR Proposal	98
2. Comments	100
3. Commission Determination	109
D. Revisions to 18 CFR Part 50	119
1. Section 50.1—Definitions	119
2. Section 50.3—Filing and Formatting Requirements	159
3. Section 50.4—Stakeholder Participation	160
4. Section 50.5—Pre-Filing Procedures	223
5. Section 50.6—General Content of Applications	246
6. Section 50.7—Application Exhibits	257
7. Section 50.11—General Permit Conditions	261
8. Clarifying Revisions to 18 CFR Part 50	265
E. Additional Considerations Raised by Commenters	266
1. Grid-Enhancing Technologies	267
2. Use of Existing Rights-of-Way	269
3. Project Costs	273
4. Miscellaneous	275
F. Regulations Implementing NEPA	279
1. Consultation With CEQ	281
2. DOE Coordination	285
3. NEPA Document Procedures	295
4. Revisions to 18 CFR 380.16	301
5. Revisions to 18 CFR 380.13 and 380.14	411
III. Information Collection Statement	412
IV. Environmental Analysis	426
V. Regulatory Flexibility Act	427
VI. Document Availability	431
VII. Effective Date and Congressional Notification	434

1. On November 15, 2021, the Infrastructure Investment and Jobs Act (IJJA) became law.¹ The IJJA, among other things, amended section 216 of the Federal Power Act (FPA),² which provides for Federal siting of electric

transmission facilities under certain circumstances. The Federal Energy Regulatory Commission (Commission) is amending its regulations governing applications for permits to site electric transmission facilities to ensure consistency with the IJJA's amendments to FPA section 216, to modernize certain regulatory requirements, and to

incorporate other updates and clarifications to provide for the efficient and timely review of permit applications.

¹ Public Law 117–58, sec. 40105, 135 Stat. 429 (2021).

² 16 U.S.C. 824p.

I. Background

A. Energy Policy Act of 2005 and FPA Section 216

2. The authority to site electric transmission facilities has traditionally resided solely with the States; however, the enactment of the Energy Policy Act of 2005 (EPA 2005)³ established a limited Federal role in electric transmission siting by adding section 216 to the FPA. Under section 216, Federal siting authority for electric transmission facilities (as defined in that section) is divided between the Department of Energy (DOE) and the Commission. Section 216(a) directs DOE, on a triennial basis, to conduct a study and issue a report on electric transmission congestion and authorizes DOE to designate certain transmission-constrained or congested geographic areas as national interest electric transmission corridors (National Corridors). Section 216(b) authorizes the Commission in certain instances to issue permits for the construction or modification of electric transmission facilities in areas that DOE has designated as National Corridors.

3. As originally enacted in EPA 2005, section 216(b)(1) authorized the Commission to issue permits to construct or modify electric transmission facilities in a National Corridor if it found that: (A) a State in which such facilities are located lacks the authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;⁴ (B) the permit applicant is a transmitting utility but does not qualify to apply for a permit or siting approval in a State because the applicant does not serve end-use customers in the State;⁵ or (C) a State commission or entity with siting authority has withheld approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant National Corridor, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.⁶

4. In addition, sections 216(b)(2) through (6) required the Commission, before issuing a permit, to find that the proposed facilities: (1) will be used for the transmission of electricity in interstate commerce; (2) are consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) are consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.⁷

5. Section 216(e) authorized a permit holder, if unable to reach agreement with a property owner, to use eminent domain to acquire the necessary right-of-way for the construction or modification of transmission facilities for which the Commission has issued a permit under section 216(b).⁸ Federal and State-owned land was expressly excluded from the purview of section 216(e) and thus could not be acquired via eminent domain.⁹

6. Section 216(h)(2) designated DOE as the lead agency for purposes of coordinating all Federal authorizations and related environmental reviews needed to construct proposed electric transmission facilities. To ensure timely and efficient reviews and permit decisions, under section 216(h)(4)(A), DOE was required to establish prompt and binding intermediate milestones and ultimate deadlines for all Federal reviews and authorizations required for a proposed electric transmission facility.¹⁰ Under section 216(h)(5)(A), DOE, as lead agency, was required to prepare a single environmental review document, in consultation with other affected agencies, that would be used as the basis for all decisions for proposed projects under Federal law.

7. On May 16, 2006, the Secretary of DOE delegated to the Commission authority to implement parts of section 216(h), specifically paragraphs (2), (3), (4)(A)–(B), and (5).¹¹ Specifically, the Secretary delegated DOE's lead agency responsibilities to the Commission for the purposes of coordinating all

applicable Federal authorizations and related environmental reviews and preparing a single environmental review document for proposed facilities under the Commission's siting jurisdiction.¹²

8. In August 2006, DOE issued a Congestion Study pursuant to section 216(a), which identified two critically congested areas in the Mid-Atlantic and Southern California.¹³ Based on the results of the Congestion Study, in October 2007, DOE formally designated two National Corridors, the Mid-Atlantic Corridor and the Southwest Area Corridor.¹⁴

B. Order No. 689

9. Section 216(c)(2) of the FPA required the Commission to issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in National Corridors, and the manner of service of notice of the permit application on interested persons. Pursuant to this statutory requirement, on November 16, 2006, the Commission issued Order No. 689, which implemented new regulations for section 216 permit applications by adding part 50 to the Commission's regulations.¹⁵ In addition, Order No. 689 adopted modifications to the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA)¹⁶ in part 380 of the Commission's regulations to ensure that the Commission is provided sufficient information to conduct an environmental analysis of a proposed electric transmission project.

10. In Order No. 689, the Commission addressed a question of statutory interpretation raised by commenters concerning the text of section 216(b)(1)(C), which, at the time, conferred jurisdiction to the Commission whenever a State had withheld approval of a State siting

¹² While Congress has provided the authority to establish prompt and binding milestones and deadlines for the review of, and Federal authorization decisions relating to, facilities proposed under section 216, 16 U.S.C. 824p(h)(4)(A), efficient processing of applications will depend upon agencies complying with the established milestones and deadlines.

¹³ DOE, National Electric Transmission Congestion Study, 71 FR 45047 (Aug. 8, 2006).

¹⁴ DOE, National Electric Transmission Congestion Report, 72 FR 56992 (Oct. 5, 2007).

¹⁵ *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 FR 69440 (Dec. 1, 2006) 117 FERC ¶ 61,202 (2006), *reh'g denied*, 119 FERC ¶ 61,154 (2007).

¹⁶ 42 U.S.C. 4321 *et seq.* See also 18 CFR pt. 380 (2023) (Commission's regulations implementing NEPA).

⁷ *Id.* 824p(b)(2)–(6).

⁸ *Id.* 824p(e)(1) (prior to the IIJA amendment in 2021).

⁹ *Id.*

¹⁰ Under FPA section 216(h)(6)(A), if any agency has denied a Federal authorization required for a transmission facility or has failed to act by the deadline established by the Secretary of DOE, the applicant or any State in which the facility would be located may file an appeal with the President. 16 U.S.C. 824p(h)(6)(A).

¹¹ See DOE Delegation Order No. S1–DEL–FERC–2006 (previously DOE Delegation Order No. 00–004.00A).

³ Public Law 109–58, sec. 1221, 119 Stat. 594 (Aug. 8, 2005) (amended 2021).

⁴ 16 U.S.C. 824p(b)(1)(A) (prior to the IIJA amendment in 2021). Instances in this rule citing the statute prior to the IIJA amendment in 2021 are noted by a parenthetical for clarity.

⁵ *Id.* 824p(b)(1)(B).

⁶ *Id.* 824p(b)(1)(C) (prior to the IIJA amendment in 2021).

application for more than one year.¹⁷ The Commission interpreted the phrase “withheld approval” to include any action that resulted in an applicant not receiving State approval within one year, including a State’s express denial of an application to site transmission facilities.¹⁸

C. *Piedmont & California Wilderness Judicial Decisions*

11. In 2009, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit), in *Piedmont Environmental Council v. FERC*,¹⁹ held that the Commission’s interpretation of “withheld approval” was contrary to the plain meaning of the statute, and that the Commission’s siting authority does not apply when a State has affirmatively denied a permit application within the one-year deadline.²⁰ In addition, the Fourth Circuit vacated the Commission’s transmission-related amendments to its NEPA regulations, finding that the Commission had failed to consult with the Council on Environmental Quality (CEQ) before adopting the revisions.²¹

12. Two years later, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), in *California Wilderness Coalition v. DOE*, considered petitions for review challenging DOE’s actions following the enactment of section 216.²² The Ninth Circuit vacated DOE’s August 2006 Congestion Study and October 2007 National Corridor designations, finding that the agency: (1) failed to properly consult with affected States in preparing the Congestion Study, as required by section 216; and (2) failed to consider the environmental effects of the National Corridor designations under NEPA.²³

13. Since the Fourth Circuit and Ninth Circuit decisions, DOE has not designated any National Corridors, and the Commission has not received any applications for permits to site electric transmission facilities.

D. *IJA Amendments to FPA Section 216*

14. On November 15, 2021, the IJA amended section 216 of the FPA. With respect to DOE’s authority, the IJA amended section 216(a)(2) to expand the circumstances in which DOE may designate a National Corridor. In addition to geographic areas currently

experiencing transmission capacity constraints or congestion that adversely affects consumers, amended section 216(a)(2) provides that DOE may designate National Corridors in geographic areas expected to experience such constraints or congestion. The IJA also amended section 216(a)(4) to expand the factors that DOE may consider in determining whether to designate a National Corridor.²⁴

15. With respect to the Commission’s siting authority, the IJA amended section 216(b)(1)(C) by deleting the phrase “withheld approval” and by incorporating revisions to the statutory text. As amended, section 216(b)(1)(C) provides that the Commission’s siting authority is triggered when a State commission or other entity with authority to approve the siting of the transmission facilities: (i) has not made a determination on a siting application by one year after the later of the date on which the application was filed or the date on which the relevant National Corridor was designated; (ii) has conditioned its approval such that the proposed project will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (iii) has denied an application.²⁵ This statutory amendment resolves the jurisdictional issue at the heart of *Piedmont* by explicitly giving the Commission siting authority when a State has denied an application.²⁶

16. Additionally, the IJA amended section 216(e), which grants a permit holder the right to acquire the necessary right-of-way by eminent domain.²⁷ As amended, section 216(e)(1) requires the Commission to determine, as a

precondition to a permit holder exercising such eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.²⁸

E. *Notice of Proposed Rulemaking*

17. On December 15, 2022, the Commission issued a Notice of Proposed Rulemaking (NPR), which proposed revisions to its regulations in parts 50 and 380 governing applications for permits to site electric transmission facilities.²⁹ Among other revisions, the Commission proposed changes to address the IJA’s amendments to section 216 of the FPA.

18. First, the Commission proposed revisions to make clear that the Commission has the authority to issue permits for the construction or modification of electric transmission facilities in a National Corridor if a State has denied a siting application.³⁰

19. Second, the Commission announced a proposed policy change that would allow an applicant that is subject to a State siting authority to seek to commence the Commission’s pre-filing process once the relevant State siting applications have been filed.³¹ The Commission explained that this change, if adopted, would eliminate the Commission’s prior policy of waiting one year after the relevant State siting applications have been filed before allowing an applicant to seek to commence the Commission’s pre-filing process. The Commission further proposed that, one year after the commencement of the Commission’s pre-filing process, if a State has not made a determination on an application before it, the State will have 90 days to provide comments to the Commission on any aspect of the pre-filing process, including any information submitted by the applicant.³²

20. Third, the Commission proposed to codify an Applicant Code of Conduct.³³ The Commission explained that compliance with the Applicant Code of Conduct is one way an applicant may demonstrate that it has made good faith efforts to engage with landowners and other stakeholders early

²⁴ DOE may consider the following factors when determining whether to designate a National Corridor under section 216(a)(4): (1) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity; (2) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy and a diversification of supply is warranted; (3) the energy independence or energy security of the United States would be served by the designation; (4) the designation would be in the interest of national energy policy; (5) the designation would enhance national defense and homeland security; (6) the designation would enhance the ability of facilities that generate or transmit firm or intermittent energy to connect to the electric grid; (7) the designation maximizes existing rights-of-way and avoids and minimizes, to the maximum extent practicable, and offsets to the extent appropriate and practicable, sensitive environmental areas and cultural heritage sites; and (8) the designation would result in a reduction in the cost to purchase electric energy for consumers.

²⁵ 16 U.S.C. 824p(b)(1)(C).

²⁶ *Id.* 824p(b)(1)(C)(iii).

²⁷ *Id.* 824p(e)(1).

¹⁷ Order No. 689, 117 FERC ¶ 61,202 at PP 24–31, *reh’g denied*, 119 FERC ¶ 61,154 at PP 7–23.

¹⁸ Order No. 689, 117 FERC ¶ 61,202 at P 26, *reh’g denied*, 119 FERC ¶ 61,154 at P 11.

¹⁹ 558 F.3d 304 (4th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010) (*Piedmont*).

²⁰ *Id.* at 313.

²¹ *Id.* at 319, 320.

²² 631 F.3d 1072 (9th Cir. 2011).

²³ *Id.* at 1096, 1106.

²⁸ *Id.*

²⁹ *Applications for Permits to Site Interstate Elec. Transmission Facilities*, 88 FR 2770 (Jan. 17, 2023), 181 FERC ¶ 61,205 (2022) (NPR), *errata notice*, 182 FERC ¶ 61,020 (2023). The Commission’s *errata notice* for the NPR, issued on January 17, 2023, reflected certain stylistic revisions requested by the **Federal Register** as well as minor, non-substantive editorial revisions.

³⁰ *Id.* P 18.

³¹ *Id.* PP 20–21.

³² *Id.* P 23.

³³ *Id.* PP 26–27.

in the applicable permitting process as required by section 216(e)(1) of the FPA as a predicate to the use of eminent domain.³⁴ The Commission also proposed that an applicant may choose an alternative method of demonstrating that it meets the “good faith efforts” standard, so long as it explains how its alternative method is equal to or better than compliance with the Applicant Code of Conduct as a means of ensuring that the statutory standard is met.

21. Fourth, the Commission proposed to add a requirement that applicants develop and file an Environmental Justice Public Engagement Plan as part of their Project Participation Plan, which is already required early in the pre-filing process.³⁵ The Commission explained that an Environmental Justice Public Engagement Plan must describe the applicant’s completed outreach to environmental justice communities, summarize comments from potentially impacted communities, describe planned outreach, and describe how the applicant will reach out to environmental justice communities about potential mitigation.³⁶

22. Finally, the Commission proposed updates to the environmental information that an application must include. In addition to a variety of proposed updates, clarifications, and corrections to existing resource reports, the Commission proposed to require an applicant to provide information regarding a proposed project’s impacts on Tribal resources, environmental justice communities, and air quality and environmental noise in three new resource reports.³⁷

23. Comments on the NOPR were due by April 17, 2023. In response to a motion filed by the National Association of Regulatory Utility Commissioners (NARUC), the Commission extended the comment deadline to May 17, 2023.

24. In response to the NOPR, 52 comments were filed.³⁸ These comments have informed our determinations in this final rule.

25. Additionally, on February 28, 2024, the Joint Federal-State Task Force on Electric Transmission (Task Force)³⁹

met to discuss transmission siting.⁴⁰ The discussion included topics such as how State and Federal siting reviews should be sequenced and coordinated, what factors the Commission should consider in its siting proceedings under section 216(b), and how the Commission’s siting process will interface with transmission planning and cost allocation requirements.

II. Discussion

A. Commission Jurisdiction and State Siting Proceedings

26. As discussed above, section 216(b)(1) of the FPA, as revised by the IJA, provides the circumstances that trigger the Commission’s jurisdiction. As discussed further below, in this final rule, the Commission revises § 50.6 of its regulations to reflect the IJA’s amendments to section 216(b)(1). The Commission also declines to adopt the policy change proposed in the NOPR with respect to when the Commission’s pre-filing process may commence.

1. IJA Amendments and Commission Jurisdiction Under FPA Section 216(b)(1)

a. NOPR Proposal

27. Section 50.6 of the Commission’s regulations describes the information that is required in each application filed pursuant to the part 50 regulations. Section 50.6(e) provides that each application must provide evidence demonstrating that one of the bases for the Commission’s jurisdiction set forth in section 216(b)(1) applies to the proposed facilities. To ensure consistency with section 216(b)(1)(A), as amended by the IJA, in the NOPR the Commission proposed to add to § 50.6(e)(1) the phrase “or interregional benefits” to clarify that an application may provide evidence that a State does not have the authority to consider the interstate benefits or interregional benefits expected to be achieved by the proposed facilities.⁴¹

⁴⁰ *Joint Fed.-State Task Force on Elec. Transmission*, Notice of Meeting and Agenda, Docket No. AD21-15-000 (Feb. 13, 2024). The transcript of this meeting can be found in Docket No. AD21-15-000. For context, the Commission established the Task Force in June 2021 to formally explore transmission-related topics such as generator interconnection, grid enhancing technologies, physical security, and regulatory gaps or challenges in oversight. The Task Force was composed of all FERC Commissioners as well as representatives from 10 State commissions nominated by NARUC, with two originating from each NARUC region. The Task Force convened for multiple formal meetings annually, which were open to the public.

⁴¹ NOPR, 181 FERC ¶ 61,205 at P 43. While the statute, as amended by the IJA, does not define the term “interregional,” the Commission proposed to apply a meaning that is consistent with Order No.

28. As discussed above, the IJA also amended FPA section 216(b)(1)(C) to expressly state that the Commission may issue a permit for the construction or modification of electric transmission facilities in National Corridors if a State has denied an application to site such transmission facilities.⁴² To reflect this amendment, in the NOPR the Commission proposed corresponding revisions to § 50.6(e)(3) to provide that the applicant is required to submit evidence demonstrating that a State has: (i) not made a determination on an application; (ii) conditioned its approval in such a manner that the proposed facilities would not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (iii) denied an application.⁴³

b. Comments

29. Several commenters ask the Commission to clarify its jurisdiction under section 216(b)(1) of the FPA. ACEG seeks confirmation that the Commission’s regulations will apply in instances where a State does not have authority to approve the siting of facilities or consider a project’s expected interstate or interregional benefits, or when an applicant does not qualify for a State permit or siting approval because the applicant does not serve end-use customers in that State.⁴⁴ ACEG also urges the Commission to “expand upon the meaning of a State ‘lacking authority’ to approve the proposed facilities.”⁴⁵

30. Commenters ask the Commission to clarify whether specific circumstances would trigger the Commission’s siting authority under FPA section 216(b)(1)(C), including when a local government entity with siting authority, such as a county zoning board, has failed to act on, conditionally approved, or denied a permit;⁴⁶ when a State has not acted within a year but no

1000, which defines an interregional transmission facility as one that is located in two or more transmission planning regions. *Id.* (citing *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), 136 FERC ¶ 61,051, at P 482 n.374 (2011)).

⁴² See *supra* P 15.

⁴³ NOPR, 181 FERC ¶ 61,205 at P 18.

⁴⁴ ACEG Comments at 4–5 (citing 16 U.S.C. 824p(b)(1)(A)–(B)).

⁴⁵ *Id.* at 7.

⁴⁶ See ACEG Comments at 6; SEIA Comments at 7; Rail Electrification Council Comments at 13. Rail Electrification Council also asks whether a State transportation authority that owns or controls a railroad right-of-way that is integral to a proposed transmission project would qualify as a “State commission or other entity” under FPA section 216(b)(1)(C)). Rail Electrification Council Comments at 13.

³⁴ *Id.* P 28.

³⁵ *Id.* PP 30–31; 18 CFR 50.4(a) (requiring Project Participation Plan).

³⁶ *Id.* P 31.

³⁷ *Id.* PP 63–71.

³⁸ Appendix B lists the entities that submitted comments on the NOPR and the abbreviated names used throughout this final rule to describe those entities.

³⁹ *Joint Fed.-State Task Force on Elec. Transmission*, 175 FERC ¶ 61,224 (2021) (establishing Task Force pursuant to FPA section 209(b)).

National Corridor has been designated;⁴⁷ and when a multistate project is approved by one or more relevant States but denied by another.⁴⁸ To clarify when the Commission's authority under section 216(b)(1) would apply, ACEG recommends that the Commission add an applicability section to its regulations.⁴⁹

31. Commenters also request clarification on the Commission's authority to act under section 216(b)(1)(C)(ii) if it determines that a State commission or other entity with siting authority has conditioned its approval in such a manner that the proposed facilities will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible. Several commenters urge the Commission to opine on what it would consider a significant reduction in transmission capacity constraints or congestion and how any such threshold would be quantified.⁵⁰ Maryland Commission observes that the statutory phrase "not economically feasible" is broad and undefined and that State conditions that simply impose an economic burden on an applicant should not be deemed sufficient to trigger the Commission's siting jurisdiction.⁵¹ Rather, Maryland Commission states that the Commission should only consider asserting its siting authority when confronted by State conditions that are not supported by the record, are contrary to law, or are substantially outweighed by the project's regional benefits and would jeopardize the existence of the project if included.⁵²

32. Some commenters urge the Commission either to defer to State siting decisions or to refrain from prematurely exercising its jurisdiction under section 216(b)(1)(C). New Jersey Board states that the Commission should refrain from exercising its section 216 authority and allow a State to reach its own determination, so long as the State has acted in good faith and there is no evidence that it is attempting to delay the process.⁵³ New Jersey Board suggests that the Commission's final rule recognize good cause for an application to remain in the State's purview.⁵⁴ New York Commission

states that the Commission should defer to State siting determinations that deny an application because a project is incompatible with public health, safety, and the environment.⁵⁵ Noting that the ability to approve or deny transmission siting applications is within States' general police powers, New York Commission argues that the NOPR is too broad, does not respect State siting authority, and is an overreach of the Commission's jurisdiction.⁵⁶ For these reasons, New York Commission urges the Commission to identify a limited set of specific circumstances that would trigger the Commission's jurisdiction if State denial of a permit is unreasonable or inappropriate.⁵⁷

c. Commission Determination

33. We adopt the NOPR proposal's revisions to § 50.6(e), which clarifies the evidence an applicant must provide to demonstrate that one of the jurisdictional bases set forth in section 216(b)(1) applies to the proposed facilities, including the addition in § 50.6(e)(1) of the phrase "interregional benefits" to clarify that an applicant may provide evidence that a State does not have authority to consider the interregional benefits expected to be achieved by the proposed project. We decline to impose additional requirements for the Commission to assert its jurisdiction beyond those required by the statute. We disagree with commenters that, by revising the Commission's regulations to reflect the IJJA's amendments to section 216(b)(1)(C), the Commission does not respect State siting authority, exceeds its statutory authority, or coopts or preempts State processes.

34. As stated previously in Order No. 689, mere consideration of an application by the Commission does not equate to a jurisdictional determination or Commission approval of the proposed project.⁵⁸ Once the Commission notices an application in accordance with § 50.9, anyone who questions the Commission's jurisdiction over the proposed project, the timing of the exercise of that jurisdiction, or the merits of the proposal can raise those matters with the Commission by filing comments, an intervention, or a protest in the proceeding. The Commission will make a jurisdictional determination and address comments and protests in an order addressing the proposed project.

35. Section 50.6(e)(1) of the Commission's regulations tracks the

statutory language that triggers the Commission's jurisdiction under FPA section 216(b)(1)(A). Thus, in response to ACEG's clarification request, we confirm that the Commission's regulations would apply in instances where a State does not have authority to approve the siting of facilities or consider a project's expected interstate or interregional benefits, and when an applicant does not qualify for a State permit or siting approval because the applicant does not serve end-use customers in that State. We decline ACEG's invitation to expand on the meaning of a State "lacking authority" to approve proposed facilities,⁵⁹ as such findings will be State-specific and, perhaps, project-specific and will be considered by the Commission on a case-by-case basis.

36. We also do not find it necessary to further define the scope of circumstances that might trigger the Commission's siting authority under section 216(b)(1). We note that § 50.6(e) of the Commission's regulations require an applicant to demonstrate that the relevant statutory requirements have been met. The Commission will make such determinations case-by-case, based upon the record in a given proceeding. For this reason, we decline commenters' requests to clarify the applicability of FPA section 216(b)(1) to particular, factual circumstances that are, at this point, hypothetical.

37. We likewise decline commenters' calls to expound on when a State approval would be conditioned in a manner that meets the statutory threshold under FPA section 216(b)(1)(C)(ii). The Commission addressed similar comments in Order No. 689.⁶⁰ As the Commission stated then, these issues cannot be resolved adequately on a generic basis. Consistent with the Commission's prior approach, we decline to outline potential conditions a State might impose that would invoke the Commission's jurisdiction under FPA section 216(b)(1).

2. Commencement of Pre-Filing

38. The Commission has recognized that Congress, in enacting section 216 of the FPA, adopted a statutory scheme that allows simultaneous State and Commission siting processes.⁶¹ As the

⁴⁷ ACEG Comments at 7.

⁴⁸ Impacted Landowners Comments at 25.

⁴⁹ ACEG Comments at 7.

⁵⁰ See Michigan Commission Comments at 11; New York Commission Comments at 6–1; OMS Comments at 5–6.

⁵¹ Maryland Commission Comments at 25.

⁵² *Id.*

⁵³ New Jersey Board Comments at 6.

⁵⁴ *Id.*

⁵⁵ New York Commission Comments at 7–9.

⁵⁶ *Id.* at 8–9.

⁵⁷ *Id.* at 9.

⁵⁸ Order No. 689, 117 FERC ¶ 61,202 at P 32.

⁵⁹ ACEG Comments at 7. While ACEG does not cite a particular statutory provision, we presume that ACEG's comment is in reference to FPA section 216(b)(1)(A)(i), which provides that the Commission may issue a permit if it finds that a State in which the transmission facilities are to be located does not have authority to approve the siting of the facilities.

⁶⁰ Order No. 689, 117 FERC ¶ 61,202 at P 34.

⁶¹ *Id.* P 19.

Commission explained in Order No. 689, the statute provides for this potential overlap by allowing the Commission to issue a permit one year after the State siting process has begun and requiring an expeditious pre-application mechanism for all permit decisions under Federal law.⁶² Thus, the Commission has recognized that the pre-filing process can occur at the same time as State proceedings.⁶³

39. Notwithstanding that the statute allows simultaneous State and Federal proceedings, the Commission in Order No. 689 announced a policy that, in cases where its jurisdiction rests on section 216(b)(1)(C),⁶⁴ the pre-filing process would not commence until one year after the relevant State applications have been filed.⁶⁵ This approach, the Commission explained, would provide the States one full year to process an application without any overlapping Commission processes, after which time an applicant might seek to commence the Commission's pre-filing process.⁶⁶ However, the Commission noted that it would reconsider this issue if it later determined that requiring applicants to wait one year before commencing the Commission's pre-filing process was delaying projects or was otherwise not in the public interest.⁶⁷

a. NOPR Proposal

40. In the NOPR, the Commission proposed to eliminate the one-year delay before the Commission's pre-filing process may commence, thus allowing simultaneous processing of State applications and Commission pre-filing proceedings (referred to herein as simultaneous processing).⁶⁸ The Commission proposed to entertain requests to commence pre-filing, and potentially grant such requests, at any time after the relevant State applications have been filed. Additionally, the Commission proposed to provide an opportunity for State input before the Commission would announce the completion of the pre-filing process and allow an application to be filed.⁶⁹ Specifically, one year after the commencement of the Commission's pre-filing process, if a State has not made a determination on an application, the Commission proposed to provide a 90-day window for the State to submit

comments on any aspect of the pre-filing process, including any information submitted by the applicant. The NOPR also sought comment on the advantages or disadvantages of the Commission entertaining requests to commence the pre-filing process before a State application has been filed.

b. Comments

41. Numerous commenters express support for the NOPR proposal.⁷⁰ A number of commenters agree that simultaneous processing would enhance efficiency by streamlining processes and allowing decision-making entities to use pre-existing data to make determinations.⁷¹ For instance, Los Angeles DWP believes that simultaneous processing would enable early engagement and coordination between State and Federal regulators, thereby increasing certainty in permit application outcomes, reducing time and costs of environmental reviews, and better aligning projects with State and Federal policy goals.⁷² Sabin Center concurs that removing the one-year delay will improve efficiency and ensure more timely decision-making by the Commission by streamlining information collection.⁷³

42. Several commenters assert that the NOPR's simultaneous processing proposal affords sufficient deference to States' decision-making involving land-use and permitting decisions.⁷⁴ ACEG states that the Commission's proposed approach toward simultaneous processing strikes the correct balance between promoting efficiency and respecting States' primacy in the process.⁷⁵

43. Some commenters agree that simultaneous processing is consistent with the Commission's statutory authority under FPA section 216 and

Congress's intent.⁷⁶ Advanced Energy United states that the IJA's amendments to FPA section 216 were meant to expedite the permitting process and that simultaneous processing would meet that goal.⁷⁷

44. Some commenters contend that the NOPR's simultaneous processing proposal would enhance stakeholder participation and communication in both State and Federal transmission siting proceedings.⁷⁸ ACP states that conducting concurrent review allows the Commission to hear from stakeholders early in the Federal siting process—and potentially in tandem with States.⁷⁹ Niskanen also supports simultaneous processing because it believes that the Commission's implementation of the statute's "good faith" standard for engaging with landowners and other stakeholders from the beginning of the process will standardize practices across the States and decrease the ability of applicants to exhibit bad faith when dealing with only the State commission.⁸⁰

45. Several commenters that otherwise support the NOPR's simultaneous processing proposal explicitly oppose the Commission's pre-filing process commencing prior to the commencement of the State's permitting process or a State application being filed.⁸¹ Several commenters that support simultaneous processing also urge the Commission to take steps to limit stakeholder confusion, for instance, by requiring applicants to specify when they will file their applications with States.⁸² The Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe are supportive of simultaneous processing, but warn that the Commission must ensure meaningful stakeholder participation during the pre-filing process.⁸³

46. Many commenters oppose the NOPR proposal to allow the Commission's pre-filing process to commence at any time after the relevant State siting applications have been filed

⁷⁰ Advanced Energy United Comments at 8–9; American Chemistry Council Comments at 5; ACP Comments at 2–7; ACOE Comments at 2–3; ACEG Comments at 5–6, 8–9; CATF Comments at 3–7; Clean Energy Buyers Comments at 6–7; ClearPath Comments at 2; CLF Comments at 2, 4; ELCON Comments at 1, 3; EDF Comments at 10–11; Los Angeles DWP Comments at 2; Michigan Commission Comments at 4; New Jersey Board Comments at 5; Niskanen Comments at 5–7; Public Interest Organizations Comments at 10–15; Sabin Center Comments at 2–3; SEIA Comments at 2–7; Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 3.

⁷¹ Los Angeles DWP Comments at 2; Michigan Commission Comments at 4; New Jersey Board Comments at 5.

⁷² Los Angeles DWP Comments at 3.

⁷³ Sabin Center Comments at 3.

⁷⁴ See, e.g., SEIA Comments at 5–7; EDF Comments at 11.

⁷⁵ ACEG Comments at 5–6.

⁷⁶ See, e.g., ClearPath Comments at 2; see also Clean Energy Buyers Comments at 5; Public Interest Organizations Comments at 11–12 (interpreting Congress's silence as an implicit grant of authority).

⁷⁷ See, e.g., ACP Comments at 8; see also Advanced Energy United Comments at 7.

⁷⁸ Los Angeles DWP Comments at 2.

⁷⁹ ACP Comments at 5.

⁸⁰ Niskanen Comments at 7.

⁸¹ ACOE Comments at 3; Yurok Tribe Comments at 24; Clean Energy Buyers Comments at 7.

⁸² See California Commission Comments at 6; EDF Comments at 11.

⁸³ Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ In Order No. 689, the Commission explained that in all other instances, the pre-filing process may be commenced at any time. *Id.* P 21 n.14.

⁶⁵ *Id.* P 21.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ NOPR, 181 FERC ¶ 61,205 at PP19–23.

⁶⁹ *Id.* P 23.

but before a State decision is made.⁸⁴ Several commenters urge the Commission to retain the existing policy adopted in Order No. 689, where the pre-filing process could not commence until one year after the relevant State applications have been filed.⁸⁵ Some commenters argue that the Commission's pre-filing process should not begin until after the relevant State authority determines that a State application is complete⁸⁶ or after the relevant State authority's finishes its adjudication.⁸⁷ Georgia Commission is concerned that simultaneous processing would contradict current State statutes and regulations guiding transmission planning, which in Georgia occurs at least every three years.⁸⁸

47. Several commenters argue that simultaneous processing would not adequately respect the States' primacy and would impinge on State jurisdiction.⁸⁹ Joint Consumer Advocates caution that the Commission, in implementing its section 216 authority, must ensure State processes are not coopted or preempted, and they assert that the Federal process should be a backstop, rather than an alternative, to the State process.⁹⁰ Georgia and Texas Commissions express concerns that the NOPR's proposed simultaneous processing will encroach on their existing permitting schemes.⁹¹ Some commenters argue that simultaneous processing would undermine State proceedings⁹² and the public's

confidence in State siting authorities.⁹³ Pennsylvania Commission and North Carolina Commission argue that Congress meant to balance the Commission's process with State primacy and that the NOPR's simultaneous processing proposal is inconsistent with that goal.⁹⁴

48. Several commenters argue that simultaneous processing invites potentially duplicative, wasteful procedures, especially in instances where the State ultimately approves the application.⁹⁵ Kentucky PSC contends that the one-year delay actually helps the Commission, as some projects will be approved by States in that time, saving the Commission from wasting time and resources on commencing the NEPA process.⁹⁶ Chamber of Commerce asserts that simultaneous processing, by virtue of its design, guarantees that one of the processes and the stakeholder efforts will amount to a void and wasted effort.⁹⁷ Some commenters express concerns that applicants may seek to recover from ratepayers costs incurred for commencing the Commission's pre-filing process in instances when the State siting commission approves a proposed transmission project.⁹⁸

49. Commenters opposed to simultaneous processing argue that the NOPR proposal would disproportionately burden State agencies charged with processing transmission siting applications. Some commenters assert that simultaneous proceedings would make it challenging for State oversight agencies to concurrently perform their quasi-judicial role and act as intervenors in Commission proceedings.⁹⁹ Other commenters contend that overlapping hearings and comment deadlines¹⁰⁰ would strain State resources or divide the attention of State experts.¹⁰¹

50. Multiple commenters assert that the NOPR's simultaneous processing

proposal would have an adverse effect on stakeholder and applicant participation in State proceedings.¹⁰² In particular, some commenters express concerns that multiple hearings and comment deadlines resulting from parallel State and Federal proceedings would confuse stakeholders by requiring interested participants and affected landowners to learn and comply with two sets of procedural rules and substantive permitting requirements.¹⁰³ Some commenters argued that the resulting confusion would reduce stakeholder participation.¹⁰⁴

51. Several of the commenters that oppose the simultaneous processing proposal also oppose the proposed 90-day comment period for States as an inadequate replacement for the one-year delay.¹⁰⁵ Kentucky and Louisiana Commissions argue that the 90-day comment period for States will put them in the position of choosing whether to remain silent in the Commission pre-filing process or to comment in favor of or against a proposed project, essentially "prejudging" the project at the Federal level while trying to maintain impartiality in the ongoing State proceeding.¹⁰⁶ North Carolina Commission and Staff oppose simultaneous processing but support the 90-day comment period in the event that the Commission adopts the proposal, because it would afford the States more time to participate in the Commission's pre-filing process.¹⁰⁷ Although Pennsylvania Commission also opposes simultaneous Federal and State proceedings, it contends that the 90-day comment period is necessary even in the absence of simultaneous processing.¹⁰⁸

52. Sabin Center and ClearPath both suggest that the 90-day comment period start one year after the start of the State review, not one year after the Commission's pre-filing process has begun.¹⁰⁹ ClearPath suggests that there be no 90-day comment period if a State

⁸⁴ Alabama Commission Comments at 1–3; Georgia Commission Comments at 1–2; Impacted Landowners Comments at 2–5; Joint Consumer Advocates Comments at 6–11; Kansas Commission Comments at 9–12; Kentucky Commission Comments at 2–4; Louisiana Commission Comments at 5–9; Maryland Commission Comments at 2, 16–21; NESCOE Comments at 4, 6–7; New York Commission Comments at 9–10; North Carolina Commission and Staff Comments at 8, 10–11; North Dakota Commission Comments at 5–6; Pennsylvania Consumer Advocate Comments at 5–7; Pennsylvania Commission Comments at 2, 4–6; Texas Commission Comments at 5–6, 10–11; Southern Comments at 3–8; Farm Bureaus Comments at 3, 6; Chamber of Commerce Comments at 2, 5.

⁸⁵ See, e.g., North Dakota Commission Comments at 6; NESCOE Comments at 4–6; Texas Commission Comments at 6.

⁸⁶ New York Commission Comments at 5; Joint Consumer Advocates Comments at 6; Maryland Commission Comments at 21 (arguing that the one-year should be tolled if material amendments are filed at the State level).

⁸⁷ New York Commission Comments at 9; Maryland Commission Comments at 2, 18–19; Pennsylvania Commission Comments at 7.

⁸⁸ Georgia Commission Comments at 2.

⁸⁹ See, e.g., Maryland Commission Comments at 2, 19; North Dakota Commission Comments at 2; Louisiana Commission Comments at 5.

⁹⁰ Joint Consumer Advocates Comments at 5.

⁹¹ Georgia Commission Comments at 2, 4; Texas Commission Comments at 6–9.

⁹² Louisiana Commission Comments at 5.

⁹³ NESCOE Comments at 6–7.

⁹⁴ Pennsylvania Commission Comments at 2; North Carolina Commission and Staff Comments at 8.

⁹⁵ See New York Commission Comments at 9; Alabama Commission Comments at 2 n.3; North Dakota Commission Comments at 6; North Carolina Commission and Staff Comments at 8.

⁹⁶ Kentucky Commission Comments at 3–4.

⁹⁷ Chamber of Commerce Comments at 5; Impacted Landowners Comments at 3.

⁹⁸ Texas Commission Comments at 10–11; Impacted Landowners Comments at 3.

⁹⁹ See Kentucky Commission Comments at 2; Alabama Commission Comments at 1; Pennsylvania Commission Comments at 6.

¹⁰⁰ See NESCOE Comments at 5–6.

¹⁰¹ See Kansas Commission Comments at 11–12; New York Commission Comments at 9; Kentucky Commission Comments at 2; Alabama Commission Comments at 1; Pennsylvania Commission Comments at 6.

¹⁰² NESCOE comments at 5–6; Kansas Commission Comments at 11–12.

¹⁰³ See NESCOE Comments at 6; New York Commission Comments at 9; Kansas Commission Comments at 11–12.

¹⁰⁴ See NESCOE Comments at 6.

¹⁰⁵ See, e.g., Alabama Commission Comments at 2 n.6; Maryland Commission Comments at 19; Kentucky Commission Comments at 2–3; Louisiana Commission Comments at 5; Southern Comments at 8.

¹⁰⁶ Kentucky Commission Comments at 2–3; Louisiana Commission Comments at 5.

¹⁰⁷ North Carolina Commission and Staff Comments at 11–12.

¹⁰⁸ Pennsylvania Commission Comments at 6–7.

¹⁰⁹ Sabin Center comments at 3; ClearPath Comments at 2.

has already approved or denied an application, as the State will have already stated its position on the project.¹¹⁰ Some entities seek clarity as to whether the 90-day window explicitly applies to every circumstance triggering the Commission's jurisdiction under section 216.¹¹¹ ACP points out that the 90-day comment period would serve as a second opportunity for State input, as States will also have the opportunity to provide input during DOE's National Corridor designation process.¹¹²

c. Commission Determination

53. After further consideration and review of the comments, we decline to adopt the NOPR proposal to allow simultaneous processing. We acknowledge comments that argue that simultaneous processing could result in efficiencies, but given the concerns raised by the States, we find that not allowing simultaneous processing strikes the appropriate balance at this time between an efficient process and respect for States' primacy in siting transmission infrastructure. We continue to believe that the statute allows parallel State and Commission processes.¹¹³ Nevertheless, we make this policy determination to continue the Commission's practice introduced in Order No. 689, based on our review of the record and, in particular, the feedback received from States in their filed comments and at the February 28, 2024 meeting of the Joint Federal-State Task Force on Electric Transmission.¹¹⁴ Additionally, given this determination, we are not adopting the NOPR proposal to provide a 90-day period for the State to comment on the pre-filing process.

54. We confirm that, in cases where the Commission's jurisdiction rests on FPA section 216(b)(1)(C)(i),¹¹⁵ the applicant should not begin the pre-filing process until one year after the relevant State applications have been filed. This will give the States one full year to process an application without any overlapping Commission processes. Once that year is complete, an applicant may begin the Commission's pre-filing procedures pursuant to § 50.5. We believe that continuing this approach most adequately addresses State concerns. However, as the Commission previously stated in Order No. 689, if we determine in the future that the lack of a Commission pre-filing process prior

to the end of the one year is delaying projects or otherwise not in the public interest, we may reexamine this issue.

B. Eminent Domain Authority and Applicant Efforts To Engage With Landowners and Other Stakeholders

55. Section 50.4 requires the applicant to develop and file a Project Participation Plan early in the pre-filing process and to distribute, by mail and newspaper publication, project participation notifications early in both the pre-filing and application review processes. These notifications will provide a range of information about the proposed project and permitting process, including a general description of the property an applicant would need from an affected landowner and a brief summary of the rights an affected landowner has at the Commission and in proceedings under the eminent domain rules of the relevant State.

1. NOPR Proposal

56. As described above, the IIJA amended FPA section 216(e)(1) to require the Commission to determine, as a precondition to a permit holder receiving eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the permitting process.¹¹⁶ Therefore, in the NOPR, the Commission proposed to supplement the existing landowner and stakeholder participation provisions in part 50 of its regulations.¹¹⁷

57. To address the IIJA's amendment to section 216(e)(1), in the NOPR the Commission proposed to supplement the regulatory requirements in § 50.4 by adding a new § 50.12.¹¹⁸ Under proposed § 50.12, an applicant may demonstrate that it has met the statutory good faith efforts standard by complying with an Applicant Code of Conduct in its communications with affected landowners. The Applicant Code of Conduct includes recordkeeping (*e.g.*, maintaining an affected landowner discussion log) and information-sharing requirements for engagement with affected landowners, as well as more general prohibitions against misconduct in such engagement.

58. As the Commission proposed in the NOPR, under § 50.12(b)(1), an applicant that chooses to show good faith by complying with the Applicant Code of Conduct must file, as part of the pre-filing request required under § 50.5(c), an affirmative statement indicating its intent to comply with the

Applicant Code of Conduct.¹¹⁹ Under § 50.12(b)(2), such an applicant must, as part of the monthly status reports required under § 50.5(e), demonstrate compliance by: (i) affirming that the applicant and its representatives have complied with the Applicant Code of Conduct; or (ii) explaining any instances of non-compliance during the relevant month and any remedial actions taken or planned. Under proposed § 50.12(b)(3), an applicant must also identify any known instances of non-compliance that were not disclosed in prior monthly status reports and explain any remedial actions taken to remedy such instances of non-compliance.

59. In the NOPR, the Commission emphasized that compliance with the Applicant Code of Conduct is one way, but not the only way, that an applicant may demonstrate that it has met the good faith efforts standard in section 216(e)(1).¹²⁰ Nevertheless, the Commission stated that the Applicant Code of Conduct reflects principles that are broadly relevant to determining whether an applicant has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process. Thus, the Commission proposed to require under § 50.12 that an applicant that chooses not to rely on compliance with the Applicant Code of Conduct must specify its alternative method of demonstrating that it meets the statute's good faith efforts standard and explain for each deviation from the Applicant Code of Conduct why the chosen alternative is an equal or better means to ensure that the good faith efforts standard is met.

2. Comments

60. Public Interest Organizations and the Yurok Tribe generally support the Applicant Code of Conduct.¹²¹ In addition, numerous commenters urge the Commission to make compliance with the Applicant Code of Conduct mandatory for applicants to maximize transparency and meaningfully assist landowners and stakeholders.¹²² Public Interest Organizations specifically recommend that the Commission elevate the Applicant Code of Conduct as the sole means of demonstrating compliance with the good faith efforts standard in section 216(e)(1), asserting that allowing alternative methods could

¹¹⁹ *Id.* P 27.

¹²⁰ *Id.* P 28.

¹²¹ Public Interest Organizations Comments at 16–17; Yurok Tribe Comments at 30.

¹²² EDF Comments at 13; Farm Bureaus Comments at 11; Public Interest Organizations Comments at 18; NESCOE Comments at 13; Pennsylvania Consumer Advocate Comments at 7.

¹¹⁰ ClearPath Comments at 2.

¹¹¹ Joint Consumer Advocates Comments at 6.

¹¹² ACP Comments at 6.

¹¹³ Order No. 689, 117 FERC ¶ 61,202 at P 19.

¹¹⁴ See *supra* note 40, Tr. 79–90.

¹¹⁵ 16 U.S.C. 824p(b)(1)(C)(i).

¹¹⁶ 16 U.S.C. 824p(e)(1).

¹¹⁷ NOPR, 181 FERC ¶ 61,205 at PP 24–29.

¹¹⁸ *Id.* PP 26–29.

result in ambiguity for the applicant and other stakeholders.¹²³

61. Impacted Landowners and EDF urge the Commission to create clear standards to guide its good faith efforts determination, including for alternative methods of demonstrating that an applicant meets the good faith efforts standard.¹²⁴

62. In opposition, American Chemistry Council and ClearPath state that the Commission's proposed good faith efforts requirements are overly prescriptive, intrusive, outside the scope of the Commission's statutory mandates, and will turn efforts to engage affected landowners into a box-checking exercise instead of meaningful engagement.¹²⁵ American Chemistry Council and ClearPath dispute the Commission's assertion that compliance with the Applicant Code of Conduct is voluntary given that applicants pursuing alternative methods of meeting the good faith efforts requirement must explain how their methods are equal to or better than compliance with the Applicant Code of Conduct.¹²⁶ ClearPath also contends that the Applicant Code of Conduct contains redundancies, including the requirement in proposed § 50.12 that applicants provide landowners, upon first contact, with documentation about the project, which, it says, is duplicative of the notification requirements in § 50.4(c).¹²⁷ Furthermore, ClearPath contends that the NOPR proposal would create inconsistent requirements for transmission siting applications under the FPA and natural gas pipeline applications under the Natural Gas Act.¹²⁸

63. Impacted Landowners state that merely having an Applicant Code of Conduct will not result in actual good faith efforts by an applicant to engage with landowners and generally that codes of conduct do not work. They assert that there has historically been no policing or punishment of violations associated with codes of conduct.¹²⁹ Further, Impacted Landowners assert that although the proposed Applicant Code of Conduct admonishes applicants

to avoid coercive tactics while they engage in negotiations with landowners, there is no way to bring up the possible exercise of eminent domain without it being interpreted by the landowner as coercive.¹³⁰

64. California Commission states that the proposed regulations under § 50.12(b)(2) should be revised to require a demonstration and documentation of compliance with the Applicant Code of Conduct rather than only an "affirmation" to ensure applicant compliance.¹³¹

65. Several commenters seek clarification regarding the timing and duration of the Commission's good faith efforts determination required by FPA section 216(e)(1). For instance, Impacted Landowners ask the Commission to clarify the point at which the "applicable permitting process" begins, during which applicants must make good faith efforts to engage with landowners and other stakeholders. They also ask when the Commission would determine if good faith efforts have been made and whether applicants will be expected or required to continue to make good faith efforts to engage with landowners and other stakeholders once a permit is issued, asserting that after permit issuance, applicants will likely increase land acquisition efforts and negotiations can become more contentious.¹³² Several commenters suggest that applicants must make good faith efforts to engage with landowners and other stakeholders throughout the permitting process, including prior to the start of the Commission's pre-filing process.¹³³ EEI notes that in instances of late project routing changes it may be difficult to comply with the statutory good faith efforts requirement.¹³⁴

66. Similarly, several commenters raise timing concerns with using an alternative method, allowed in proposed § 50.12(c), to demonstrate that the good faith efforts standard has been met. Public Interest Organizations assert that the proposed regulations are ambiguous with respect to how or when the Commission would determine that an applicant's alternative method is equal to or better than the Commission's Applicant Code of Conduct.¹³⁵ EEI asks the Commission to avoid any disruption

or delay when making that determination.¹³⁶

67. Several commenters offer suggestions with respect to the scope of an applicant's good faith efforts under FPA section 216(e)(1). Public Interest Organizations and SEIA claim that proposed § 50.12, which applies to communications with affected landowners, fails to take into account section 216(e)(1)'s statutory directive to make good faith efforts to engage "landowners and other stakeholders."¹³⁷ Public Interest Organizations and SEIA recommend that the regulations in § 50.12 be amended to include conduct with "other stakeholders,"¹³⁸ noting that this change would extend the duty of good faith to environmental justice communities.¹³⁹ The Yurok Tribe, Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe state that Tribes should be included as a separate stakeholder in the regulations with whom applicants must demonstrate good faith efforts to engage, including in the Applicant Code of Conduct.¹⁴⁰

68. Impacted Landowners argue that the proposed Applicant Code of Conduct only applies to applicants and would not extend to contracted land agents who negotiate with landowners.¹⁴¹ Niskanen suggests that the Commission add explicit language to the Applicant Code of Conduct to capture applicability to land agents acting on behalf of applicants.¹⁴²

69. Pennsylvania Consumer Advocate, asserting that improper land agent tactics are the most common cause of complaints during transmission line siting cases, urges Commission staff to oversee interactions between applicants and affected landowners.¹⁴³ Several commenters suggest that the Commission establish compliance procedures and communication channels for landowners and stakeholders to provide feedback to the Commission concerning applicants' efforts to engage in good faith and violations of the Applicant Code of

¹²³ Public Interest Organizations Comments at 42–44.

¹²⁴ Impacted Landowners Reply Comments at 6; EDF Comments at 13.

¹²⁵ American Chemistry Council Comments at 6; ClearPath Comments at 3.

¹²⁶ American Chemistry Council Comments at 6; ClearPath Comments at 3. For example, ClearPath notes that the regulations require monthly status reports and questions whether any less frequent reporting would be deemed "equal or better" than monthly reporting.

¹²⁷ ClearPath Comments at 3.

¹²⁸ *Id.*

¹²⁹ Impacted Landowners Comments at 7–10.

¹³⁰ *Id.* at 8.

¹³¹ California Commission Comments at 7.

¹³² Impacted Landowners Reply Comments at 5–6.

¹³³ Public Interest Organizations Comments at 17 and 21; Niskanen Comments at 7.

¹³⁴ EEI Comments at 7.

¹³⁵ Public Interest Organizations Comments at 42–44.

¹³⁶ EEI Comments at 7.

¹³⁷ Public Interest Organizations Comments at 3 and 17.

¹³⁸ *Id.* at 18–21.

¹³⁹ *Id.* at 78–79; SEIA Comments at 10.

¹⁴⁰ Yurok Tribe Comments at 30; Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 2.

¹⁴¹ Impacted Landowners Comments at 9–10.

¹⁴² Niskanen Comments at 18–20.

¹⁴³ Pennsylvania Consumer Advocate Comments at 8.

Conduct.¹⁴⁴ Public Interest Organizations and Niskanen recommend that the Commission assign its Office of Public Participation to receive from landowners and stakeholders reports of abuse or fraudulent behavior exhibited by the applicant or any representative of the applicant.¹⁴⁵ Additionally, numerous commenters state that the Commission should add language to the Landowner Bill of Rights instructing affected landowners to promptly report to the Commission any instances of abuse or fraudulent behavior exhibited by the applicant or any representative of the applicant.¹⁴⁶ Impacted Landowners recommend that the Commission independently investigate complaints of violations of the Applicant Code of Conduct, and that Commission-verified violations should be punished to prevent recurrence.¹⁴⁷

70. Similarly, several commenters recommend that the Commission require applicants to include the discussion logs required under proposed § 50.12(a)(1) as part of the monthly status reports applicants must submit under § 50.5(e)(11),¹⁴⁸ or, alternatively, provide copies of discussion logs to landowners, stakeholders, and Tribes for the purpose of verifying their accuracy.¹⁴⁹ The Yurok Tribe and Public Interest Organizations ask that the Applicant Code of Conduct include a requirement for applicants to note within their discussion logs who within a Tribe was contacted, a description of the contacted Tribal representative's role, and whether another Tribal representative was suggested to be contacted.¹⁵⁰ The Yurok Tribe states that the applicant must be held accountable to follow up on alternative contact recommendations. The Yurok Tribe also suggests that the discussion logs include the date of any

questions posted by a Tribe, the contents and date of any applicant responses to questions, any follow-up after the initial answer, and the method of contact for each interaction (e.g., phone, email, in-person).¹⁵¹

71. Specific to the Applicant Code of Conduct, Public Interest Organizations note that proposed § 50.12(a)(2) requires the applicant to provide certain information to each stakeholder at first contact. However, Public Interest Organizations state that the regulations do not include a deadline for the applicant to provide these documents. Public Interest Organizations recommend that the Commission set a reasonable deadline for providing this information, such as sending the document within three business days of first contact.¹⁵²

72. Several commenters provide additional recommendations for the Applicant Code of Conduct, including requiring that company representatives: provide landowners with a copy of the Applicant Code of Conduct at first notification;¹⁵³ present photo identification;¹⁵⁴ consent to being recorded or photographed,¹⁵⁵ and explain their position and decision-making authority along with providing contact information for decision makers.¹⁵⁶ Impacted Landowners ask that the Applicant Code of Conduct require applicants to notify landowners of their right to have counsel of their choice review the easement agreement before signing and that use of eminent domain to acquire a right-of-way requires payment of just compensation determined by the appropriate court.¹⁵⁷ Other commenters suggest that the Commission require via the Applicant Code of Conduct that applicants must obtain consent from Tribes to enter any form of Tribal land or any area known to have cultural resources and that all individuals who conduct outreach to Tribes have undergone training, including affected Tribes' own programming.¹⁵⁸ ACEG recommends that the Applicant Code of Conduct require applicants to adequately protect landowners' personally identifiable information.¹⁵⁹ Finally, EDF suggests that the Applicant Code of Conduct include provisions for applicants to

determine the preferred language of all affected landowners and communicate with affected landowners in their preferred language.¹⁶⁰

3. Commission Determination

73. To incorporate the IJA's amendment to section 216(e)(1) requiring a determination by the Commission as to whether the permit holder has made good faith efforts to engage with landowners and other stakeholders, we adopt the NOPR proposal, with modifications. We find that establishing standards via the Applicant Code of Conduct provides clarity on expectations for applicants and will support the Commission in making the required good faith efforts determination. As discussed further below, in response to commenter feedback, we modify the NOPR proposal to: clarify the timing and duration of certain Applicant Code of Conduct provisions, ensure applicant representatives present photo identification and provide the applicant's contact information during discussions with affected landowners, require that applicants explain to affected landowners that they may request copies of discussion log entries that pertain to their property, and require applicants to provide affected landowners copies of their discussion log entries upon request.

74. We both decline commenters' requests to make the Applicant Code of Conduct mandatory and disagree with commenters who argue that, by setting minimum requirements, we have *de facto* made the Applicant Code of Conduct mandatory. Given that the IJA requires, as a prerequisite to the permit holder using eminent domain, that the Commission determine whether a permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process, we believe it is important for the Commission to identify a means for potential applicants to obtain that determination. At the same time, while the Applicant Code of Conduct reflects the principles, we find to be broadly relevant to determining that an applicant has made good faith efforts to engage with landowners, we will not declare that the specific steps outlined in the Applicant Code of Conduct are the only way those principles can be achieved and demonstrated. Therefore, we will allow applicants to propose for the Commission's consideration alternative methods to demonstrate that the statute's good faith efforts standard

¹⁴⁴ Impacted Landowners Comments at 11; Impacted Landowners Reply Comments at 5–6; Public Interest Organizations Comments at 17; Pennsylvania Consumer Advocate Comments at 7–8.

¹⁴⁵ Public Interest Organizations Comments at 40; Niskanen Comments at 15–17.

¹⁴⁶ Public Interest Organizations Comments at 40; Niskanen Comments at 15–17.

¹⁴⁷ Impacted Landowners Comments at 11.

¹⁴⁸ Due to a clarifying edit, in this final rule the Commission has split and redesignated what appeared in the NOPR as § 50.5(e)(7) and (8) into § 50.5(e)(7), (8), and (9). With this change, the NOPR's redesignated § 50.5(e)(9) and (10) are further redesignated to § 50.5(e)(10) and (11). Consequently, this final rule references these regulations according to the final redesignated numbering.

¹⁴⁹ Public Interest Organizations Comments at 22–23; NESCOE Comments at 14; Niskanen Comments at 20; Yurok Tribe Comments at 32 and 34.

¹⁵⁰ Yurok Tribe Comments at 31–32; Public Interest Organizations Comments at 70–71.

¹⁵¹ Yurok Tribe Comments at 32.

¹⁵² Public Interest Organizations Comments at 23.

¹⁵³ Impacted Landowners Comments at 11.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Yurok Tribe Comments at 31; Public Interest Organizations Comments at 70–71.

¹⁵⁷ Impacted Landowners Comments at 11.

¹⁵⁸ Yurok Tribe Comments at 33; Public Interest Organizations Comments at 70.

¹⁵⁹ ACEG Comments at 18.

¹⁶⁰ EDF Comments at 13.

will be met. We disagree that this framework would lead to ambiguity as commenters suggest. The scope and complexity of projects that the Commission may receive could significantly vary and we find it appropriate at this point not to forestall alternative options to demonstrate compliance with the good faith efforts standard. We find that the Applicant Code of Conduct and option to comply with an alternative method provides applicants sufficiently clear standards to allow a demonstration of good faith efforts while providing for appropriate flexibility, which may be necessary based on project-specific circumstances.

75. Establishing an Applicant Code of Conduct does not exceed the Commission's authority under FPA section 216. As described above, Congress has directed the Commission to determine, as a prerequisite to the use of eminent domain under FPA section 216(e)(1), that a permit holder has made good faith efforts to engage with landowners and other stakeholders. It is consistent with that directive to set forth in the Commission's regulations a set of actions which we find, if followed, will result in the appropriate engagement expected of applicants in their interactions with landowners and provides guidance as to the standards the Commission will apply in determining whether an applicant has met the statutory requirement.

76. Regarding ClearPath's concerns that the Applicant Code of Conduct contains redundancies, we note that the notification requirements under § 50.12 are structured to specifically address an applicant's demonstration of its good faith efforts to engage affected landowners. The Commission's existing notification requirements in § 50.4 facilitate participation from all landowners and other stakeholders during the Commission's proceeding. Although affected landowners may receive multiple notifications from applicants as a result of these requirements, the Commission does not view this as overly burdensome for applicants.

77. We also are not persuaded by ClearPath's argument that the Commission can only adopt reforms to stakeholder participation requirements if those revisions are applied equally to other Commission infrastructure processes (*i.e.*, to natural gas and hydropower proceedings).¹⁶¹ Section

216(e)(1) of the FPA requires the Commission to determine, as a prerequisite to eminent domain authority, that a permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process. There is no such requirement under the NGA or Part I of the FPA.

78. In response to questions about the timing of the Commission's good faith efforts determination, we clarify that, regardless of whether the applicant follows the Applicant Code of Conduct or an alternative method, we expect to issue such determinations concurrently with an order on the merits of a permit application under section 216(b), based on the record in the proceeding.

79. Regarding Impacted Landowners' question as to when the "applicable permitting process" and good faith efforts requirements begin and whether applicants must continue to make good faith efforts to engage after permit issuance, we clarify that a good faith efforts demonstration begins with the commencement of the Commission's pre-filing process and continues through the issuance of the Commission's order on the merits of the application. We adopt a revision in the Applicant Code of Conduct to relocate, from § 50.12(a)(1) to the introductory text in paragraph (a) of this section, the phrase "for the duration of the pre-filing and application review processes" to make clear that this duration applies to all Applicant Code of Conduct requirements. We also expect applicants to act in good faith in their dealings with landowners and other stakeholders during any post-authorization engagement related to the exercise of eminent domain, construction of the project, and any post-construction mitigation or other ongoing activities involving landowners and other stakeholders.

80. We also disagree with assertions that merely adopting an Applicant Code of Conduct would not result in actual good faith efforts or could produce contradictory results. Some of these assertions appear premised on the notion that any engagement in which an applicant retains the potential to use eminent domain is not in good faith. However, we believe that an applicant demonstrates good faith efforts by the course of its engagement and efforts to involve landowners and other stakeholders in the process, rather than by whether eminent domain is

ultimately necessary or parties are satisfied with the outcome of that engagement. We also disagree with claims that the Applicant Code of Conduct will reduce engagement to a "box checking exercise."¹⁶² We believe compliance with the information-sharing and recordkeeping provisions in the Applicant Code of Conduct will encourage meaningful engagement with landowners and help ensure that engagement meets the good faith efforts standard.

81. We decline to revise proposed § 50.12(b)(2) to require further demonstration beyond affirmation of compliance with the Applicant Code of Conduct. The Applicant Code of Conduct requires thorough documentation of an applicant's discussions with affected landowners, and each month an applicant must either affirm that it has complied with the Applicant Code of Conduct or provide a detailed explanation of any instances of non-compliance and any remedial actions taken or planned. As noted above, an applicant must demonstrate good faith efforts for the duration of the Commission's pre-filing and application review processes. In this final rule, we add § 50.12(b)(4) to clarify that an applicant must continue to file monthly status reports describing its efforts to comply with the Applicant Code of Conduct during the application review process.

82. Regarding alternatives to the Applicant Code of Conduct, we clarify that an applicant that uses an alternative method to demonstrate good faith efforts to engage with landowners will bear the burden to explain how its alternative method is equal to or better than compliance with the Applicant Code of Conduct. The Commission would not typically reach a determination that this standard is met until it evaluates the permit application and determines whether to issue a permit. Thus, an applicant who seeks to demonstrate that an alternative method is equal to or better than compliance with the Applicant Code of Conduct will face uncertainty regarding the acceptability of its method until the Commission determines it meets the regulatory standard. We have set forth an Applicant Code of Conduct that reflects principles we find to be broadly relevant to determining whether an applicant has made good faith efforts to engage with landowners and establishes a set of practices we believe are sufficient to achieve those principles. Applicants should propose deviations

¹⁶¹ The Commission is not obligated to implement changes in a single, sweeping step, and is not barred from implementing process improvements to only one program at a time. *See, e.g., Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transportation Workers v. Fed. R.R.*

Admin., 10 F.4th 869, 875 (D.C. Cir. 2021) (agencies have great discretion to take one step at a time and do not need to act in "one fell regulatory swoop") (internal citation and quotation omitted).

¹⁶² *See, e.g., American Chemistry Council Comments at 6; ClearPath Comments at 3.*

only where they are confident that their approach is equal to or better than the Applicant Code of Conduct as a means of demonstrating that they have made good faith efforts to engage with landowners as required by the statute.

83. In response to EEL's comment regarding the potential for late-stage route changes, we note that applicants are required to file monthly reports during the pre-filing process detailing the efforts to comply with the Applicant Code of Conduct. To the extent that project route changes are developed during the pre-filing process, we expect that engagement with landowners and other affected stakeholders who would be newly impacted by the contemplated route change will be documented in monthly reports. In the instance of route changes that occur after an application is filed, § 50.4(c)(3) requires notifications to newly affected landowners when they are identified. We expect applicants to continue to make good faith efforts to engage affected landowners, including those impacted by post-application and post-authorization route changes, throughout the application review process and through construction and restoration and mitigation efforts.

84. In response to comments regarding the scope of proposed § 50.12, we agree with commenters that FPA section 216(e)(1) requires an applicant to demonstrate good faith efforts to engage with "landowners and other stakeholders." We decline to alter the scope of the Applicant Code of Conduct, which specifically provides an applicant a means to demonstrate compliance with the good faith efforts standard in communications with affected landowners. The Applicant Code of Conduct specifies recordkeeping and information-sharing requirements that are tailored to encourage productive and more sustained engagement with affected landowners regarding the use or acquisition of their property, which may not necessarily apply to engagement with other stakeholders. With regard to good faith efforts to engage with other stakeholders, applicants bear the burden to demonstrate good faith efforts at engagement and should strive to incorporate best practices used in engagement with affected landowners in engagement with other stakeholders, as applicable. We also clarify that the Commission will assess case-by-case an applicant's good faith efforts to engage with other stakeholders, based on the record in a proceeding. We will consider, among other things, an applicant's efforts to engage stakeholders as described in the Project

Participation Plan (including engagement with environmental justice communities and Tribes), monthly status reports describing stakeholder communications during pre-filing, and compliance with Commission regulations for project notifications.

85. In response to the requests of several Tribes, we clarify that Tribes meeting the definition of Indian Tribe in § 50.1 qualify as stakeholders for which applicants would be required to make good faith efforts to engage. We conclude that the good faith efforts requirements as discussed herein will ensure appropriate engagement with Tribes. Accordingly, the Commission would consider evidence of engagement with Tribes in its assessment of whether the good faith efforts standard has been met.

86. As to applicability of the Applicant Code of Conduct to land agents, we note that proposed § 50.12(a)(12), adopted in this final rule, explicitly applies the Applicant Code of Conduct to any representative acting on the applicant's behalf, which includes land agents.

87. We decline to adopt additional mechanisms to monitor compliance with the good faith efforts standard. We do not believe that it is an appropriate or practical use of Commission or stakeholder resources to adjudicate good faith efforts issues during the course of a proceeding. We encourage affected landowners and other stakeholders to participate in the pre-filing process and the permit proceeding once an application is filed. Landowners and other stakeholders may file comments in the project-specific proceeding and may contact the Commission's landowner helpline to identify perceived violations of the Applicant Code of Conduct for consideration and to request investigation by the Commission. Any comments submitted in the record may inform the Commission's deliberation regarding the good faith efforts standard and issuance of the permit. We also note that the Office of Public Participation may be able to provide technical assistance to landowners and other stakeholders regarding how to participate in a proceeding, but will not serve as an advocate for stakeholders.

88. We also decline to make any additional changes to the applicant's duty under § 50.12(a)(1) to develop and maintain a log of discussions because we conclude that the proposed requirements are sufficiently detailed to record engagement with affected landowners, and the Applicant Code of Conduct, as discussed above, is specifically aimed at promoting good faith engagement. We similarly decline

to require applicants to file the discussion logs with the applicant's monthly status reports required by § 50.5(e)(11), as such a categorical requirement is not necessary to promote good faith engagement and could result in the public disclosure of information that landowners may not want shared with the general public. With respect to commenters' request that affected landowners be provided with any relevant discussion logs, this final rule modifies § 50.12(a)(2) to require applicants to explain to affected landowners that they may request copies of discussion log entries that pertain to their property and how affected landowners make such requests, and modifies § 50.12(a)(5) to require applicants to provide affected landowners copies of discussion log entries, upon request.

89. Turning to commenter feedback on specific provisions in the Applicant Code of Conduct, we agree with Public Interest Organizations that requiring an applicant to provide to each affected landowner specified documents "immediately" after first contact may be vague and confusing. Therefore, we modify the NOPR proposal in § 50.12(a)(2) by deleting "immediately" and adding in its place "within three business days" to clarify how soon after the first contact the required document must be provided to the landowner.

90. We decline to require applicants to provide landowners with copies of the Applicant Code of Conduct, as recommended in comments. As stated in the NOPR, the Applicant Code of Conduct reflects principles that are broadly relevant to determining whether an applicant has made good faith efforts to engage with landowners. We do not believe that requiring applicants to provide the Commission's regulatory text to affected landowners is necessary or will assist in our good faith efforts determination. In any event, we note that the Commission's *Electric Transmission Facilities Permit Process* pamphlet—a copy of which applicants must include as part of their Pre-filing Notifications sent by mail—will be updated to reflect the provisions in this final rule, and will include the text of the Applicant Code of Conduct.

91. Regarding requests that applicant representatives present photo identification when engaging with affected landowners, we agree and adopt this requirement in § 50.12(a)(3). We find that a photo identification requirement provides an important protection to an affected landowner in confirming the identity and business association of the applicant representative with whom the

landowner is speaking, and such requirement presents a minimal burden on the applicant.

92. Given the protections to affected landowners contained herein, including in the Landowner Bill of Rights and the required sharing of information by the applicant, as well as the photo identification requirement, we decline to also add a requirement that applicant representatives consent to being recorded and photographed.

93. Regarding the request for company representatives to provide contact information for decision makers, we assume commenters are referring to a decision maker within the applicant's company. We agree that it is important to provide affected landowners a way to contact the applicant to obtain more information about a project or report any issues with land agents. Therefore, we modify the NOPR proposal in § 50.12(a)(3) to require an applicant's representative to also provide contact information for the applicant.

94. Regarding Tribal concerns for obtaining consent to enter Tribal lands, we clarify that the Applicant Code of Conduct would apply to land owned in fee by a Tribe or member of a Tribe, so § 50.12(a)(9) would require approval from the Tribe or member of a Tribe under those circumstances.

95. We also decline to adopt a requirement that applicants have specific engagement training that may be provided by Tribes. While such engagement training may constitute a good business practice, we do not find a generic requirement necessary to promote good faith efforts to engage with affected landowners or other stakeholders. We reiterate that the burden is on the applicant to demonstrate that the good faith efforts standard has been met, and we therefore expect that the applicant will take reasonable steps to engage with Tribes.

96. We also disagree that an addition to the Applicant Code of Conduct to protect landowners' personally identifiable information is necessary. We expect applicants to protect sensitive information from public release, however, some personal information (e.g., a landowner's name or mailing address) may be sourced from public databases or applicants may need to share such information with its own contractors or submit it to agencies as part of permitting application submittals. Of course, when filing information that may contain personal information with the Commission, applicants should use any appropriate

filing classification for proper treatment by the Commission.¹⁶³

97. As to the suggestion that applicants should communicate with landowners in their preferred language, we understand the importance of communicating basic information about the project, particularly to landowners who may be subject to eminent domain, in languages other than English where a significant portion of the community has limited English proficiency. As discussed below, in response to comments, we modify proposed § 50.4 to require applicants to identify census block groups that include limited English proficiency households, identify the languages spoken in those census block groups, and, under certain circumstances, provide project notifications in languages other than English. Applicants must also describe in the Environmental Justice Public Engagement Plan how they will identify, engage, and accommodate people with limited English proficiency.

C. Environmental Justice Public Engagement Plan

1. NOPR Proposal

98. In the NOPR, the Commission stated that the existing provisions of § 50.4(a) require applicants to develop and file a Project Participation Plan early in the pre-filing process.¹⁶⁴ The Commission explained that this requirement is intended to facilitate stakeholder communications and the dissemination of public information about the proposed project, including meaningful engagement early in the pre-filing process with potentially affected environmental justice communities. The Commission further explained that engagement with environmental justice communities is consistent with a series of executive orders, the *Promising Practices for EJ Methodologies in NEPA Reviews* (*Promising Practices*) report, and the Commission's Equity Action Plan.¹⁶⁵ Accordingly, the Commission

¹⁶³ For example, applicants may request privileged treatment for landowner mailing lists submitted to the Commission by following the procedures specified in § 388.112 of the Commission's regulations.

¹⁶⁴ NOPR, 181 FERC ¶ 61,205 at P 30.

¹⁶⁵ *Id.* (citing E.O. 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629 (Feb. 11, 1994); E.O. 14008, Tackling the Climate Crises at Home and Abroad, 86 FR 7619 (Jan. 27, 2021); E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021); Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf); Commission, Equity Action Plan (2022), <https://www.ferc.gov/equity>.)

proposed to require, under § 50.4(a)(4) as part of the Project Participation Plan, that applicants develop an Environmental Justice Public Engagement Plan describing the applicant's outreach activities that are targeted to identified environmental justice communities.¹⁶⁶

99. The NOPR explained that the proposed Environmental Justice Public Engagement Plan would require applicants to summarize comments received from potentially impacted environmental justice communities during any previous outreach activities, if applicable, and describe planned outreach activities during the permitting process, including efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities.¹⁶⁷ The proposed plan must also describe the manner in which the applicant will reach out to environmental justice communities about potential mitigation.¹⁶⁸

2. Comments

100. Some commenters question the Commission's authority to require the Environmental Justice Public Engagement Plan, given the reliance on executive orders and guidance. Representatives McMorris Rodgers and Duncan state that the NOPR appears to broadly interpret the Commission's

practices_document_2016.pdf; Commission, Equity Action Plan (2022), <https://www.ferc.gov/equity>.)

¹⁶⁶ To identify potentially-affected environmental justice communities in individual proceedings, Commission staff uses current U.S. Census American Community Survey data for the race, ethnicity, and poverty data at the State, county, and block group level. As recommended in *Promising Practices*, the Commission currently uses the fifty percent and the meaningfully greater analysis methods to identify minority populations. Specifically, a minority population is present where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50%; or (2) the aggregate minority population in the block group affected is 10% higher than the aggregate minority population percentage in the county. Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf. Using *Promising Practices'* low-income threshold criteria method, low-income populations are currently identified as block groups where the percent of a low-income population in the identified block group is equal to or greater than that of the county. E.g., *Transcon. Gas Pipe Line Co. LLC*, 186 FERC 61,209, at PP 34–36 (2024).

¹⁶⁷ NOPR, 181 FERC ¶ 61,205 at P 31.

¹⁶⁸ We note that the proposed *Environmental justice* resource report, discussed further below, would require the applicant to describe any proposed mitigation measures intended to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed mitigation measures and how that input informed such measures. See *infra* Part II.F.4.e.

statutory authority and thus request that the Commission specify what statutory authorities it is relying upon.¹⁶⁹ Conversely, NESCOE argues that the proposed Environmental Justice Public Engagement Plan aligns with the Commission's statutory authority under FPA section 216(b).¹⁷⁰ ClearPath is also concerned that reliance on best practices derived from CEQ, the Environmental Protection Agency (EPA), Census Bureau, and other authoritative sources, introduces uncertainty and delay should applicants have to re-do compliance requirements every time new data or guidance becomes available.¹⁷¹

101. American Chemistry Council and ClearPath argue that, although they support community engagement, the proposed Environmental Justice Public Engagement Plan does not advance this goal because the proposal imposes extensive new requirements, as well as specific notice and follow-up actions that are likely to undermine community engagement, redirect effort from engagement to duplicative and excessive paperwork, and foster increased procedural litigation and challenges—leading to delays.¹⁷² American Chemistry Council states that the Commission should limit any new planning mandates to outlining strategic goals, planned communication tools and strategies, and desired outcomes.¹⁷³ Representatives McMorris Rodgers and Duncan argue that the Environmental Justice Public Engagement Plan includes vague requirements and asks whether the Commission will issue more specific guidelines.¹⁷⁴ ClearPath argues that the Commission failed to explain how the current stakeholder participation revisions are deficient for environmental justice communities, but not for the general public; therefore, it recommends that the Commission continue to utilize its existing public participation procedures and not add a separate, duplicative Environmental Justice Public Engagement Plan.¹⁷⁵

102. On the other hand, several commenters support the requirement for an Environmental Justice Public Engagement Plan. Public Interest Organizations believe that the Commission must take concrete, tangible action to require robust

community engagement and partnership.¹⁷⁶ Environmental Law & Policy Center states that this early stakeholder engagement will improve the transmission siting process.¹⁷⁷ Clean Energy Buyers also comment in support but recognize that the success of a plan will depend on the applicant's ability to actually engage with the target communities.¹⁷⁸

103. Several commenters request clarification and revision to the proposed requirement for an Environmental Justice Public Engagement Plan. EDF states that because the NOPR was drafted before the issuance of Executive Order 14096, the Commission should review its proposal in light of renewed and strengthened environmental justice requirements to ensure compliance with updated rules and guidance.¹⁷⁹ It also encourages the Commission to mandate engagement on mitigation, including the discussion of alternatives and community benefit programs. Environmental Law & Policy Center urges the Commission to adopt specific recommendations to ensure that engagement is more than a box-checking exercise for developers.¹⁸⁰ NESCOE states that, under the NOPR proposal, applicants would not be required to comply with any actual standards for engaging with environmental justice communities, including documentation, accountability, and enforcement of consequences for inadequate engagement.¹⁸¹ EDF requests that the Commission periodically review the results of applicants' Environmental Justice Public Engagement Plans and determine whether they are yielding sufficient engagement with environmental justice communities.¹⁸²

104. Several commenters recommend specific methodology and terminology clarifications.¹⁸³ Public Interest Organizations ask the Commission to require applicants to use updated information from CEQ and EPA when identifying environmental justice communities as part of their Environmental Justice Public

Engagement Plan or providing specificity on the additional sources the Commission expects applicants to use, to ensure consistency and transparency in the methodology selection process.¹⁸⁴ Public Interest Organizations state that the Commission must: prioritize identification methodologies that promote accurate identification of environmental justice communities; provide guardrail language to guide the methodology selection process while creating flexibility; acknowledge the scope and limitations of potential databases and tools, where applicable; and commit to promptly update its methods for identifying environmental justice communities.¹⁸⁵ In addition, they state that the Commission should refine the term "outreach activities" in order to require developers to seek guidance on and then incorporate community-based best practices and methods for both disseminating and requesting information and input from the community.¹⁸⁶ Public Interest Organizations argue that outreach activities should include a reciprocal educational component where developers as well as the community members share and meaningfully engage with each other.¹⁸⁷

105. EDF and Policy Integrity recommend that the Commission and developers utilize specific tools such as the EPA's EJScreen Tool, CEQ's Climate and Economic Justice Screening Tool (CEJST), and State-developed mapping tools to identify environmental justice communities.¹⁸⁸ Public Interest Organizations agree on the need for more nuanced and fulsome identification of environmental justice communities, but state that utilization of the EJScreen and CEJST can only be useful first steps in this methodology given that both tools have inherent limitations.¹⁸⁹

106. Policy Integrity states that the Commission should require incorporation of screening tools that use a combination of environmental and socioeconomic proxies, such as proximity to pollution, because relying upon demographic-only proxies like income and race might not capture localized harms and omit communities that would otherwise satisfy the proposed definition of environmental

¹⁶⁹ Representatives McMorris Rodgers and Duncan Comments at 2.

¹⁷⁰ NESCOE Comments at 15–26.

¹⁷¹ ClearPath Comments at 4.

¹⁷² American Chemistry Council Comments at 7; ClearPath Comments at 4–5.

¹⁷³ American Chemistry Council Comments at 7.

¹⁷⁴ Representatives McMorris Rodgers and Duncan Comments at 2.

¹⁷⁵ ClearPath Comments at 4.

¹⁷⁶ Public Interest Organizations Comments at 44, 86–89.

¹⁷⁷ Environmental Law & Policy Center Comments at 2.

¹⁷⁸ Clean Energy Buyers Comments at 8–9.

¹⁷⁹ EDF Comments at 9 (referencing E.O. 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251 (Apr. 21, 2023)).

¹⁸⁰ Environmental Law & Policy Center Comments at 2.

¹⁸¹ NESCOE comments at 25; EDF Comments at 9.

¹⁸² EDF Comments at 9.

¹⁸³ EDF Comments at 8; Environmental Law & Policy Center Comments at 4.

¹⁸⁴ Public Interest Organizations Comments at 86.

¹⁸⁵ *Id.* at 84–85.

¹⁸⁶ *Id.* at 88.

¹⁸⁷ *Id.*

¹⁸⁸ EDF Comments at 9; Policy Integrity Comments at 24–37; Environmental Law & Policy Center Comments at 4.

¹⁸⁹ Public Interest Organizations Comments at 84–85.

justice community.¹⁹⁰ It asks the Commission to recognize any historically marginalized community that bears any type of disproportionate environmental burden or faces disparities in access to environmental benefits as an environmental justice community.¹⁹¹ In addition, Policy Integrity states that the Commission should establish a mechanism for communities to self-identify as environmental justice communities, and then adjudicate whether a community should be considered an environmental justice community in light of submitted evidence.¹⁹²

107. Commenters make additional recommendations in support of transparency and accountability in the process of engaging with environmental justice communities, including requiring notices in languages other than English, maintaining a project website, and using additional notification methods.¹⁹³ NESCOE recommends several engagement best practices such as holding in-person meetings “in locations that are accessible by public transportation . . . [and] at times that would allow working individuals to attend,” providing childcare during such meetings, designating a community liaison, and disseminating non-technical information that meaningfully explains how one might be impacted by the project.¹⁹⁴ Some commenters recommend that the Commission’s Office of Public Participation have a role in the identification of barriers to participation as well as helping foster engagement between the Commission, applicants, and environmental justice communities.¹⁹⁵

108. NESCOE and Clean Energy Buyers suggest that the Commission should ensure that its public engagement and environmental justice review practices are generally consistent and coordinated with applicable State policies and agencies.¹⁹⁶ Joint Consumer Advocates argue that the Commission’s proposed approach only requires applicants to describe outreach activities and summarize comments, which largely places the burden on disadvantaged populations to describe anticipated impacts to human health or

the environment, rather than engaging State agencies like consumer advocate offices.¹⁹⁷

3. Commission Determination

109. We adopt the NOPR proposal to require an Environmental Justice Public Engagement Plan under § 50.4(a)(4) as a component of the Project Participation Plan, with the following modification. The NOPR proposed that the plan describe an applicant’s efforts to identify, engage, and accommodate “non-English speaking groups and linguistically isolated communities;” however, this final rule updates that terminology to “people with limited English proficiency.”

110. As an initial matter, we disagree that requiring applicants to include an Environmental Justice Public Engagement Plan as part of its Project Participation Plan exceeds the Commission’s statutory authority. NEPA requires the Commission to evaluate the environmental impacts of any major Federal action, such as the issuance of a permit to site electric transmission facilities under section 216 of the FPA.¹⁹⁸ The Commission’s obligation to take a “hard look” at such impacts under NEPA requires consideration of impacts on environmental justice communities, much as it requires the Commission to consider impacts on other affected communities.¹⁹⁹ This requirement facilitates the development of the record, including the *Environmental justice* resource report, that the Commission needs to assess impacts on environmental justice communities by providing a roadmap for applicants’ engagement with environmental justice communities and an opportunity for comment on that engagement. In addition, requiring applicants to describe engagement with identified environmental justice communities will assist the Commission in meeting its statutory obligations under FPA section 216. Because environmental justice communities may experience environmental impacts more acutely than other communities or targeted methods of engagement may be more effective,²⁰⁰ we appropriately require that an applicant develop a

targeted outreach plan for environmental justice communities.²⁰¹

111. Requiring an applicant to describe its outreach targeted to environmental justice communities as part of its Project Participation Plan is also consistent with the Executive Orders that direct Federal agencies to identify and address disproportionate and adverse human health or environmental effects of their actions on minority and low-income populations (*i.e.* environmental justice communities).²⁰² In response to EDF’s request that we review Executive Order 14096, we note that the new Executive Order did not rescind Executive Order 12898. The Commission’s current practices as an independent regulatory agency are largely consistent with the principles and goals of Executive Order 14096.²⁰³ This requirement is also consistent with the Commission’s 2022 Equity Action Plan, which promotes equitable processes and outcomes for underserved communities, including environmental justice communities, at the Commission.²⁰⁴

112. Regarding comments stating that the proposed Environmental Justice Public Engagement Plan does not advance the goal of community engagement and imposes extensive new or duplicative requirements, we disagree. The Commission currently requires a Project Participation Plan in § 50.4(a), which requires applicants to identify specific tools and actions to facilitate stakeholder communications and public information, including those tools and actions used to engage stakeholders.²⁰⁵ To advance stakeholder participation under § 50.4, we are requiring applicants to plan and target their outreach to ensure appropriate and effective meaningful engagement with

²⁰¹ See E.O. 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 FR 25251, 25252 (Apr. 21, 2023).

²⁰² See E.O. 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629 (Feb. 11, 1994); E.O. 14008, Tackling the Climate Crises at Home and Abroad, 86 FR 7619 (Jan. 27, 2021); E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021); E.O. 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 FR 25251 (Apr. 21, 2023).

²⁰³ E.O. 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 FR 25251 (Apr. 21, 2023).

²⁰⁴ FERC, *Equity Action Plan* (2022), <https://www.ferc.gov/equity>.

²⁰⁵ Consistent with the revised definition of “stakeholder” in § 50.1 in this final rule, all stakeholders mean any “Federal, State, interstate, or local agency; any Indian Tribe; any affected landowner; any environmental justice community member; or any other interested person or organization.”

¹⁹⁰ Policy Integrity Comments at 24.

¹⁹¹ *Id.* at 2.

¹⁹² *Id.* at 37–39.

¹⁹³ ClearPath Comments at 5; Public Interest Organizations Comments at 87; NESCOE Comments at 26.

¹⁹⁴ NESCOE Comments at 26.

¹⁹⁵ *Id.* at 25–26; Public Interest Organizations Comments at 89–91.

¹⁹⁶ NESCOE Comments at 26; Clean Energy Buyers Comments at 9.

¹⁹⁷ Joint Consumer Advocate Comments at 18.

¹⁹⁸ 42 U.S.C. 4332(2)(C); see *Sierra Club v. FERC*, 38 F.4th 220, 226 (D.C. Cir. 2022).

¹⁹⁹ See *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

²⁰⁰ For example, targeted methods of engagement may include additional notification to community leaders, religious institutions, and other community resources, and the publishing of project information via community newspapers and radio stations.

potentially affected environmental justice communities.

113. The requirement to address targeted outreach to identified environmental justice communities merely codifies the expectation that engagement with stakeholders in differing circumstances will require differing approaches in order to be effective. Therefore, we do not believe this requirement imposes additional administrative burden or delay for applicants. This separate provision aims to ensure that applicants do not use a “one size fits all” approach to outreach, and it fosters the inclusion of outreach techniques that are tailored to communication with environmental justice communities.

114. With regard to potential burdens placed on environmental justice communities in having to communicate potential adverse impacts caused or exacerbated by the project, we acknowledge this concern and require applicants to identify the measures taken to accommodate environmental justice communities who may face barriers to traditional outreach or engagement methods. Additionally, the Commission’s Office of Public Participation will continue to engage with the public and act as a liaison to members of the public affected by and interested in Commission proceedings.

115. In response to comments recommending that the Commission require the utilization of specific screening tools to identify environmental justice communities such as CEQ’s CEJST, we decline to do so. The Commission currently uses the smallest geographic data area available, census block groups, to identify environmental justice communities in accordance with the identification methodology put forth in *Promising Practices* and described above.²⁰⁶ In contrast, CEJST uses census tracts, a larger geographic data area, to identify “disadvantaged communities” based on a variety of thresholds. We decline to require the use of alternative screening tools that do not provide a localized review of smaller environmental justice communities in block groups. Further, to the extent that commenters argue that the Commission should utilize the tools to expand the definition of environmental justice communities, we

decline for the reasons expressed addressing definitions below.²⁰⁷

116. We acknowledge the desire expressed by commenters for specific guidance for the Environmental Justice Public Engagement Plan and best practices for engagement with environmental justice communities.²⁰⁸ But we find that the provisions of § 50.4 are sufficient to establish applicants’ obligation to prepare a Project Participation Plan that includes how they will address outreach to environmental justice communities.

117. Likewise, we decline to incorporate policies of States or other agencies. Such specific practices may not be universally or practically applicable across the variety of applications and contexts relevant to this rule. Imposing an overly prescriptive set of requirements mandating specific methodologies could negatively impact flexibility needed to address engagement in the context of a broad spectrum of applications. Instead, we believe such practices may more appropriately be considered as part of future action by the Commission in specific proceedings and/or as guidance, intended to assist applicants to more effectively implement their regulatory obligations.

118. We also decline to adopt requirements mandating specific levels of engagement as part of this rule. Again, adopting such requirements is impracticable given the variety of applications and related factual contexts we expect to encounter.

D. Revisions to 18 CFR Part 50

1. Section 50.1—Definitions

119. Section 50.1 sets forth the definitions for part 50 of the Commission’s regulations. The Commission proposed in the NOPR to add definitions for “Indian Tribe” and “environmental justice community.” The Commission also proposed to revise the definitions of “national interest electric transmission corridor,” “permitting entity,” and “stakeholder.” Although the Commission did not propose to revise the definition of “affected landowners,” the NOPR sought comment on whether the Commission should revise the definition to include landowners within a certain geographic distance from the proposed project facilities.

120. This final rule adopts a definition for “Indian Tribe,” as proposed in the NOPR, consistent with the Commission’s regulations governing other types of energy infrastructure projects.²⁰⁹ We also adopt the definition of “permitting entity” as proposed in the NOPR. In addition, we modify several proposed definitions as further discussed below.

a. Definition of Environmental Justice Community

i. NOPR Proposal

121. The Commission in the NOPR proposed to add a definition for the term “environmental justice community” to assist applicant compliance with the requirement in proposed § 50.4(a)(4) that an applicant develop and file an Environmental Justice Public Engagement Plan.²¹⁰ Specifically, the Commission proposed to define the term “environmental justice community” as “any disadvantaged community that has been historically marginalized and overburdened by pollution, including, but not limited to, minority populations, low-income populations, or indigenous peoples.”

ii. Comments

122. Farm Bureaus state that at the Federal level there is no clear definition of environmental justice communities.²¹¹ American Chemistry Council and NESCOE agree and encourage the Commission to work with EPA, DOE, and other Federal agencies to develop one consistent definition for environmental justice communities, as the lack of a consistent terminology and definition across government programs creates confusion and uncertainty for all stakeholders.²¹² ClearPath questions the legal durability of the Commission’s definition, particularly if other agencies adopt different definitions.²¹³ ClearPath and Chamber of Commerce assert that adding the definition of “environmental justice community” may exceed the Commission’s statutory authority and expertise, increasing opportunities for legal challenges.²¹⁴

²⁰⁹ See, e.g., 18 CFR 4.30(b)(10) (2023) (defining “Indian Tribe” in reference to an application for a license or exemption for a hydropower project) and 18 CFR 157.1 (defining “Indian Tribe” in reference to an application for a certificate of public convenience and necessity for a natural gas pipeline project).

²¹⁰ See discussion *supra* Part II.C.

²¹¹ Farm Bureaus Comments at 13.

²¹² American Chemistry Council Comments at 7; NESCOE Comments at 27.

²¹³ ClearPath Comments at 4.

²¹⁴ ClearPath Comments at 4; Chamber of Commerce Comments at 4.

²⁰⁶ *Supra* note 166. E.g., *ANR Pipeline Co.*, 185 FERC ¶ 61,191, at P 96 (2023); see also *PennEast Pipeline Co. LLC*, 170 FERC ¶ 61,198, at 62,305 (2020) (upholding staff’s reliance on EPA’s EJScreen Tool to identify census block groups meeting the definition of an environmental justice community despite the availability of alternative screening tools).

²⁰⁷ *Infra* P 135.

²⁰⁸ Outside of this final rule, the Commission has received comments on best practices for engagement with environmental justice communities during the Environmental Justice Roundtable and filed in Docket No. AD23–5–000.

123. ClearPath and Representatives McMorris Rodgers and Duncan assert that the Commission's definition of "environmental justice community" is standardless, such that the term "overburdened by pollution" has neither a quantitative methodology for applicants to follow nor a threshold for a designation to be made in a legally durable manner.²¹⁵ ClearPath states that the Commission makes the definition open-ended when it states it "includes, but may not be limited to minority populations, low-income populations, or indigenous people."²¹⁶ Chamber of Commerce states that transmission line infrastructure is not a source of "pollution" as contemplated under the Commission's proposed definition of "environmental justice community."²¹⁷

124. CATF suggests that the proposed definition of "environmental justice community" be modified, specifically to remove the word "disadvantaged," citing a CEQ memorandum which states that some communities and advocates prefer "overburdened and underserved" instead of "disadvantaged."²¹⁸

125. EDF and Policy Integrity state that the Commission's definition for "environmental justice community" is too narrow, risking the omission of communities that bear disproportionate environmental burdens beyond pollution (e.g., flooding) and health impacts resulting from industry and infrastructure, or that lack equal access to environmental benefits (e.g., green space).²¹⁹

126. EDF also states that the Commission's proposed definition could be read as limiting the consideration of communities that can specifically demonstrate that they have been historically marginalized or overburdened by pollution, since it contains an additional requirement that the community be a "disadvantaged community," without a definition of that term.

127. Impacted Landowners state that rural landowners along the center line of a proposed overhead transmission project on a new right-of-way should be considered environmental justice communities because such landowners are disadvantaged and marginalized.²²⁰ Further, Impacted Landowners suggest that identification of environmental justice communities should include religious affiliation, occupation, age, or

those who have been historically impacted due to numerous energy infrastructure projects located on their property.²²¹

128. Los Angeles DWP proposes defining environmental justice community as "a group of people or a community that is disproportionately affected by environmental pollution, hazards, or other environmental risks, and that may face social, economic, or political barriers to accessing a healthy and sustainable environment."²²²

129. Public Interest Organizations recommend revising the Commission's proposed definition of environmental justice community to include "any community that is historically marginalized and/or overburdened by pollution, including but not limited to communities with significant representation of communities of Color, low-income communities, or Indian Tribes and Indigenous peoples."²²³ Public Interest Organizations also state that using the term "communities with significant representations of communities of Color," rather than "minority populations" reflects the Commission's practice of using the Fifty Percent Analysis and Meaningfully Greater Analysis, as recommended in *Promising Practices*.

130. Public Interest Organizations also request that the Commission include a definition of "overburdened" in § 50.1.²²⁴ They point to the EPA 2020 EJ Glossary for the Commission to model in defining "overburdened communities."²²⁵

131. SEIA recommends revising the Commission's proposed definition of "environmental justice community" to "a geographic location with significant representation of persons of color, low-income persons, indigenous persons, or members of Tribal nations, where such persons experience, or are at risk of

experiencing, higher or more adverse human health or environmental outcomes."²²⁶ SEIA states that this definition would be quantifiable based on census data, and can allow all stakeholders to work from a common understanding of what would make an environmental justice community.

iii. Commission Determination

132. The Commission adopts the definition of "environmental justice community" as proposed in the NOPR with one modification, removing "disadvantaged" in the definition, as further discussed herein.

133. As an initial matter, we disagree that defining "environmental justice community" exceeds the Commission's legal authority for the same reasons expressed above.²²⁷ Further, we decline to defer establishing a definition of "environmental justice community" until such time as a universal definition can be agreed upon by multiple agencies because the Commission cannot wait to carry out its statutory responsibilities under NEPA and section 216 of the FPA.

134. We are informed by Executive Order 14008's focus on communities that have been historically and disproportionately marginalized and overburdened by pollution.²²⁸ The term "environmental justice community" includes, but may not be limited to, minority populations, low-income populations, or indigenous peoples.²²⁹ This definition is substantially the same definition the Commission has used in its environmental reviews and orders pertaining to energy infrastructure development applications over the last several years.²³⁰ The definition has allowed the Commission, applicants, and stakeholders to have a general sense of the types of communities that may fall under the term, while the identification methodology noted above²³¹ and in each of the Commission's NEPA documents and Commission orders provides a common understanding of the steps necessary to identify environmental justice

²²¹ Impacted Landowners Comments at 24.

²²² Los Angeles DWP Comments at 3.

²²³ Public Interest Organizations Comments at 81.

²²⁴ Public Interest Organizations Comments at 83.

²²⁵ The EPA 2020 EJ Glossary defines "overburdened communities" as "minority, low-income, tribal, or Indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities." EPA, *EJ 2020 Glossary* (Feb. 2024), <https://www.epa.gov/system/files/documents/2024-02/ej-2020-glossary.pdf>.

²²⁶ SEIA Comments at 12.

²²⁷ *Supra* PP 110–111.

²²⁸ E.O. 14008, *Tackling the Climate Crises at Home and Abroad*, 86 FR 7619 (Jan. 27, 2021); see also E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 FR 25251 (Apr. 21, 2023).

²²⁹ See E.O. 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 FR 7629 (Feb. 11, 1994); see also EPA, *EJ 2020 Glossary* (Feb. 2024), <https://www.epa.gov/system/files/documents/2024-02/ej-2020-glossary.pdf>.

²³⁰ See, e.g., *Columbia Gas Transmission, LLC*, 186 FERC ¶ 61,048, at P 20 n.36 (2024); *Andrew Peklo III*, 186 FERC P 61,208, at P 23 n.41 (2024).

²³¹ *Supra* note 166.

²¹⁵ ClearPath Comments at 4; Representatives McMorris Rodgers and Duncan Comments at 2.

²¹⁶ ClearPath Comments at 4.

²¹⁷ Chamber of Commerce Comments at 3–4.

²¹⁸ CATF Comments at 9.

²¹⁹ EDF Comments at 8; Policy Integrity Comments at 2.

²²⁰ Impacted Landowners Comments at 20.

communities. To the extent that the Commission, applicants, or participants identify additional populations with environmental justice concerns, the Commission will address impacts on these communities in the context of specific proceedings.

135. We define “environmental justice community” with the intent of neither too rigidly limiting nor strictly defining a set list of demographic populations or communities. We are intentionally allowing flexibility in the definition of “environmental justice community,” as this acknowledges that there are many environmental or human health qualifiers that may need to be analyzed separately by Commission staff to determine anticipated impacts on potential environmental justice communities. This flexibility is intended to strike a balance between applying an identification methodology that can be used in all proceedings and allowing the identification of other populations, during scoping or in comments filed in the record of individual proceedings, that may fall outside of the categories of minority populations, low-income populations, or indigenous peoples. We do not agree that this flexibility renders the definition practically unworkable, as applicants seeking to develop energy infrastructure in other contexts have been able to use the definition and identification methodology to successfully develop and submit the information that the Commission needs to process applications.²³² Likewise, we do not agree that the definition of “environmental justice community” is so expansive that it cannot be readily understood and applied.

136. Commenters’ assertion that transmission line infrastructure is not a source of “pollution” as contemplated under the definition of “environmental justice community” is inapposite. Defining an environmental justice community as one that has been overburdened by pollution acknowledges the historical burdens of disproportionate rates of pollution faced by environmental justice communities.²³³ We believe that there are many ways in which transmission line infrastructure may result in reasonably foreseeable adverse impacts on environmental justice communities during construction, operation, and maintenance of the project facilities.

137. We acknowledge commenters’ concerns regarding use of the word

“disadvantaged” in the definition of “environmental justice community.” Given that the definition of environmental justice communities adopted in this final rule includes language indicating its applicability to communities that have been historically marginalized and overburdened by pollution, we agree that it is not necessary to include the word “disadvantaged” in the definition and have removed it in this final rule. We also decline to adopt a separate definition for the term “overburdened” or to add “underserved” to the definition. As explained above, the proposed definition has allowed the Commission, applicants, and stakeholders to have a general sense of the types of communities that may fall under the phrase without the need for further definition or including additional terms, while the Commission’s identification methodology provides a common understanding of the steps necessary to identify environmental justice communities.

138. We decline to adopt the phrase “communities with significant representations of communities of Color” because we conclude that the definition we are adopting is sufficiently broad to identify communities that have been historically marginalized and overburdened by pollution without that addition. We will continue our practice of defining “environmental justice communities” as including, but not being limited to, minority populations, low-income populations, or indigenous peoples.

b. Definition of National Interest Electric Transmission Corridor

i. NOPR Proposal

139. The Commission proposed in the NOPR to revise the definition of “national interest electric transmission corridor” to include any geographic area that is expected to experience energy transmission capacity constraints or congestion, for consistency with the IJJA’s amendments to section 216(a).

ii. Comments

140. While EDF states that the proposed definition of “national interest electric transmission corridor” is appropriate, Farm Bureaus and Kentucky Commission state that the definition is too broad, as a National Corridor could include any geographic area that has any amount of congestion.²³⁴ Kentucky Commission requests that the Commission modify

the definition to include a threshold for congestion, while Farm Bureaus request that the Commission reopen public comment on this proposal after DOE has identified National Corridors.²³⁵ EDF notes that the Commission and DOE should coordinate to ensure consistent definitions.

iii. Commission Determination

141. We adopt the definition of “national interest electric transmission corridor” proposed in the NOPR in this final rule. As stated in the NOPR, the Commission proposed changes to the definition of “national interest electric transmission corridor” strictly to incorporate the revisions to the term in the IJJA’s amendment to section 216(a) of the FPA, and we continue to find it appropriate to define this term based on the statute. Section 216(a) of the FPA designates the Secretary of DOE as the sole authority to determine whether a geographic area is experiencing, or expected to experience, sufficient capacity constraints or congestion to warrant the designation of a “national interest electric transmission corridor,” and the Commission will defer to DOE’s interpretation of the statute for those purposes. Additionally, as the proposed definition is derived directly from the statute, it is unnecessary to wait to finalize this regulation until DOE has identified a National Corridor.²³⁶

c. Definition of Stakeholder

i. NOPR Proposal

142. The Commission in the NOPR proposed to revise the definition of “stakeholder” for clarity and to ensure that environmental justice community members and other interested persons or organizations are covered by the definition. As proposed, § 50.1 defines “stakeholder” as any Federal, State, interstate, or local agency; any Tribal government; any affected landowner; any environmental justice community member; or any other interested person or organization.

ii. Comments

143. Impacted Landowners state that grouping severely impacted landowners

²³⁵ Kentucky Commission Comments at 3; Farm Bureaus Comments at 2.

²³⁶ In DOE’s recent Guidance on section 216(a), DOE’s definition of a National Corridor closely matches the Commission’s proposed definition. DOE defined a National Corridor as “. . . a geographic area where, based on the Needs Study or other relevant information, DOE has identified . . . present or expected transmission capacity constraints or congestion that adversely affects consumers, and which has been designated by the Secretary as a [National Corridor].” DOE Grid Deployment Office, Guidance on Implementing Section 216(a) of the Federal Power Act, at 16 (Dec. 19, 2023).

²³² E.g., *ANR Pipeline Co.*, 185 FERC ¶ 61,191 at P 96.

²³³ See E.O. 14008, *Tackling the Climate Crises at Home and Abroad*, 86 FR 7619 (Jan. 27, 2021).

²³⁴ EDF Comments at 5; Farm Bureaus Comments at 2; Kentucky Commission Comments at 3.

with individuals who have generalized environmental concerns, or project advocates who will profit from the project, and considering them all equal “stakeholders” is unfair and unjust. Impacted Landowners suggest that a stakeholder should be defined as a person or entity with an interest in a project but who will experience no impacts.²³⁷ Niskanen states that the definition of stakeholder is too broad and suggests the definition be modified to include any Federal, State, interstate, Tribal, or local agency or Tribal government involved with approving or whose interests may be affected by the proposed transmission facilities, and any environmental justice community that could be potentially impacted in some way by a proposed project.²³⁸

144. Public Interest Organizations recommend that the Commission amend the definition of stakeholder to replace “Tribal government” with “Indian Tribe,” and that the Commission should add “Indigenous peoples” to the definition of stakeholders.²³⁹ Public Interest Organizations explain that the distinction between Indian Tribes and any Tribal community member will preserve the government-to-government relationship between the Federal government and Indian Tribes. Niskanen also notes that the proposed definition for stakeholder as it relates to “any Tribal government” is inconsistent with the definition given in § 50.1 of “Indian Tribe.”

iii. Commission Determination

145. We adopt the definition of “stakeholder” proposed in the NOPR, with one modification. We agree with Public Interest Organizations and Niskanen that the definition of “stakeholder” should include the term “Indian Tribe” instead of “Tribal government,” for consistent use of defined terms in the Commission’s regulations. Therefore, this final rule adopts usage of “Indian Tribe” in the definition of “stakeholder.” Similarly, the use of “Tribal government” in applicant notification requirements in § 50.4(c)(1) is replaced with “Indian Tribe.”

146. We also decline to limit the definition of stakeholders to entities that may be interested but would experience no impacts from a project, or to only agencies or governments that would be affected by a project. The extent of project-related effects is evaluated and refined throughout the review process

and may not be well understood early in the review process when engagement with stakeholders should begin. Further, impacts from a project can vary from direct environmental effects to indirect effects on users of public spaces to non-environmental effects for individuals who will experience less congestion, increased reliability of their electric grid, or rate changes. Further, Niskanen’s suggested definition would remove from consideration landowners or other individuals who do not meet the definition of affected landowner and are not members of an environmental justice community, but who may be affected by a project. As such, we find it appropriate to allow any interested party to be considered a stakeholder.

147. With respect to Public Interest Organizations’ request to add “Indigenous peoples” to the definition of “stakeholder,” we note that Indigenous peoples are considered stakeholders under the definition proposed and adopted in this final rule.

d. Definition of Affected Landowner

i. NOPR Proposal

148. In the NOPR, the Commission did not propose any revisions to the existing definition of “affected landowners” in § 50.1, which defines “affected landowners” as owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property: (1) is directly affected (*i.e.*, crossed or used) by the proposed activity including all facility sites, rights-of-way, access roads, staging areas, and temporary workspace; or (2) abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of a proposed construction work area. Nevertheless, the NOPR sought comment on whether the Commission should revise the definition to include landowners located within a certain geographic distance from the proposed project facilities to address effects on visual (or other) resources, and, if so, what geographic distance should be used and why.

ii. Comments

149. ClearPath opposes any revisions to the existing definition of “affected landowners,” arguing that the Commission has not provided evidence that the definition is deficient or that Congress directed the Commission to

revise the definition.²⁴⁰ ClearPath also states that the NOPR fails to address whether expanding the definition of “affected landowners” would qualify the additional affected landowners for compensation under eminent domain, which may make projects economically unviable.²⁴¹

150. Several commenters note that property tax bills do not list more than one person even if there are multiple owners of property, and do not list tenants with possessory interests. These commenters request that the Commission revise the definition of “affected landowners” to include any person with a legal right or interest in the property (*e.g.*, a landowner, a contract purchaser of record, a person possessing the property under a lease, a record lienholder, a record encumbrancer of the property, and conservation easement holders).²⁴² EDF and Public Interest Organizations ask that the Commission clarify the definition of “affected landowners” as it relates to Tribal lands, particularly whether individual Tribal members residing on trust land satisfy the definition, and request that Tribes be included in the definition due to trust responsibilities.²⁴³

151. EDF, Niskanen, Public Interest Organizations, and SEIA state that the Commission should use DOE’s definition of “affected landowners” from its then-current regulations implementing section 216(h) of the FPA (*i.e.*, landowners located within either 0.25 miles of a proposed study corridor or route of a qualifying project or at a minimum distance specified by State law, as well as those with a residence within 3,000 feet of a proposed construction work area for a qualifying project),²⁴⁴ because it is broader than the Commission’s definition and will provide for regulatory consistency between the Commission and DOE.²⁴⁵ Public Interest Organizations argue that

²⁴⁰ ClearPath Comments at 5.

²⁴¹ *Id.*

²⁴² EDF Comments at 5; Farm Bureaus Comments at 2–3; Land Trust Alliance Comments at 2–3.

²⁴³ EDF Comments at 5; Public Interest Organizations Comments at 26–27.

²⁴⁴ 10 CFR 900.3 (2023). On May 1, 2024, DOE issued a final rule revising its regulations implementing section 216(h) of the FPA that, among other things, revises this definition and removes the distance criteria. See DOE, *Coordination of Federal Authorizations for Electric Transmission Facilities*, 89 FR 35312 (May 1, 2024). Regarding the revised definition to be codified at 10 CFR 900.2, DOE provides that a “potentially affected landowner” is one whose real property interest is potentially affected directly or indirectly by a proposed project. 89 FR 35340. DOE’s final rule is effective on May 31, 2024.

²⁴⁵ EDF Comments at 6; Niskanen Comments at 6–9; Public Interest Organizations Comments at 25–26.

²³⁷ Impacted Landowners Comments at 22.

²³⁸ Niskanen Comments at 9–11.

²³⁹ Public Interest Organizations Comments at 53–54.

limiting affected landowners to those within 50 feet of proposed facilities fails to provide surrounding residents and communities the opportunity to meaningfully participate in the permitting process, and may cause landowners beyond this distance to feel marginalized, which may add unnecessarily high regulatory and litigation risks.²⁴⁶

152. Impacted Landowners request that the Commission use the term “impacted landowners” instead of “affected landowners,” noting that it is the degree of impact, not an arbitrary distance, that creates an impacted landowner.²⁴⁷ Niskanen indicates that the current definition does not adequately consider visual impacts or light pollution and subsequent devaluation of property.²⁴⁸ EDF and Land Trust Alliance suggest that the Commission use the results of a visual impact assessment to identify affected landowners, and define “affected landowners” as any landowner whose viewshed or ecosystem services may be affected.²⁴⁹ Conversely, ClearPath argues that broadly expanding the affected landowner definition to anyone whose viewshed is affected could include properties up to 17 miles away and that the resource report addressing visual impacts in an application requires evaluating visual effects without the need to increase the affected landowner definition.²⁵⁰

iii. Commission Determination

153. We continue to find the definition of affected landowner in our existing regulations appropriate and adopt no changes.

154. In response to ClearPath’s concern that changing the definition might mean additional landowners would be entitled to compensation, we note that section 216(f) of the FPA provides that any right-of-way acquired for construction or modification of transmission facilities through the use of eminent domain is considered a taking of private project for which just compensation is due. Whether a landowner is entitled to just compensation under section 216(f) is in no way connected to how the Commission’s regulations define an affected landowner.

155. As part of the Commission’s review process, we seek to ensure that landowners are given an opportunity to

submit comments and participate in the Commission proceeding. Therefore, the definition of “affected landowners” is meant to encompass owners of property that: are proposed to be crossed by the project, are most likely to be affected by minor route adjustments or variations that may occur to avoid or minimize impacts to sensitive resources based on environmental survey results, or may be impacted by construction activities conducted in close proximity. The definition of “stakeholder” is then intended to capture other landowners and parties who may have an interest in a project or may be otherwise affected by a project and can inform the Commission’s review of an application.

156. We acknowledge the numerous requests for a broader and more inclusive definition of an affected landowner (e.g., to include lessees, multiple property owners, conservation easement holders) but decline to adopt such a definition. The definition of “affected landowners” sets forth the scope of other regulatory obligations, including specific notification requirements, and applicants must have a practicable means of determining which entities fall within the scope of the definition. We find that there are not sufficient means for an applicant to readily identify a broader set of entities, as proposed by commenters, particularly for lengthy proposed transmission lines. The existing definition of “affected landowners” is practicable and likely to identify most entities with interests in the property. While a Tribe or member of a Tribe would not be an affected landowner if they occupy lands held in trust by the United States, a Tribe or member of a Tribe may qualify as an affected landowner if they occupy land that is not held in trust by the United States and otherwise meet the definition.²⁵¹

157. While there are numerous requests for larger geographic bounds to be used in the definition, we decline to modify the definition in this manner. Commenters suggest such a modification is necessary to ensure a broader group of stakeholders who may be impacted by a proposed project are

aware of and have an opportunity to share their views on the proposal. We note, however, that the applicant must also notify all landowners with a residence within a quarter mile of the edge of the construction right-of-way under the notification requirements in § 50.4(c)(1). Moreover, stakeholders do not need to be an affected landowner or live in a residence within a quarter mile of the proposed site to participate in the Commission’s proceedings. Under the definition of “stakeholder” in § 50.1, any interested entity or person may file comments as a stakeholder and participate in the Commission’s pre-filing and application processes. We believe that the existing definition of “affected landowners” and existing quarter mile notification requirement provides individuals with appropriate notification of a proposed project to allow an opportunity to participate in Commission proceedings.

158. Although some commenters argue that the definition of affected landowners should include landowners who may be impacted by visual or other project effects, the geographic extent of impacts will vary by region and project, and it is therefore difficult to identify a bright-line definition that could be used by an applicant to identify landowners who may experience visual impacts shortly after the commencement of the pre-filing process (when initial notifications to affected landowners must occur). Proposed transmission projects will be subject to NEPA, and the environmental effects of a project (including visual impacts) will be analyzed and addressed through the NEPA process. The NEPA and FPA processes include opportunities for landowners and other stakeholders to participate in the review process and comment on anticipated effects of a project, including visual impacts.

2. Section 50.3—Filing and Formatting Requirements

159. Section 50.3 establishes the filing and formatting requirements for submissions in the Commission’s pre-filing and application processes. In the NOPR, the Commission proposed to revise § 50.3(b) to eliminate the requirement that applications, amendments, and all exhibits and other submissions must be submitted in an original and seven conformed copies. Instead, to reduce waste, the Commission proposed that applicants only be required to make these submissions in electronic format. We received no comments regarding this proposed change. This final rule adopts § 50.3 as proposed.

²⁴⁶ Public Interest Organizations Comments at 25–26.

²⁴⁷ Impacted Landowners Comments at 21.

²⁴⁸ Niskanen Comments at 6–9.

²⁴⁹ EDF Comments at 6; Land Trust Alliance Comments at 3.

²⁵⁰ ClearPath Comments at 5.

²⁵¹ We note that with regard to the Commission’s trust responsibilities, Tribes are afforded additional outreach and consultations consistent with the Commission’s consultation practices under its Tribal Consultation Policy, as well as the Commission’s trust responsibilities and government-to-government relationships with Tribes. *Pol’y Statement on Consultation with Indian Tribes in Comm’n Procs.*, Order No. 635, 68 FR 46452 (Sept. 5, 2003), 104 FERC ¶ 61,108 (2003), revised, Order No. 863, 84 FR 56940 (Oct. 24, 2019) 169 FERC ¶ 61,036 (2019). The policy statement is codified at 18 CFR 2.1c (2023). These activities do not depend on whether Tribal members are “affected landowners.”

3. Section 50.4—Stakeholder Participation

a. Project Participation Plan

i. NOPR Proposal

160. The Commission explained in the NOPR that § 50.4(a) requires each applicant to develop and file a Project Participation Plan for use during the pre-filing and application processes to ensure that stakeholders have access to timely and accurate information about the proposed project and permitting process. The Project Participation Plan must, among other things, identify specific tools and actions to facilitate stakeholder communications and public information, including a regularly updated website. In the NOPR, the Commission proposed to revise § 50.4(a)(1) to incorporate minor clarifying language and specify that an applicant's website must include an interactive mapping component to provide users with the ability to locate the proposed facilities in relation to specific properties and other features. Additionally, as discussed above, the Commission proposed to require an applicant to develop and file an Environmental Justice Public Engagement Plan as part of its Project Participation Plan under § 50.4(a) early in the pre-filing process.²⁵²

ii. Comments

161. Arizona Game and Fish recommends that § 50.4's Project Participation Plan include a requirement for applicants to consult or coordinate with specific entities, such as State wildlife or natural resource agencies.²⁵³ Maryland Commission urges that county and municipal governments affected by a proposed transmission line be given the opportunity to participate fully in the Commission's proceeding and provide recommendations.²⁵⁴

162. The Yurok Tribe requests that the Commission require applicants to develop a Tribal Participation Engagement Plan in the pre-filing process, similar to the Environmental Justice Public Engagement Plan.²⁵⁵

iii. Commission Determination

163. We adopt the NOPR proposal to revise the Project Participation Plan requirements to incorporate minor clarifications, specify that an applicant's website must include an interactive mapping component, and include an Environmental Justice Public

Engagement Plan and a Tribal Engagement Plan.

164. Regarding requests to include coordination and consultation requirements for State, county and local agencies or governments in the Project Participation Plan, we do not believe such changes are needed. As further discussed below, the § 50.4(c) project notification requirements adopted in this final rule extend to, among others, permitting entities and other local, State, and Federal governments and agencies involved in the project, which include the entities that Arizona Game and Fish and Maryland Commission suggest. The project notification requirements inform recipients how to participate in the Commission's proceeding, including opportunities to provide recommendations to the Commission and how to contact the applicant. Local agencies and governments are typically included on project stakeholder mailing lists, as they are stakeholders as defined by § 50.1, who receive Commission notices regarding opportunities to submit comments, attend meetings and site visits, and participate in the pre-filing and application phases; and we encourage their participation. The Commission will consider comments submitted by any State, county, or local agencies during the processing of an application.

165. We adopt the Yurok Tribe's suggestion to require applicants to address outreach targeted to Indian Tribes, similar to the requirement to include an Environmental Justice Public Engagement Plan in an applicant's Project Participation Plan. Requiring applicants to develop a plan to identify and engage Tribal communities will facilitate the development of the record, including the *Tribal resources* resource report as discussed below, which the Commission needs to assess impacts on Indian Tribes. Therefore, new § 50.4(a)(5) requires an applicant to include a Tribal Engagement Plan as a component of the Project Participation Plan that addresses all outreach that is targeted to identified Tribes, including a summary of comments from potentially affected Tribes in previous outreach, a description of planned Tribal outreach activities, and a description of how the applicant will engage Tribes about potential mitigation measures.²⁵⁶

²⁵⁶ We note that this new provision of the Project Participation Plan does not affect and is separate from the Commission's consultation practices under its Tribal Consultation Policy, as well as existing trust responsibilities and government-to-government relationships with Tribes. Order No. 635, 104 FERC ¶ 61,108, *revised*, Order No. 863, 169

b. Project Notification Requirements

i. NOPR Proposal

166. Section 50.4(c) sets forth the project notification requirements for applicants. Section 50.4(c)(1) requires applicants to distribute, by mail and newspaper publication, project notifications within specified time periods, first, following commencement of the pre-filing process and, second, after an application has been filed. Section 50.4(c)(1) directs the applicant to notify, among others, all affected landowners and landowners with a residence within a quarter mile from the edge of the construction right-of-way for the proposed project. In the NOPR, the Commission proposed to revise § 50.4(c)(1) for clarity and to ensure that applicants provide notification of the proposed project to all interested individuals and organizations. The NOPR also sought comment on whether a quarter-mile limit is sufficient and, if not, what geographic distance should be used and why.

167. Section 50.4(c)(2)(i) describes the required contents of the Pre-filing Notification. For clarity, in the NOPR, the Commission proposed organizational changes in the regulations to distinguish the requirements that pertain to any Pre-filing Notification that is sent by mail or published in a newspaper (proposed § 50.4(c)(2)(i)) from the requirements that pertain to any Pre-filing Notification that is sent by mail specifically to an affected landowner (proposed § 50.4(c)(2)(ii)).

168. The Commission in the NOPR proposed to add a requirement that any Pre-filing Notification mailed to an affected landowner also include a copy of a Commission document titled "*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings*" (Landowner Bill of Rights). The Commission also proposed in the NOPR to require that any Pre-filing Notification sent by mail or published in the newspaper include information clarifying that the Commission's pre-filing and application processes are separate from any simultaneous State siting proceeding and explaining how to participate in any such State siting proceeding.

169. In the NOPR, the Commission explained that it expects applicants to make a good faith effort to ensure that individuals and organizations entitled to receive project notifications can comprehend the contents of such notifications. Accordingly, the NOPR

FERC ¶ 61,036. The policy statement is codified at 18 CFR 2.1c (2023).

²⁵² See discussion *supra* Part II.C.

²⁵³ Arizona Game and Fish Comments at 2–3.

²⁵⁴ Maryland Commission Comments at 8.

²⁵⁵ Yurok Tribe Comments at 27–28.

directed applicants to consider the need for project notifications in languages other than English as part of the Environmental Justice Public Engagement Plan, as described above. The NOPR also sought comment on what methods of notification beyond mail and newspaper publication might be utilized in order to effectively reach the largest possible number of stakeholders.

ii. Comments

170. Public Interest Organizations and Niskanen suggest that the Commission require the two applicant project notifications in § 50.4(c) to include information on how to become an intervenor in a Commission proceeding and the consequences of failing to intervene, namely, lacking standing to petition for rehearing and pursue judicial review of an order issued by the Commission.²⁵⁷ Public Interest Organizations also request that § 50.4(c)(2)(iii) of the Commission's regulations be modified to require inclusion of the Landowner Bill of Rights in the Application Notification required under § 50.4(c)(1)(i)(B),²⁵⁸ and further urge the Commission to consider changes to § 50.4(c)(2)(i) to require that the pre-filing notice clearly state how affected landowners and other stakeholders can participate in the pre-filing process in order to make the communities feel heard, support the applicant in meeting landowner needs, and reduce legal risks.²⁵⁹

171. The existing regulations in § 50.4(c)(1)(ii) require applicants to publish a notification of the pre-filing request and application filings in newspapers of general circulation. Some commenters suggest that the Commission modify this requirement to include other methods of notice, such as social media, popular internet sites, local digital newspapers, online-only publications that serve a local interest, neighborhood listservs and community web pages, utility web pages, and including a QR code on notices that directs the reader to an appropriate web page.²⁶⁰ CLF and EDF encourage requiring the notices be posted in a range of locations in the community (e.g., churches, mosques, temples, community centers, public parks, post

offices, and schools) where transmission projects are proposed.²⁶¹

172. Public Interest Organizations recommend that the Commission's newspaper notification requirements in § 50.4(c)(2)(i)(B) be modified to include the website address for the Commission's pamphlet *Electric Transmission Facilities Permit Process*.²⁶² Niskanen states that the Commission should create accessible online and paper versions of the pamphlet, written in layperson's terms and should include: the scope of the Commission's transmission siting authority; what findings the Commission must make to approve a project; an explanation as to how to obtain ongoing, accurate project information from the Commission; clear contact information for the Office of Public Participation; basic, step-by-step descriptions of the Commission's pre-filing and application processes; and a description of how to participate in these processes, including clear, bolded instructions on when, why, and how to become an intervenor in the relevant proceeding.²⁶³

173. Impacted Landowners and SEIA request that § 50.4(c)(2) require the notices be written in plain language.²⁶⁴ Several commenters suggest that notices be provided in multiple languages.²⁶⁵ Impacted Landowners and ACEG request that the notices contain a summary of rights a landowner has in reference to the Federal eminent domain laws that would be applicable, instead of just the State laws proposed for reference in the NOPR.²⁶⁶

174. Public Interest Organizations and the Yurok Tribe state that the Commission should develop standardized language that all applicants must include in each notice under § 50.4(c) that clearly explains the Commission's processes, all necessary deadlines, and the purpose and consequences of intervening or seeking rehearing.²⁶⁷ Public Interest Organizations and the Yurok Tribe also suggest that these standard notices explain the roles of the Commission's Office of Public Participation, Tribal Liaison, and the Environmental Justice

Liaison,²⁶⁸ and how to contact each of them.²⁶⁹ Finally, Public Interest Organizations ask that the Commission revise its standard notice to clarify the different ways interested persons may participate in the pre-filing process, in which restrictions on off-the-record (ex parte) communications do not apply.

175. Public Interest Organizations and the Yurok Tribe suggest that the Commission change its requirement under § 50.4(c)(1)(i)(A) for mailing notification of the pre-filing process. Specifically, they ask that the Pre-filing Notifications be mailed within 3 business days after the Director of the Commission's Office of Energy Projects notifies the applicant of the commencement of the pre-filing process, instead of within 14 days as currently required.²⁷⁰ The Yurok Tribe states that there is no justification for the existing 14-day period and that Tribes and stakeholders should be given as much time as possible to prepare and participate through an earlier notification.

176. CLF and NESCOE assert that not all residents own the property in which they reside and request that project notifications under § 50.4(c)(1) be sent to residents (e.g., renters/lessees) in addition to the landowners.²⁷¹

177. The Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe state that Tribes should be included in the Stakeholder Participation section of the proposed regulations regardless of whether the Tribes are already involved in a project and should be addressed separately from, or as a required element of, the Environmental Justice Public Engagement Plan.²⁷² Specifically, the Tribes, as well as the Yurok Tribe, state that proposed § 50.4(c)(1) appears to limit the requirement to notify Tribes to those who are already involved in a project, and they suggest that the Commission should amend its regulations to require that project

²⁶⁸ Public Interest Organizations recommend that the Commission establish Environmental Justice Liaisons as non-decisional staff within the Office of Public Participation. Public Interest Organizations Comments at 89–90. While the Commission has a Senior Counsel for Environmental Justice and Equity and an Environmental Justice and Equity Group within the Office of General Counsel, it does not currently have an Environmental Justice Liaison.

²⁶⁹ Public Interest Organizations Comments at 30; Yurok Tribe Comments at 26.

²⁷⁰ Public Interest Organizations Comments at 28–29; Yurok Tribe Comments at 26.

²⁷¹ CLF Comments at 6–7; NESCOE Comments at 28.

²⁷² Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 2.

²⁵⁷ Public Interest Organizations Comments at 18; Niskanen Comments at 17–18.

²⁵⁸ Public Interest Organizations Comments at 32 and 38.

²⁵⁹ *Id.* at 13–14.

²⁶⁰ CLF Comments at 7; ELCON Comments at 4; Michigan PSC Comments at 10; SEIA Comments at 11; Los Angeles DWP Comments at 5.

²⁶¹ CLF comments at 7; EDF Comments at 12.

²⁶² Public Interest Organizations Comments at 33.

²⁶³ Niskanen Comments at 14.

²⁶⁴ Impacted Landowners Comments at 23; SEIA Comments at 11.

²⁶⁵ SEIA Comments at 11; NESCOE Comments at 28–29; Impacted Landowners Comments at 23; Public Interest Organizations Comments at 30.

²⁶⁶ Impacted Landowners Comments at 23; ACEG Comments at 17–18.

²⁶⁷ Public Interest Organizations Comments at 17–18; Yurok Tribe Comments at 25.

notifications are sent to all Tribes with ancestral or current-day lands that may experience impacts from the project.²⁷³

178. Conversely, ClearPath suggests that § 50.4(c)(1) should remove the word, “all,” which immediately precedes the entities that an applicant is required to notify, asserting that requiring applicants to notify “all” listed entities would put the applicant at risk for unnecessary litigation and may incur unnecessary delay.²⁷⁴ Similarly, Niskanen suggests removing the word “any” from the § 50.4(c)(1) requirement that applicants notify “any known individuals or organizations that have expressed an interest in the State siting proceeding; and any other individuals or organizations that have expressed to the applicant, or its representatives, an interest in the proposed project (emphasis added).”²⁷⁵ Niskanen argues that requiring applicants to notify “any” individual or organization that has merely expressed an interest in a proposed project may invite protracted legal challenges to any given project.²⁷⁶ Niskanen also asserts that the Commission should be responsible for ensuring that all stakeholders are properly accounted for and sent notice through the applicant, and should create an accountability mechanism for applicants to follow up on undeliverable notifications.²⁷⁷

179. ACP and ACEG question how the Commission will consider notification requirements in the instances of route changes, particularly ones that occur relatively late in the Commission’s proceeding.²⁷⁸ ACP states that applicants would have complied with the Applicant Code of Conduct and conducted early outreach, and, therefore, should not be required to restart the notice and comment periods in instances of reroutes. ACEG suggests notifying landowners along alternative routes earlier in the process or allowing for an expedited notice and comment process if newly impacted parties are identified.

iii. Commission Determination

180. To support the Commission’s good faith efforts determinations under the IJA’s amendment to section 216(e)(1) and make needed clarifications to the Commission’s existing project notification requirements under

§ 50.4(c), we adopt the NOPR proposal, with modifications. Specifically, we revise § 50.4(c) to address confusion over the use of the terms “notice” and “notification.” We also revise § 50.4(c)(1)(ii) to expand newspaper publication requirements to reach a broader audience and revise § 50.4(c)(2)(i)(B) to require applicants to include the website address for the Commission’s pamphlet *Electric Transmission Facilities Permit Process* in newspaper publications to improve accessibility of information regarding the Commission’s processes. We revise § 50.4(c)(1)(i)(C) to include a new requirement for applicants to mail project notifications in other languages under certain circumstances. Finally, to reflect that we are not adopting the NOPR’s proposal to allow simultaneous processing, we adjust the required contents of the participation notification concerning information about State siting proceeding(s) in § 50.4(c)(2)(i)(H).

181. As an initial matter, we recognize that § 50.4(c)’s interchangeable and intermittent use of “notice” and “notification” may have created confusion for commenters, some of whom conflated § 50.4(c)’s notification requirements for applicants with the Commission’s notice requirements as described in § 50.9. Accordingly, we make minor consistency edits throughout § 50.4(c) to consistently use the term “notification” to apply exclusively to applicants’ obligation to provide certain information, and the term “notice” to apply exclusively to Commission-issued notices. Additionally, we clarify which provisions in § 50.4(c) apply to Pre-filing Notifications versus Application Notifications.

182. We decline commenters’ requests to revise § 50.4(c) to require additional information in Applicant Notifications concerning intervening in Commission proceedings. We find that the proposed revisions to § 50.4(c), as modified in this final rule, will adequately inform those affected landowners and other stakeholders interested in becoming parties to a Commission proceeding of the Commission’s processes and timing for filing motions to intervene. Although there is no intervention period during the pre-filing process, as no application is before the Commission, the regulations in § 50.4(c)(2)(i)(G) already require an applicant’s Pre-filing Notifications to include information explaining the Commission’s pre-filing and application processes and when and how to intervene in application proceedings. Following the commencement of the pre-filing process, applicants will be required

under § 50.4(c)(2)(ii)(B)—as adopted herein—to include a copy of the Landowner Bill of Rights, which notifies recipients of their right to intervene in any open Commission proceeding, within the Pre-filing Notification mailed to affected landowners.

183. We decline Public Interest Organizations’ request to require that the Landowner Bill of Rights be provided in the Application Notification required by § 50.4(c)(1)(i)(B) to be distributed within 3 business days after the Commission publishes notice of the application under § 50.9. As discussed above, under proposed § 50.4(c)(2)(ii)(B), as adopted herein, the Landowner Bill of Rights must be included in an applicant’s mailed Pre-filing Notification. Proposed § 50.4(c)(3) also requires applicants to provide the Landowner Bill of Rights in instances where affected landowners are identified after the initial notifications are mailed. Therefore, we find that all affected landowners will be provided a copy of the Landowner Bill of Rights and, as such, it is not necessary to provide it again with the Application Notification.

184. We agree with commenters’ recommendations that the Commission include additional requirements in § 50.4(c) for the publication of notifications in media beyond newspapers of general circulation. There are accessibility limitations inherent in relying solely on any single media platform, whether print publications or electronic, for notification of Commission proceedings, and no single media platform is reasonably assured of reaching a general audience across varying geographical locations. Therefore, we revise § 50.4(c)(1)(ii) to expand the publication requirements for applicant notifications beyond newspaper print publications. Specifically, we require that in addition to newspaper print publications, applicant notifications be published in other online or hard copy periodicals of general circulation serving the affected area, as appropriate. These notifications must also be submitted to any available county and municipal government online bulletin boards and other similar community resources.

185. We also agree with Public Interest Organizations that the applicant’s Pre-filing Notifications should include the website address for the Commission’s *Electric Transmission Facilities Permit Process* pamphlet. Thus, we revise § 50.4(c)(2)(i)(B) to adopt this requirement. However, we decline at this time to adopt Niskanen’s recommendations to include certain information in the pamphlet. The

²⁷³ Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 3; Yurok Tribe Comments at 26.

²⁷⁴ ClearPath Comments at 6.

²⁷⁵ Niskanen Comments at 12.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 13.

²⁷⁸ ACP Comments at 14; ACEG Comments at 15.

pamphlet will be updated to reflect the requirements of this final rule and will be posted to the Commission's public website when available.

186. We agree with Impacted Landowners and SEIA that applicant notifications should be written to be readily understood by the public. We also agree with commenters that notifications should be provided in multiple languages. Therefore, we add a new provision in § 50.4(c)(1)(i)(C) to require applicants to mail project notifications in languages other than English under certain circumstances. Our approach is intended to ensure that applicants provide meaningful notification to people with limited English proficiency who are affected landowners or landowners within a quarter mile of the right-of-way.

187. Under this new notification requirement in § 50.4(c)(1)(i)(C), applicants may be required to include written translations of the applicant's notifications to affected landowners and landowners with residences located within a quarter mile from the edge of the construction right-of-way for a proposed project. To determine whether written translations are required, applicants must identify the landowners' census block groups, ascertain whether any of the census block groups include people with limited English proficiency, and, for each census block group, identify the languages spoken by people with limited English proficiency. For each language identified in the census block group that accounts for five percent of households or 1,000 persons,²⁷⁹ whichever is less, applicants must include written translation of the applicant's notifications with the applicant's mailed notifications to all landowners entitled to notification within that census block group. The U.S. Census American Community Survey's 5-year estimates include the information needed to identify the number of limited English proficiency households, similar to the information collected for identifying environmental justice communities.

188. We retain the existing requirement that any Pre-filing Notification mailed to an affected landowner include a brief summary of the specific rights the landowner has in proceedings under the eminent domain laws of the relevant State. We decline commenters' suggestion that this notification should instead include a

summary of Federal eminent domain law. Section 216(e)(1) of the FPA allows permit holders to bring an eminent domain proceeding in the appropriate court in the Federal district or the State in which the property is located.²⁸⁰ Section 216(e)(3) provides that the practice and procedure in any eminent domain proceeding in Federal district court must conform as nearly as practicable to the practice and procedure in a similar proceeding in the applicable State court.²⁸¹ Thus, if an eminent domain proceeding is initiated in Federal district court, the court will determine the appropriate procedures for individual proceedings. For this reason, and because the rules governing eminent domain proceedings may vary by State, we find it most helpful for the Pre-filing Notification required to be sent by the applicant to contain a brief summary of the landowner's rights under the eminent domain laws of the relevant State.

189. We decline commenters' requests to adopt standardized language in applicant notifications under § 50.4(c). Commission-issued notices in the pre-filing and application review processes will convey standardized information about the Commission's processes and identify applicable deadlines for comments and intervention. In addition, much of the information that Public Interest Organizations request be included in the standard notifications will be addressed via guidance or informational brochures, like in the *Electric Transmission Facilities Permit Process* pamphlet that applicants must provide with their notification of commencing the pre-filing process.

190. We also note that Commission notices typically explain the role of and provide contact information for the Office of Public Participation, which can be a helpful resource for stakeholders who need assistance understanding how to participate in Commission matters, including stakeholders with environmental justice concerns. In addition, Commission staff issue separate letters to engage Indian Tribes, which typically contain the contact information for the Commission's Tribal Liaison, project manager, and assigned project archaeologist who will be most familiar with the project and able to address Tribal questions. These Commission notices and letters sufficiently provide landowners, Tribes, and stakeholders with opportunities and support for engagement.

191. We decline Public Interest Organizations' and the Yurok Tribe's suggestions to modify § 50.4(c)'s timing requirements with respect to mailing project notifications. The Commission carefully considered the timing and coordination for each notification in the Order No. 689 rulemaking proceeding and proposed no changes to the deadline for applicants to mail required notifications in the NOPR. We continue to find no changes are necessary. The Director's notice under § 50.5(d) commences the pre-filing process for a project and triggers numerous additional applicant requirements (e.g., finalizing a Project Participation Plan, refining the mailing list for the Pre-filing Notification, finalizing a contract with the selected third-party contractor, and notifying permitting entities). Given the numerous obligations triggered by the commencement of the pre-filing process, we find it appropriate to allow applicants 14 calendar days from the Director's notice date to send the Pre-filing Notification. We believe that this will result in more accurate notifications.

192. We decline CLF's and NESCOE's requests to modify § 50.4(c)(1) to require that project notifications must be mailed to "residents." As explained above in our discussion of the definition of "affected landowner," we find that there are insufficient means to readily identify residents (e.g., renters/lessees), particularly across potentially hundreds of miles of transmission line. Accordingly, we will continue to require notifications based on the landowner identified in tax records. However, under § 50.4(c)(1) as adopted herein, residents who are not identified in tax records may express interest in a project to be added to the applicant's mailing list as stakeholders so that they can receive project notifications.

193. We agree with the Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe, as well as the Yurok Tribe, that applicants should include Tribes whose ancestral or current-day lands may be affected by a project in their required notifications, regardless of whether the Tribes are already involved in a project. Within the notification requirements of § 50.4(c)(1), we adopt a minor revision to the placement of "Indian Tribe" within the list of entities to be notified to remove applicability of the qualifier "involved in the project" to Indian Tribes. With this modification, applicants must notify Indian Tribes regardless of any prior involvement in the project.

194. We disagree with ClearPath's and Niskanen's recommendations to modify

²⁷⁹ The number of people with limited English proficiency within the census block group level may be estimated using the census tract's average household size.

²⁸⁰ 16 U.S.C. 824p(e)(1).

²⁸¹ *Id.* 824p(e)(3).

§ 50.4(c)(1) to remove reference to the terms “all” and “any,” respectively. Although § 50.4(c)(1) requires the applicant to make a good faith effort to notify all listed entities,²⁸² it is generally understood that project mailing lists will evolve throughout the pre-filing process as additional entities learn about a project and express interest. During the pre-filing process, we expect applicants to make all reasonable efforts to ensure that interested stakeholders have been made aware of the proposed project. In addition, § 50.4(c)(4), as proposed in the NOPR and adopted herein, requires applicants to make reasonable attempts to find the correct address and re-send the notification if it is returned as undeliverable.

195. Regarding questions from ACP and ACEG about how the Commission will consider notification requirements in the instances of late route changes, we note that § 50.4(c)(3), as proposed in the NOPR and adopted herein, provides that if, for any reason, a person or entity entitled to receive these project notifications has not yet been identified when the notifications are sent or published, the applicant must provide the required information at the time the person or entity is identified. This provision applies where new landowners are identified as “affected landowners” subject to route changes. The Commission addresses reopening of comment periods due to reroutes on a project-specific basis, generally to account for numerous factors (e.g., if new landowners are involved in the reroute, whether those landowners have been involved in the project to date, whether landowners requested the reroute on their property, where in the process a project is, and upcoming opportunities for landowner input). The Commission will issue revised notices with applicable comment periods when appropriate for a given reroute on a project.

c. Landowner Bill of Rights

i. NOPR Proposal

196. As part of the Project Notification requirements, in the NOPR, the Commission proposed to add a requirement that any Pre-filing Notification mailed to an affected landowner also include a copy of a Commission document titled “*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings*” (Landowner Bill of Rights). The NOPR sought comment on a draft version of the

Landowner Bill of Rights provided in the Appendix to the NOPR. The Commission explained that requiring the applicant to provide this document at the outset of the permitting process would help ensure that affected landowners are informed of their rights in dealings with the applicant, in Commission proceedings, and in eminent domain proceedings.

ii. Comments

197. Pennsylvania Commission states that, regardless of whether simultaneous or consecutive review processes at the State and Commission occur, landowners are likely to be overwhelmed and confused about where and when to participate, particularly after receiving multiple notices for each process and, in some cases, State versions of a Landowner Bill of Rights in addition to the Commission’s.²⁸³ Thus, instead of mandating mailing specifically the Commission’s Landowner Bill of Rights, Pennsylvania Commission suggests establishing the Landowner Bill of Rights as a recommended framework and allowing applicants to adapt and modify the Landowner Bill of Rights, with encouraged coordination with the State, to have a single Landowner Bill of Rights for a project.²⁸⁴

198. Public Interest Organizations and Niskanen suggest that the Commission amend the Landowner Bill of Rights to require applicants to negotiate with landowners in good faith early in the permitting process as a prerequisite for receiving eminent domain authority.²⁸⁵ Public Interest Organizations also ask that the Commission add language to the Landowner Bill of Rights stating that the applicant may also not misrepresent the status of discussions or negotiations between itself and landowners or any other party and must communicate respectfully, avoiding harassing, coercive, manipulative, or intimidating communications or high-pressure tactics.²⁸⁶

199. Farm Bureaus note that the Landowner Bill of Rights does not require applicants to provide any information, but instead informs landowners of the “right to access” certain information concerning the applicant and project. Farm Bureaus state that the Landowner Bill of Rights should require the applicant to furnish this information rather than burden

landowners with seeking it themselves.²⁸⁷

200. In addition, several commenters recommend changes to the Landowner Bill of Rights to better inform landowners about specific rights. Specifically, Public Interest Organizations and NESCOE suggest adding language explaining why compensation may be required, what eminent domain is, and how the Federal eminent domain process works.²⁸⁸ Impacted Landowners request the Commission add plain language to the Landowner Bill of Rights explaining that landowners are not required to negotiate easement agreements written by transmission line owners without advice from counsel.²⁸⁹ Public Interest Organizations and Farm Bureaus ask that the Landowner Bill of Rights clarify the difference between participation in the Commission’s pre-filing versus application phase and how landowners can participate in each process.²⁹⁰

201. Public Interest Organizations and Niskanen ask that the Commission grant intervenor status to all landowners that comment in a proceeding or, in the alternative, explain in the Landowner Bill of Rights that affected landowners lose their right to challenge any Commission order or authorization of the project if they do not intervene in the Commission docket and become a party to the proceeding.²⁹¹

iii. Commission Determination

202. In this final rule, we adopt the NOPR proposal to require applicants to provide a copy of the Commission’s Landowner Bill of Rights to affected landowners with their Pre-filing Notification. A final version of the Landowner Bill of Rights is attached to this final rule, with no changes from the draft version included in the NOPR except for the addition of a toll-free telephone number for the Commission’s Office of Public Participation, and we will include an electronic copy on the Commission’s public website for reference.

203. We decline commenter suggestions to afford applicants flexibility to modify the Landowner Bill of Rights. The purpose of the Landowner Bill of Rights is to ensure that affected landowners are informed in a consistent manner of their rights in dealings with the applicant and in

²⁸⁷ Farm Bureaus Comments at 10.

²⁸⁸ Public Interest Organizations Comments at 39; NESCOE Comments at 29–30.

²⁸⁹ Impacted Landowners Comments at 22–23.

²⁹⁰ Public Interest Organizations Comments at 40; Farm Bureaus Comments at 10.

²⁹¹ Public Interest Organizations Comments at 33 and 41; Niskanen Comments at 15–16.

²⁸² 18 CFR 50.4(c)(1).

²⁸³ Pennsylvania Commission Comments at 8–10.

²⁸⁴ *Id.* at 9–10.

²⁸⁵ Public Interest Organizations Comments at 40; Niskanen Comments at 15.

²⁸⁶ Public Interest Organizations Comments at 40.

Commission proceedings. Allowing applicants to develop their own document, as the Pennsylvania Commission suggests, could produce the uncertainty and confusion that the Landowner Bill of Rights seeks to avoid.

204. We decline to amend the Landowner Bill of Rights to include requirements for applicants in their negotiations and interactions with landowners because we find such revisions unnecessary. The Landowner Bill of Rights is intended to inform landowners, in plain language, about landowner rights and about actions landowners can take in a Commission proceeding, but it does not establish requirements for applicants to follow. Refraining from certain misconduct in communications with landowners, avoiding misrepresenting the status of discussions or negotiations, and avoiding harassing, coercive, manipulative, or intimidating communications are factors the Commission may consider as part of its good faith efforts determinations.

205. We disagree with Farm Bureaus' assumption that the Landowner Bill of Rights requires landowners to seek information. The Pre-filing and Application Notification requirements in § 50.4(c) require the applicant to provide information to landowners, including about the location and schedule of the project and their rights. We believe that these requirements afford landowners ready access to central information about a project.

206. We decline to modify the Landowner Bill of Rights to incorporate a summary of the eminent domain process. The eminent domain process may vary State to State and including generic language in the Landowner Bill of Rights that would be applicable across all States would be less useful than the summary of the eminent domain laws of the relevant State that applicants must include in the Pre-filing Notification that is sent by mail to affected landowners under § 50.4(c)(2)(ii)(C). Further, the Landowner Bill of Rights explains that landowners have the right to receive compensation if their land is necessary for construction of a proposed project and that the amount of compensation would be determined through a negotiated easement agreement or through an eminent domain proceeding in the appropriate Federal or State court.

207. With respect to commenters' request that the Commission include language about landowners' rights in negotiating easements and hiring legal counsel, we note that the Landowner Bill of Rights already informs

landowners of their rights to negotiate easement agreements, hire legal counsel, and hire their own appraiser or other professional to assist in any easement negotiations. Therefore, we find no need to modify the Landowner Bill of Rights on these topics.

208. We also decline to include provisions distinguishing the pre-filing and application review processes in the Landowner Bill of Rights. With the exception of filing a motion to intervene, which is clearly identified as an activity that may only occur after an application is filed, none of the other rights listed in the Landowner Bill of Rights are contingent on the project's phase.

209. Finally, we decline to grant intervenor status to all landowners that comment in a proceeding. A landowner may not wish to intervene or become a party to the proceeding. Additionally, we find that our project notification requirements at § 50.4(c)(2)(i), which require applicants to provide access to the Commission's *Electric Transmission Facilities Permit Process* pamphlet and information explaining when and how to intervene in a proceeding, will afford sufficient information about the steps to participate in a Commission proceeding and become an intervenor.

d. Office of Public Participation Involvement

i. NOPR Proposal

210. In the NOPR, the Commission did not propose any changes to the role, function, or duties of the Commission's Office of Public Participation.

ii. Comments

211. Environmental Law and Policy Center and CLF ask that the Commission direct its Office of Public Participation, Tribal Liaison, and Environmental Justice Liaison²⁹² to develop best practices for facilitating stakeholder engagement that, at a minimum, would ensure notification to environmental justice communities affected by proposed projects; provide meaningful opportunities to participate, including opportunities for the public to provide written and oral comments to the Commission; provide resources and technical assistance, including plain language summaries and translated materials as needed; and provide environmental justice engagement recommendations on a project-by-project basis that are tailored based on affected communities and anticipated

environmental justice impacts.²⁹³ CLF also suggests that applicants be required to consult with the Office of Public Participation when developing both the Environmental Justice Public Engagement Plans and the *Environmental justice* resource report to help ensure that applicants adequately consider any impacts on environmental justice communities and conduct comprehensive outreach to environmental justice communities.²⁹⁴

212. Public Interest Organizations recommend that the Office of Public Participation engage with any stakeholder that submits comments in a State proceeding to explain the Commission's pre-filing process and siting process.²⁹⁵ Additionally, Public Interest Organizations and the Yurok Tribe request that the Commission require applicants to file with the Commission any comments received in State-level proceedings.²⁹⁶ The Yurok Tribe also suggests that the Commission require applicants to provide the State commissions with copies of any comments submitted in the Commission's proceeding.

iii. Commission Determination

213. We do not find it is necessary to have a requirement for applicants to engage with the Office of Public Participation when developing the Environmental Justice Public Engagement Plan or the *Environmental justice* resource report. The Office of Public Participation is able to engage with applicants regarding best practices for stakeholder communications and outreach activities, in general, including meaningful early engagement with potentially affected environmental justice communities. However, the Office of Public Participation can neither review nor comment on applicant drafts or documents in contested proceedings.

214. With respect to the Office of Public Participation creating best practices on environmental justice engagement, we find that the Pre-filing and Application Notification requirements in § 50.4(c) and Project Participation Plan requirements in § 50.4(a), which would include the Environmental Justice Public Engagement Plan filing requirement we are adopting in this final rule, afford adequate notification of key information about the project, information about opportunities to participate in the pre-

²⁹³ Environmental Law and Policy Center Comments at 5; CLF Comments at 11.

²⁹⁴ CLF Comments at 7–8.

²⁹⁵ Public Interest Organizations Comments at 15.

²⁹⁶ *Id.* at 14; Yurok Tribe Comments at 27.

²⁹² As explained above, Environmental Justice Liaison is a position that does not currently exist at the Commission. See *supra* note 268.

filing process and any Commission proceeding, and address how applicants plan to accommodate people with limited English proficiency. These notifications and plans are tailored to the specific project and unique circumstances of any environmental justice communities that may be affected by a project and are the more appropriate means for Commission staff to provide feedback or support to an applicant in developing outreach efforts.

215. We decline to adopt commenters' recommendations requiring the Office of Public Participation's involvement in State-level proceedings. The Office of Public Participation's role is to support stakeholders that have expressed interest in engaging in the Commission's processes, not other agency or State processes. Additionally, requiring the Office of Public Participation to engage with all stakeholders that provide comments in a State proceeding would be infeasible. Project notifications required in § 50.4(c) and the Project Participation Plan required in § 50.4(a) ensure that stakeholders have sufficient notification of the proposed project and opportunities to provide their views on the project during the pre-filing and application review processes.

216. We also decline to require that an applicant file with the Commission the comments submitted in a State-level proceeding or file with the relevant State commissions comments placed in the Commission's record. We do not presume that commenters intend to have their comment filed with the Federal and State entities without their permission.

e. Tribal Consultation Policy

i. NOPR Proposal

217. In the NOPR, the Commission did not propose any changes to the Commission's Tribal consultation policy.²⁹⁷

ii. Comments

218. The Yurok Tribe and Public Interest Organizations state that the Commission must adopt a stronger Tribal consultation policy.²⁹⁸ The Yurok Tribe also believes that the Commission should provide dedicated resources within the Office of Public Participation to support consultation with and enable participation by Tribes. The Yurok Tribe and Public Interest Organizations suggest that the Commission provide funding to support Tribal participation

and intervenor compensation.²⁹⁹ The Yurok Tribe notes that the Inflation Reduction Act allocated \$100 million to the Commission to assist in environmental reviews, including stakeholder engagement, and that these funds should go to support Tribal participation.

219. To more fully meet the Commission's trust obligations, commenters urge the Commission to create a Tribal Advisory Committee to advise on all Commission interactions with Tribes and to recommend changes to Commission policies and establish a better relationship with Tribes.³⁰⁰ Similarly, these commenters ask that the Commission clarify and revise the role of the Commission's Tribal Liaison to be non-decisional, help facilitate the process to receive Tribal funds, support Tribal consultation and participation, and be located within the Commission's Office of Public Participation.³⁰¹

220. The Yurok Tribe suggests several changes to Commission Tribal consultation practices and recommends the adoption of a new Tribal Consultation Policy with opportunity for Tribes to review and comment on a draft of the policy.³⁰² The Yurok Tribe states that Tribes should have an opportunity to comment on whether an action requires consultation and be allowed to initiate consultation if the Commission fails to begin consultation. The Yurok Tribe also recommends that Tribes be afforded an opportunity to have a pre-meeting with Commission staff prior to a consultation meeting to allow for clarifying questions. After a consultation meeting, the Yurok Tribe suggests that the Commission follow up with Tribes to confirm next steps, schedule additional meetings, and advise the Tribe of the results of consultation.

iii. Commission Determination

221. While we appreciate Public Interest Organizations' and the Yurok Tribe's comments on the distribution of dedicated resources to enable Tribal participation, the creation of a Tribal Advisory Committee, the role of the Commission's Tribal Liaison, and proposed revisions to the Commission's Tribal Consultation Policy are all related to broader Commission consultation practices across all project types, rather than requirements that would apply to an applicant under FPA section 216,

and are therefore beyond the scope of this final rule.

222. We also note that applicants are required to send a Pre-filing Notification to all Indian Tribes whose interest may be affected by the proposed project with initial project information and how to participate in the Commission's process. Commission staff also reaches out to potentially affected Tribes, initiates government-to-government consultation, and opens public comment periods as part of the review process. Tribes may use any of the available opportunities to comment on whether an action requires consultation and may request to initiate consultation at any time. As such, we find no changes to the Commission's regulations are necessary.

4. Section 50.5—Pre-Filing Procedures

a. Congestion-Related Information

i. NOPR Proposal

223. Section 50.5 describes the required pre-filing procedures for applicants seeking a permit under FPA section 216. Section 50.5(c) describes the information that an applicant must provide in the pre-filing request. In the NOPR, the Commission proposed to require that any pre-filing request include a detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system (proposed § 50.5(c)(8)) and, as described above, a statement indicating whether an applicant intends to comply with the Applicant Code of Conduct (proposed § 50.5(c)(9)).

224. Section 50.5(e) describes the information that an applicant must provide once the Director of the Office of Energy Projects has issued a notice commencing the pre-filing process, and the respective deadlines for filing such information. In the NOPR, the Commission proposed clarifications to § 50.5(e)(3) and (4) to ensure consistency with the project notification requirements in § 50.4(c). The Commission also proposed to require an applicant to file congestion-related information earlier in the Commission's permitting process to provide sufficient time for Commission staff to evaluate the adequacy of information needed to conduct the required analyses under FPA section 216(b)(4).³⁰³ Specifically, within 30 days of the notice commencing the pre-filing process, the

²⁹⁷ Order No. 635, 104 FERC ¶ 61,108, *revised*, Order No. 863, 169 FERC ¶ 61,036. The policy statement is codified at 18 CFR 2.1c (2023).

²⁹⁸ Yurok Tribe Comments at 6–7 and 14–15; Public Interest Organizations Comments at 55–58.

²⁹⁹ Yurok Tribe Comments at 19–20 and 37; Public Interest Organizations Comments at 58–60.

³⁰⁰ Yurok Tribe Comments at 20–21; Public Interest Organizations Comments at 63–64.

³⁰¹ Yurok Tribe Comments at 20–23; Public Interest Organizations Comments at 60–63.

³⁰² Yurok Tribe Comments at 15–17.

³⁰³ FPA section 216(b)(4) requires the Commission to find that the proposed construction or modification of transmission facilities will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers. 16 U.S.C. 824p(b)(4).

Commission proposed to require an applicant to file a draft version of Exhibit H, *System analysis data*, required by § 50.7 (proposed § 50.5(e)(9)). In addition to a draft version of Exhibit H, the Commission also proposed to require an applicant to file additional supporting information showing how the proposed project will reduce capacity constraints and congestion on the transmission system, such as system impact study reports, relevant regional transmission plans, and, if applicable, expert witness testimony and other relevant information submitted with the State application(s) (proposed § 50.5(e)(7) and (8)).

ii. Comments

225. ACEG suggests that the requirement to submit a full system impact report early in the pre-filing process is unnecessary and unreasonable.³⁰⁴ It argues that the system impact study can take more than a year to complete and that the level of detail required may not be available at the early pre-filing stage.³⁰⁵ Accordingly, ACEG recommends that the Commission revise this requirement so that an applicant need only provide a status report on the system impact study during pre-filing, as opposed to the study itself.³⁰⁶ ACEG believes this would likely achieve the Commission's goal of ensuring appropriate consideration of the proposed project's impact on the safety and reliability of the transmission system while also avoiding unnecessary delays.³⁰⁷ Additionally, ACEG states that the proposed requirements that an applicant file, early in the pre-filing process, a full system impact study report (§ 50.5(e)(8)) and a draft version of Exhibit H (§ 50.5(e)(9)) are duplicative. ACEG recommends deleting paragraph (e)(9) and specifying in paragraph (e)(8) that a status report, rather than a full report of the system impact study, is sufficient.³⁰⁸

226. Likewise, Impacted Landowners state that it is unclear who is responsible for preparing the detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system that, as proposed in the NOPR, would be submitted as part of an application (proposed Exhibit H in § 50.7(h)(3)).³⁰⁹ Impacted Landowners recommend that this information be verified by

independent, impartial entities with expertise in transmission planning, such as Regional Transmission Organizations/Independent System Operators (RTO/ISO).³¹⁰ They urge the Commission to “make a clear determination of who has authority to determine these factors [for transmission capacity and congestion determinations] and apply them evenly across the board.”³¹¹

iii. Commission Determination

227. We adopt the NOPR proposal for § 50.5 in this final rule, with the following modifications in response to commenter feedback. With regard specifically to the congestion supporting information requirements detailed in proposed § 50.5(e)(8) and (e)(9), we are modifying the timeline associated with the submission of this information so that applicants will have a greater degree of flexibility as they navigate the pre-filing process.

228. We disagree with ACEG that the requirement that an applicant submit a full system impact study report during pre-filing is unnecessary and unreasonable. Upon entry into the Commission's pre-filing process, we expect that most applicants will have already completed a system impact study for the proposed project to identify the constraints, mitigation, and transmission upgrades that will significantly reduce transmission congestion. However, the Commission does not intend for completion of the study report to be a barrier to applicants that otherwise would be ready to enter into and benefit from the pre-filing process. Therefore, applicants who have already completed a full system impact study are required to submit the full system impact study report at initiation of pre-filing; however, applicants who have not completed the study report can submit a status report of the system impact study instead of the full report. Commission staff will review this status report and communicate with the applicant to establish a submission deadline for the full system impact study report during the pre-filing process.

229. Additionally, the draft version of Exhibit H is not duplicative of the system impact study report, but rather complementary and essential to contextualizing and verifying the report's findings. The system impact study report contains the narrative approach to the modeling and conclusions, while draft Exhibit H requires the actual power flow cases

utilized as inputs into the report. Draft Exhibit H also includes system analysis data, such as model input files and the assumptions, criteria, and guidelines upon which the models are based and which take into consideration transmission facility loading (planned and forecasted forced outages). Commission staff can use draft Exhibit H data to replicate and validate the models and assumptions in the applicant-provided system impact study report. However, as draft Exhibit H is not useful to the Commission until the full system impact study report is submitted, an applicant must submit draft Exhibit H within 30 days of submission of the full system impact study report and not within 30 days of the notice commencing the pre-filing process. The pre-filing process will not be concluded until the full system impact study report and draft Exhibit H is submitted and staff has had sufficient time to review and validate the report and data.

230. In response to requests for clarification regarding which entity may prepare information under § 50.7(h)(3), we clarify that applicants are responsible for submitting to the Commission the requisite pre-filing materials, including the detailed description of how the proposed project will address transmission capacity constraints and congestion. We decline to limit the information that may be submitted to support a finding under FPA section 216(b)(4) based upon who prepared the information, as a wide range of information from different sources may be relevant depending on the factual circumstances. Commission staff will review all submitted information and request additional information, as necessary, to ensure that any filed application is complete and contains sufficient information for the Commission to determine whether the proposed project will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers, as required by FPA section 216(b)(4).

b. Regional Transmission Planning Information

i. NOPR Proposal

231. Proposed § 50.5(c)(8) would require an applicant to include in its pre-filing request a detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system. In addition, within 30 days of the notice commencing the pre-filing process, proposed § 50.5(e)(7)(i) would require an applicant to submit the most recent

³⁰⁴ ACEG Comments at 10.

³⁰⁵ *Id.* at 10.

³⁰⁶ *Id.* at 11.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 11–12.

³⁰⁹ Impacted Landowners Comments at 11–13.

³¹⁰ *Id.* at 11–12.

³¹¹ *Id.* at 13.

regional transmission plan for each transmission planning region that would be crossed by the proposed project. Finally, under proposed Exhibit H in § 50.7, any application must include an analysis of how the project will: improve system reliability over the long and short-term; impact long-term regional transmission expansion plans; impact congestion on the applicant's entire system and neighboring systems; and incorporate any advanced technology design features, if applicable.³¹²

ii. Comments

232. Joint Consumer Advocates request that the Commission require an applicant to explain in its pre-filing consultation whether an RTO or ISO has identified the project as necessary to address a need identified through a regional transmission planning process, arguing that this will ensure projects submitted through the FPA section 216 process are limited to those necessary to address congestion issues.³¹³ Joint Consumer Advocates also ask the Commission to revise § 50.5(c) to require that an applicant's pre-filing request address the proposed project's cost effectiveness (*i.e.*, the project's benefits and costs to the consumer).³¹⁴

233. Relatedly, EEI states that the Commission should require applicants to demonstrate during pre-filing that the project meets a clear need and is not duplicative of other proposed or existing transmission projects.³¹⁵ EEI further recommends that the Commission consult with the relevant transmission planning entities to ensure that the proposed project supports system reliability.³¹⁶

iii. Commission Determination

234. We adopt the NOPR proposal concerning regional transmission planning information in § 50.5(e)(7) and § 50.5(c), with minor terminology clarifications, given that the relative benefits and costs of a project can take a variety of forms. Further, we clarify that the requested analysis in Exhibit H in § 50.7 of how the proposed project will impact congestion on the system where it will be located as well as neighboring systems will apply to neighboring systems only when relevant to the individual proposed project.

235. We decline commenters' requests to require an applicant to explain in the pre-filing consultation whether an RTO

or ISO has identified the project as necessary to address a need identified in a regional transmission planning process. While we expect that, in many cases, an applicant may indicate in its pre-filing submissions whether the proposed transmission project has or has not been identified as necessary to meet a need identified by a regional transmission planning process, we do not find it necessary to revise the regulations to specify that an applicant must provide this information during the initial consultation. Additionally, § 50.5(e)(7)(i) requires an applicant to submit regional transmission plans, and this information will likely provide insight into whether a project was deemed necessary to meet a regional need. We further note that a proposed transmission project may not always be identified by an RTO or ISO through its regional transmission planning process, or included in a regional transmission plan, such as a merchant transmission project. In such circumstances, the applicant must nevertheless demonstrate early in the pre-filing process how the proposed project will reduce capacity constraints and congestion on the transmission system, as required under § 50.5(c)(8) and (e)(7).

236. We similarly decline a request to require under § 50.5(c) submission of specific information regarding the proposed project's cost-effectiveness. Under § 50.6(f), an applicant is required to include a demonstration that the proposed facility meets each of the statutory standards under section FPA section 216(b)(2)-(6) for the Commission to issue a permit, including the requirement under section 216(b)(4) that a proposed project "protects or benefits consumers." While evidence related to the project's cost-effectiveness would be relevant to the Commission's consideration of the statutory standards under FPA section 216(b), information about the relative benefits and costs of a project could take a variety of forms. Accordingly, we decline to modify § 50.5 to require submission of particularized information, and assessment of the adequacy of information to demonstrate the statutory standards under section FPA 216(b) will occur on a case-by-case basis.

237. We do not find it necessary to codify a process for consulting with relevant transmission planning entities to ensure that a proposed project supports system reliability. As previously stated, we agree that determinations of an independent entity, such as an RTO or ISO, should be afforded due weight in the Commission's assessment of whether a particular project is needed to protect or

benefit consumers.³¹⁷ Therefore, we will consider any such independent determinations as a factor, along with all other relevant factors, in determining whether the statutory criteria have been met.

c. Existing Rights-of-Way Information

i. NOPR Proposal

238. The Commission did not propose any requirements related to rights-of-way data or analysis under § 50.5.

ii. Comments

239. Rail Electrification Council and Impacted Landowners request that, as part of the pre-filing submittals required by § 50.5, applicants be required to provide information related to the consideration, availability, and use of railroad rights-of-way or any other relevant existing rights-of-way to site all or a portion of a project.³¹⁸

iii. Commission Determination

240. We decline to modify § 50.5 to require submission of additional information about the consideration and availability of existing rights-of-way. An applicant is already required to identify certain information about the use of existing-rights-of-way as part of the resource reports that applicants must submit in draft form during the pre-filing process. Specifically, in the *Land use, recreation, and aesthetics* resource report discussed further below, applicants must identify where construction or permanent rights-of-way will be adjacent or overlap existing rights-of-way (proposed § 380.16(l)(1)). Additionally, in the *Alternatives* resource report discussed further below, applicants must submit information on the consideration of alternatives to the proposed project, including their relationship to existing rights-of-way.

d. State Permitting Information

i. NOPR Proposal

241. The Commission's existing regulations in § 50.5(e)(3)(iii) require applicants to notify permitting entities³¹⁹ and request information on material not required by the Commission's resource reports under § 380.16 that permitting entities may require to reach a decision on the proposed project. The NOPR proposed

³¹⁷ Order No. 689, 117 FERC ¶ 61,202 at P 44.

³¹⁸ Rail Electrification Council Comments at 9–12; Impacted Landowners Reply Comments at 8.

³¹⁹ As proposed in the NOPR and adopted herein, the term permitting entity means any Federal or State agency, Indian Tribe, or multistate entity that is responsible for issuing separate authorizations under Federal law that are required to construct electric transmission facilities in a National Corridor.

³¹² NOPR, 181 FERC ¶ 61,205 at PP 41, 45.

³¹³ Joint Consumer Advocates Comments at 13.

³¹⁴ *Id.* at 13.

³¹⁵ EEI Comments at 8.

³¹⁶ *Id.* at 8.

to redesignate paragraph (e)(3)(iii) as (e)(3)(ii) but made no changes to the substance of this existing requirement.

ii. Comments

242. Joint Consumer Advocates request that applicants be required, as part of the initial consultation meeting under § 50.5(b), to identify any differences between the filing requirements for the Commission and applicable States, and then provide any additional information required in the State process during the pre-filing process.³²⁰

243. Joint Consumer Advocates also request that the monthly status reports required under § 50.5(e)(11) include details on the associated State(s) permitting proceeding(s) and that stakeholders be allowed to review the monthly status reports and, if necessary, file comments with the Commission.³²¹ Joint Consumer Advocates believe this would allow the Commission to determine if an applicant is fully engaged in the State permitting proceeding.

iii. Commission Determination

244. We decline to modify § 50.5 to require submission of information required under State law. The initial consultation meeting and pre-filing request are initial steps to enter the pre-filing process and are intended to introduce a project to Commission staff and ensure applicants have sufficient information or project development to begin engaging with Commission staff. We do not find it necessary to modify § 50.5 to require submission of information that is unnecessary for that purpose, and which may or may not be relevant to Commission determinations under FPA section 216(b). Any entity, including a State, may file copies of information considered in a related State proceeding for consideration in the Commission's proceeding.

245. Similarly, we decline to modify the monthly status report requirements in § 50.5(e)(11) because we find the requested changes unnecessary. The monthly status reports already require applicants to detail the applicant's project activities, agency and Tribal meetings, and updates on the status of other required permits or authorizations. The regulations also require that the monthly status reports be filed with the Commission, and therefore will be available for stakeholders to review.

5. Section 50.6—General Content of Applications

a. NOPR Proposal

246. Section 50.6 describes the information that must be provided as part of an application for a permit under FPA section 216. In the NOPR, the Commission proposed to revise § 50.6(c) to update certain terminology for clarity (e.g., deleting origin and termination points and replacing those terms with point of receipt and point of delivery, respectively). The Commission also proposed to revise § 50.6(d) to specify that verification that the proposed route lies within a DOE-designated National Corridor must include the date of designation.

247. Under existing § 50.6(e), each application must also demonstrate that one of the jurisdictional bases set forth in FPA section 216(b)(1) applies to the proposed facilities. As discussed above, the NOPR proposed revisions to §§ 50.6(e)(1) and (3) to ensure that the Commission's regulatory text tracks the IJJA's amendments to FPA sections 216(b)(1)(A) and (C), respectively.³²²

248. In addition, existing § 50.6(f) provides that each application must demonstrate that the proposed facilities meet the statutory criteria in FPA sections 216(b)(2) through (6), including, as relevant here, that the proposed construction or modification is consistent with the public interest. The NOPR did not propose any changes to § 50.6(f).

b. Comments

249. Several commenters ask the Commission to clarify how it would determine whether the proposed facilities are consistent with the public interest, as required by FPA section 216(b)(3).³²³ North Carolina Commission and Staff urge the Commission to explicitly require applicants to demonstrate, either in pre-filing or in the application, that the proposed project serves the public interest.³²⁴ For example, North Carolina Commission and Staff provide a list of public interest criteria that, in its view, applicants should be required to demonstrate, including that the project's expected benefits to ratepayers are roughly commensurate with its costs; that consumers are protected from risks of project abandonment; that the project is consistent with system needs as demonstrated in Commission-mandated

planning processes and, if applicable, State integrated resource plans; that the project is preferable to reasonably available alternatives that would reduce congestion (e.g., additional generation, non-wires alternatives, and other less-intrusive or less-costly transmission projects); and that the project will enhance reliability.³²⁵

250. The Yurok Tribe states that the public interest standard under FPA section 216(b)(3) requires the Commission to consider, minimize, and mitigate impacts on Tribal resources.³²⁶ The Yurok Tribe urges the Commission to adopt a presumption that projects denied by States on the basis of adverse Tribal impacts are not in the public interest.³²⁷

251. Texas Commission states that there is no requirement that a Federal application include a State's final order denying an application and argues that it would be inefficient and burdensome for the States to have to recapitulate the entirety of its reasoning for denying an application in its comments in the Federal proceeding. Therefore, Texas Commission requests that the Commission expressly require that an application filed under FPA section 216(b)(1)(C)(iii) include a copy of the State's final and non-appealable order denying approval of the application.³²⁸ Further, Texas Commission requests that the Commission adopt a policy that, upon request of a State commission or the applicant, the record in the Commission's proceeding include the record in the State proceeding.³²⁹

c. Commission Determination

252. This final rule adopts the revisions to § 50.6 as proposed in the NOPR. We decline to further revise this section based on commenters' suggestions, as discussed below.

253. Consistent with the Commission's position in Order No. 689, we decline to adopt an exclusive list of factors or a bright-line test to determine whether a project meets the statutory criteria for issuing a permit in FPA sections 216(b)(2) through (6), including the requirement to demonstrate that a proposed project is consistent with the public interest.³³⁰ As the Commission explained in Order No. 689, in reviewing a proposed project, the Commission will consider all relevant factors presented on a case-by-case basis and balance the public

³²² *Supra* P 15.

³²³ *E.g.*, North Carolina Commission and Staff Comments at 12–15; Sabin Center Comments at 2, 5; Yurok Tribe Comments at 9–13.

³²⁴ North Carolina Commission and Staff Comments at 13.

³²⁵ *Id.* at 14.

³²⁶ Yurok Tribe Comments at 9–12.

³²⁷ *Id.* at 12–13.

³²⁸ Texas Commission Comments at 13.

³²⁹ Texas Commission Comments at 14.

³³⁰ Order No. 689, 117 FERC ¶ 61,202 at P 41.

³²⁰ Joint Consumer Advocates Comments at 10–11.

³²¹ *Id.* at 10.

benefits against the potential adverse consequences. The Commission will also conduct an independent environmental analysis of the project as required by NEPA, including reasonable alternatives to the proposed project. The Commission will review the proposed project and determine if it reduces transmission congestion and if it will protect or benefit consumers. The Commission will also consider the impact that the proposed facility will have on the existing transmission grid and the reliability of the system.

254. The Commission will also consider the adverse effects the proposed facilities will have on Tribes, landowners, and local communities. After evaluating the entire record of the proceeding and due consideration of the issues raised, the Commission will determine if the proposed project meets the criteria in FPA section 216(b). The Commission's review of a proposed project will be a flexible balancing during which it will weigh the factors presented in the project proceeding. The Commission will also impose appropriate conditions necessary to mitigate adverse effects on the relevant interests from the construction and operation of a proposed project and will approve the project only where the public benefits to be achieved from the project outweigh the adverse effects.

255. Regarding Texas Commission's request that an application filed under FPA section 216(b)(1)(C)(iii) include a copy of the State's final and non-appealable denial order, the Commission, in revised § 50.6(e)(3)(iii), requires an applicant to provide evidence that a State commission, or other entity that has the authority to approve the siting of facilities, has denied an application. In circumstances where a State denial triggers the Commission's jurisdiction, we expect that most applicants would file a copy of the State's denial order as this would likely be the best evidence that the State had denied the applicant's siting application. If an applicant does not submit to the Commission a copy of the State's denial order, the State may choose to file a copy as part of its comments on the application or Commission staff may direct the applicant to file it. Therefore, we do not believe that the requested change to the Commission's regulations is necessary.

256. We also decline to adopt a policy that the State record be incorporated into the record of the Commission's siting proceeding upon a State commission's or applicant's request. To the extent that the Commission may find certain elements of the State siting proceeding useful in its decision-

making process, it will request this information, as needed, on a case-by-case basis. We do not believe that incorporating the State record in its entirety into the Commission's record as a general rule is necessary as it would require the submission and review of information that may not be relevant.

6. Section 50.7—Application Exhibits

a. NOPR Proposal

257. Section 50.7 identifies the exhibits that applicants must file with an application and describes the technical data that must be provided in each exhibit. Section 50.7(g) requires each applicant to submit Exhibit G—*Engineering data*, which must include a detailed project description. In the NOPR, the Commission proposed revisions to ensure that the project description includes points of receipt and delivery (§ 50.7(g)(1)(i)), line design features that minimize audible corona noise during rain or fog (§ 50.7(g)(1)(vi)), and overhead and underground structures (§ 50.7(g)(2)(ii)).

258. The Commission also proposed revisions to § 50.7(h), which describes the requirements for Exhibit H—*System analysis data*. Specifically, in the NOPR, the Commission proposed to: (1) require the analysis to include project impacts on transmission capacity constraints (§ 50.7(h)(1)); (2) clarify that the analysis must include steady-state, short-circuit, and dynamic power flow cases, as applicable, and consider planned and forecasted forced outage rate for generation and transmission and generation dispatch scenarios (§ 50.7(h)(2)); and (3) require the analysis to identify how the proposed project will affect congestion on neighboring transmission systems (§ 50.7(h)(3)).

b. Comments

259. ACEG recommends that the Commission modify § 50.7(g)(8) to clarify that the relevant information “may be provided through the state filing process,” *i.e.*, through the filing of an application with the State.³³¹

c. Commission Determination

260. This final rule adopts the revisions to § 50.7 as proposed in the NOPR. This information will enable Commission staff to evaluate whether the proposed facilities would significantly reduce transmission congestion and protect or benefit consumers, as required by section 216(b)(4). We note that applicants may also file additional information to contextualize the required analyses. We

decline to revise § 50.7(g), as ACEG suggests, to clarify that the information required under § 50.7(g)(8) may be provided through the State filing process. Section 50.7(g)(8) directs an applicant to include any other engineering data or information identified as a minimum requirement for the siting of a transmission line in the State in which the facility will be located as part of its Exhibit G filing. We interpret ACEG's recommendation to mean that the Commission rely on information provided by an applicant through a separate State filing process rather than requiring the applicant to identify and file with the Commission any other information identified by the State as a minimum siting requirement. While in many cases an application filed with the State would likely include the necessary information to satisfy § 50.7(g)(8), this may not always be the case. Moreover, we find it is necessary that any additional engineering information that the State identifies as a minimum siting requirement be identified in Exhibit G and filed as part of the Commission record.

7. Section 50.11—General Permit Conditions

a. NOPR Proposal

261. Section 50.11 lists the general conditions that would apply to any permit issued under part 50 of the Commission's regulations. In the NOPR, the Commission proposed to clarify § 50.11(a) and (b) and proposed to add language to § 50.11(d) that would, under certain circumstances and for a limited time, preclude the issuance of authorizations to proceed with construction of transmission facilities authorized under FPA section 216 while requests for rehearing of orders issuing permits remain pending before the Commission.³³² The Commission explained that the proposed addition, which mirrors a regulation that the Commission previously adopted in the natural gas pipeline context,³³³ would ensure that construction of approved transmission facilities does not begin during the 30-day rehearing period and, if a qualifying rehearing request is filed, until that request is no longer pending before the Commission, the record of the proceeding is filed with the court of appeals, or 90 days has elapsed since the rehearing request was deemed

³³² NOPR, 181 FERC ¶ 61,205 at PP 46–47.

³³³ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 FR 40113 (July 6, 2020), 171 FERC ¶ 61,201 (2020), *order on reh'g*, Order No. 871–B, 86 FR 26150 (May 5, 2021), 175 FERC ¶ 61,098, *order on reh'g*, Order No. 871–C, 176 FERC ¶ 61,062 (2021).

³³¹ ACEG Comments at 13.

denied by operation of law.³³⁴ The Commission stated that this revision is intended to balance the Commission's commitment to expeditiously respond to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of Commission review.³³⁵

b. Comments

262. Chamber of Commerce, American Chemistry Council, and ClearPath disagree with the proposed revisions to § 50.11. American Chemistry Council states that the provision would delay action on needed investment.³³⁶ Similarly, ClearPath argues that projects with a likelihood of approval following a rehearing process should be timely developed and project developers should bear the risk of commencing construction while a rehearing request is pending.³³⁷ Chamber of Commerce asserts that delaying the effectiveness of a final Commission order pending rehearing is inconsistent with the FPA's provision stating that the filing of an application for rehearing does not operate as a stay of the Commission's order.³³⁸

263. On the other hand, CATF, EDF, and Public Interest Organizations support the proposed addition to § 50.11(d).³³⁹ CATF believes that holding construction pending rehearing to resolve challenges to project construction and need builds trust in the permitting process.³⁴⁰ While Public Interest Organizations agree with the requirement in § 50.11(d), they recommend that the Commission clarify that, before issuing a permit, the Commission will ensure that the applicant has obtained all necessary Federal and State permits and not authorize any activities that would take private property or alter the environment.³⁴¹

c. Commission Determination

264. We adopt the revisions to § 50.11 as proposed in the NOPR. We are not persuaded by arguments that precluding issuance of authorizations to proceed with construction of transmission facilities during certain limited periods of time would result in undue delay of

needed infrastructure development. We are committed to encouraging the development of needed transmission infrastructure and to minimizing the risk of delays. Nonetheless, we also consider the interest in expeditiously responding to parties' concerns on rehearing and the serious concerns posed by the possibility of construction commencing prior to the completion of agency review, including the potential for irreparable harm to property interests or the environment.³⁴² The purpose of the revision is to preclude construction during the period the Commission may act on rehearing under the defined circumstances and for a limited period of time, such that construction does not commence before the Commission has completed its decision-making process. The rehearing process serves as a mechanism for the Commission to carefully consider the arguments presented, in order to resolve disputes or bring its expertise to bear on complex, technical matters before they are potentially presented to the courts.³⁴³ Further, it is correct that section 313(c) of the FPA states that the filing of a rehearing request does not stay a Commission order. We believe by exercising our discretion to add language to § 50.11(d), we are addressing the significant fairness and due process concerns that could arise if the Commission authorized a developer to commence construction before the Commission has finalized its proceeding and an aggrieved party can seek court review of a Commission decision.³⁴⁴ Any incremental delay or uncertainty created by this provision is acceptable given the benefits that it provides. Moreover, we note that the Commission has previously implemented this policy in the context of natural gas pipeline authorizations, with no deleterious effects of which we are aware.

8. Clarifying Revisions to 18 CFR Part 50

265. In addition to the revisions discussed above, the Commission proposed minor, non-substantive edits throughout part 50 of the regulations. This final rule adopts the proposed revisions and makes additional minor edits, which are intended to clarify or streamline existing requirements, to correct grammatical errors and cross-references, and to maintain consistency. In addition, this final rule revises § 50.5(c)(6) to require that an applicant include as part of its pre-filing request proposals for all prospective third-party

contractors instead of at least three proposals. This change is consistent with the Commission's current practice for the review of third-party contractors to assist Commission staff with preparing environmental documents for natural gas and hydropower proceedings.³⁴⁵

E. Additional Considerations Raised by Commenters

266. The Commission received a number of comments on topics that were not directly implicated by the NOPR's proposed changes to part 50 of the Commission's regulations. Those comments and our determinations are discussed in this section. We find no need to modify the final rule in response to these comments, as further discussed below.

1. Grid-Enhancing Technologies

a. Comments

267. California Commission states that the Commission's siting process should consider non-wire alternatives that are cost effective, noting that these types of analyses are required in California prior to the issuance of Certificates of Public Convenience and Necessity.³⁴⁶ Environmental Law & Policy Center agrees, contending that requiring the consideration of grid-enhancing technologies and other advanced technologies in the transmission planning and siting processes would remedy a deficiency in the NOPR of an arbitrary line drawn between wires and non-wires solutions.³⁴⁷ Further, Environmental Law & Policy Center suggests that consideration of grid-enhancing technologies and advanced transmission technologies would help address stakeholder concerns commonly associated with large infrastructure development (*i.e.*, siting conflicts, visual impacts, habitat loss, and environmental justice concerns) because it can reduce the footprint of a transmission project.³⁴⁸

b. Commission Determination

268. We find that no modification of the regulations is required to allow for consideration of grid-enhancing or other advanced technologies. As proposed in the NOPR and adopted herein,

³³⁴ NOPR, 181 FERC ¶ 61,205 at P 47.

³³⁵ *Id.*

³³⁶ American Chemistry Council Comments at 4.

³³⁷ ClearPath Comments at 6.

³³⁸ Chamber of Commerce Comments at 6 (citing 16 U.S.C. 825(c)).

³³⁹ CATF Comments at 12; EDF Comments at 15; Public Interest Organizations Comments at 139.

³⁴⁰ CATF Comments at 12.

³⁴¹ Public Interest Organizations Comments at 139.

³⁴² See Order No. 871, 171 FERC ¶ 61,201 at P 11.

³⁴³ *Id.* P 9.

³⁴⁴ See Order No. 871-B, 175 FERC ¶ 61,098 at P 49.

³⁴⁵ See FERC, *Handbook for Using Third-Party Contractors to Prepare Environmental Documents* (July 2022), <https://www.ferc.gov/media/handbook-using-third-party-contractors-prepare-environmental-documents>.

³⁴⁶ California Commission Comments at 4.

³⁴⁷ Environmental Law & Policy Center Reply Comments at 6–7 (citing California Commission Comments at 4).

³⁴⁸ Environmental Law & Policy Center Reply Comments at 6–7.

§ 50.7(h)(3)(iv) requires an applicant to include, as part of the Exhibit H system analysis data, an analysis of how the proposed project will incorporate any advanced technology design features, if applicable. Accordingly, the Commission will consider any proposed advanced technology design features submitted by an applicant as part of its Exhibit H system analysis data, on a case-by-case basis. The Commission will also consider on a project-specific basis information submitted regarding non-wires alternatives. As discussed further below, an applicant is required to address a variety of alternatives in the environmental resource reports, including, where appropriate, alternatives other than new transmission lines.³⁴⁹

2. Use of Existing Rights-of-Way

a. Comments

269. Some commenters assert that the Commission should use its authority under FPA section 216(b) to promote the use of existing rights-of-way to site new transmission projects, including using highway and railroad corridors, as well as burying transmission projects in existing rights-of-way.³⁵⁰ Rail Electrification Council states that section 216 allows the Commission to consider whether utilizing existing rights-of-way for proposed transmission lines would promote efficient use of resources, advance regional plans, and avert or minimize undue harm to communities and the environment.³⁵¹ Further, Rail Electrification Council asserts that the Commission should promote the use of best practices in siting transmission facilities, one of which is the use of existing rights-of-way where financially and operationally feasible and where beneficial to developers, property owners, and local economies.³⁵²

270. Rail Electrification Council also asks the Commission to opine on whether specific railroad rights-of-way could be designated as National Corridors and whether such designation would facilitate transmission development by reducing project impacts and by authorizing the use of eminent domain, including in instances

where State law might prevent access to privately held rights-of-way.³⁵³

b. Commission Determination

271. Under FPA section 216(a), one of the factors that DOE may consider in determining whether to designate a National Corridor is whether the designation maximizes existing rights-of-way.³⁵⁴ Section 216(b), however, does not include a comparable provision that the Commission consider whether proposed transmission facilities maximize use of existing rights-of-way for transmission siting. Although we agree that co-location in existing rights-of-way may benefit landowners, reduce costs and environmental impacts, and shorten construction time,³⁵⁵ co-location in existing rights-of-way may not always be feasible. The Commission will consider whether and to what degree a project may be able to use existing rights-of-way on a case-by-case basis. Because an applicant is already required to submit information to the Commission regarding a project's use of existing rights-of-way, no further changes are needed to the regulations.

272. Regarding the suitability and benefits of designating specific railroad rights-of-way as National Corridors, DOE, not the Commission, is responsible for designating National Corridors under section 216(a) of the FPA. Thus, this is a matter for DOE to consider, and is beyond the scope of this final rule.

3. Project Costs

a. Comments

273. Several commenters contend that the NOPR does not address how the costs of projects subject to the Commission's siting authority will be evaluated, allocated, or recovered.³⁵⁶

b. Commission Determination

274. We find that no modification of the regulations is necessary in response to commenters' concerns that the NOPR did not address cost considerations. Such issues are outside of the scope of this final rule. Nothing in this final rule is intended to modify existing Commission processes governing the evaluation, allocation, and cost recovery of a transmission project.

4. Miscellaneous

a. Comments

275. Farm Bureaus argue that the proposed rule is unclear as to whether a non-incumbent transmission developer could apply for a Federal permit at the same time that an incumbent transmission developer is obtaining a State permit, which they state would create a major conflict between State and Federal law.³⁵⁷

276. Farm Bureaus also note that ISOs and RTOs are responsible for identifying current priority transmission corridors and state that it is unclear how National Corridors relate to projects and "multi-value priority areas" that have already been identified by ISOs and RTOs.³⁵⁸

b. Commission Determination

277. We find that no modification of the regulations is necessary in response to Farm Bureaus' comments. This rulemaking proceeding is not the appropriate forum to address individual hypothetical scenarios. As we have stated elsewhere in this final rule, we will take into account information specific to each application, including information regarding the jurisdictional basis to support the submission of an application with the Commission.³⁵⁹

278. In response to the request that the final rule explain how National Corridors relate to RTO/ISO-identified projects and priority areas, we reiterate that the designation of National Corridors is within DOE's exclusive authority under FPA section 216(a). For that reason, we find that Farm Bureaus' requested clarification is outside the scope of this final rule.

F. Regulations Implementing NEPA

279. In Order No. 689, the Commission also amended its regulations implementing NEPA to incorporate environmental review procedures for electric transmission facilities. These amendments included revisions or additions to: § 380.3(c) (adding electric transmission projects to the list of project types for which applicants must provide environmental information), § 380.5(b)(14) (adding electric transmission facilities to the list of project types for which the Commission will prepare an environmental assessment (EA)), § 380.6(a)(5) (adding major electric transmission facilities using right-of-way in which there is no existing facility to the list of project types for which the Commission will prepare an

³⁴⁹ See Resource Report 12—*Alternatives* discussion *infra* Part II.F.4.h.

³⁵⁰ See Impacted Landowners Comments at 2; Rail Electrification Council Comments at 7–9; Impacted Landowners Reply Comments at 3–4.

³⁵¹ Rail Electrification Council Comments at 8 (referencing <https://nextgenhighways.org/>; ACEG, Recommended Siting Practices for Electric Transmission Developers, Sec. 4 "Co-Location in Existing Rights-of-Way" (Feb. 2023), <https://cleanenergygrid.org/portfolio/recommended-siting-practices-electric-transmission-developers/>).

³⁵² *Id.* at 7–9.

³⁵³ *Id.* at 13.

³⁵⁴ 16 U.S.C. 824p(a)(4)(G).

³⁵⁵ See ACEG, *Recommended Siting Practices for Electric Transmission Developers* 8 (Feb. 2023), <https://cleanenergygrid.org/portfolio/recommended-siting-practices-electric-transmission-developers/>.

³⁵⁶ California Commission Comments at 4; Louisiana Commission Comments at 8–9; North Carolina Commission and Staff Comments at 14; Senator Barrasso Comments at 5.

³⁵⁷ Farm Bureaus Comments at 5.

³⁵⁸ *Id.* at 7.

³⁵⁹ See *supra* P 34.

environmental impact statement (EIS)), § 380.8 (designating the Office of Energy Projects as responsible for the preparation of environmental documents for electric transmission facilities), § 380.10(a)(2)(iii) (clarifying that pre-filing proceedings for electric transmission facilities are not open to motions to intervene), and § 380.15 (stating that electric transmission project sponsors must comply with the National Electric Safety Code and transmission rights-of-way are subject to the same construction and maintenance requirements as natural gas pipelines). The Commission also added § 380.16, which describes the specific environmental information that applications for permits to site transmission facilities under section 216 must include. The applicant must submit this information in an environmental report, consisting of resource-specific reports, described further below.

280. As explained above, the Fourth Circuit's 2009 *Piedmont* decision vacated Order No. 689's amendments to the Commission's NEPA regulations because the court found that the Commission had failed to consult with CEQ prior to issuing the revised regulations.³⁶⁰ Despite the Fourth Circuit's vacatur, the amendments to the Commission's NEPA regulations set forth in Order No. 689 are still reflected in 18 CFR part 380 although they are not currently effective.³⁶¹

1. Consultation with CEQ

a. NOPR Proposal

281. In the NOPR, the Commission sought comment on the whole of the Commission's NEPA regulations pertaining to electric transmission facilities, as well as the specific proposed changes to those regulations described further below. The Commission also committed to consulting with CEQ on the proposed changes to its NEPA regulations described below as well as those originally implemented by Order No. 689.

b. Comments

282. Commenters including Public Interest Organizations, EEI, and ClearPath note that the Commission must consult with CEQ when updating its NEPA regulations and that the Commission must take CEQ's input

seriously and incorporate CEQ's proposed alterations.³⁶² Public Interest Organizations also explain that CEQ is in the process of updating its NEPA regulations and that the Commission's NEPA implementing regulations may need to be updated based on CEQ's forthcoming updates.³⁶³

c. Commission Determination

283. On March 2, 2023, a letter was sent to CEQ requesting consultation related to the proposed NEPA regulations.³⁶⁴ Following discussion of the proposed regulations among CEQ and Commission staff, CEQ provided its comments on the proposal on August 24, 2023.

284. On June 3, 2023, Congress enacted the Fiscal Responsibility Act.³⁶⁵ A section titled "Builder Act" amended NEPA in several ways.³⁶⁶ We have reviewed the Builder Act amendments and have determined that no changes are needed to the Commission's regulations to implement NEPA. We are also reviewing CEQ's Phase 2 rulemaking to determine whether any of the Commission's NEPA implementing regulations need to be revised.³⁶⁷ If so, the Commission will follow the appropriate rulemaking procedures in a separate proceeding.

2. DOE Coordination

a. NOPR Proposal

285. The Commission did not propose any specific process regarding coordination with DOE in the NOPR.

b. Comments

286. Multiple commenters urge the Commission to clarify how it will coordinate with DOE to avoid unnecessarily lengthy and duplicative Federal environmental review processes for National Corridor designation and transmission permitting.³⁶⁸ Specifically,

³⁶² Public Interest Organizations Comments at 101–102; EEI Comments at 9; ClearPath Comments at 6–7.

³⁶³ Public Interest Organizations Comments at 101–102.

³⁶⁴ Commission General Counsel March 2, 2023 Letter to CEQ Requesting Consultation (filed Mar. 21, 2023).

³⁶⁵ Fiscal Responsibility Act of 2023, Pub.L. 118–5, 137 Stat. 10.

³⁶⁶ *Id.* § 321 (providing the "Builder Act").

³⁶⁷ On May 1, 2024, CEQ published its Phase 2 final rule revising its regulations implementing NEPA, including to implement the Builder Act amendments. CEQ, *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 FR 35442 (May 1, 2024). CEQ's Phase 2 final rule is effective on July 1, 2024, and agencies will have 12 months from the effective date to develop or revise proposed procedures to implement CEQ's revised regulations.

³⁶⁸ ACP Comments at 7–13 and 15; ACORE Comments at 4–5; EDF Comments at 11; Public Interest Organizations Comments at 105.

commenters state that the Commission should tier its NEPA analysis for its permit decision off DOE's NEPA analysis for the National Corridor designation, and only focus on elements that DOE did not address or that have changed since DOE's review.³⁶⁹

287. EEI recommends that the Commission conduct programmatic NEPA reviews that encompass all potential transmission development projects at a regional scale, instead of each one individually.³⁷⁰ EEI suggests that individual project NEPA reviews could be tiered from the programmatic NEPA document.

288. Several commenters ask that the Commission serve as a cooperating agency during DOE's environmental review process for designating National Corridors but also independently assess that analysis before relying on its use.³⁷¹ EEI states that the Commission should adopt categorical exclusions that match DOE's existing categorical exclusions for electric transmission facilities.³⁷²

289. ACORE states that, although the Commission is not a signatory to the May 2023 interagency Memorandum of Understanding (MOU) with other Federal agencies to expedite electric transmission infrastructure under section 216(h) of the FPA, the Commission should work with DOE to clarify whether the provisions of that MOU can be used for non-qualifying projects where the Commission is the lead agency.³⁷³

290. ACEG and SEIA ask that the Commission clarify how the Commission's siting process timing would align with a project voluntarily complying with DOE's regulations in 10 CFR part 900 for early coordination, information sharing, and environmental reviews, particularly where DOE serves as the lead agency.³⁷⁴

³⁶⁹ ACP Comments at 7–9, 11–13 (explaining that a tiering approach would better align with Congress's intent under FPA section 216(h)(5)); CATF Comments at 18–22 (recommending that tiering and adopting existing NEPA analyses is a best practice for infrastructure permitting as per the March 2023 Guidance from the Federal Permitting Improvement Steering Council, Office of Management and Budget, and the CEQ, encouraging agencies to "rely on, adopt, or incorporate by reference components of any high quality NEPA . . . analyses."); Public Interest Organizations Comments at 103–105; ACEG Comments at 18–19. *See generally*, Off. of Mgmt. and Budget, M–23–14, Memorandum for the Heads of Executive Departments and Agencies, Implementation Guidance for the Biden-Harris Permitting Action Plan, at 5 (Mar. 6, 2023).

³⁷⁰ EEI Comments at 10–12.

³⁷¹ Public Interest Organizations Comments at 105; CATF Comments at 20–21.

³⁷² EEI Comments at 9.

³⁷³ ACORE Comments at 3–4.

³⁷⁴ ACEG Comments at 10; SEIA Comments at 7–8.

³⁶⁰ *See supra* P 11.

³⁶¹ Notwithstanding that these regulations are not currently effective, for ease of reference, the term "existing" is used in Part II.F. to denote Order No. 689's amendments to the Commission's NEPA regulations in 18 CFR part 380.

c. Commission Determination

291. The Commission will coordinate with DOE to the maximum extent practicable to minimize redundancy and promote efficiency in the Federal environmental review processes under section 216 of the FPA. However, the framework for the Commission's coordination with DOE in exercising DOE's separate authority to designate National Corridors under section 216(a) of the FPA is beyond the scope of this final rule. Accordingly, the Commission will consider each request it receives from DOE to be a cooperating agency individually based on the specific circumstances. Further, the Commission will coordinate with other agencies throughout the Commission's review process to comply with the requirements of section 216(h) of the FPA, as delegated to the Commission by the Secretary of DOE, and to promote timely and efficient Federal reviews and permit decisions.

292. The Commission will consider tiering on a case-by-case basis, as appropriate. Tiering allows a Federal agency to avoid duplicating previous environmental analysis by referring to another NEPA document containing the necessary analysis.³⁷⁵ The appropriateness of tiering is dependent on numerous factors, including the scope and timing of the original NEPA document, the underlying assumptions used in the original analysis, and changes to the affected environment since the original analysis.³⁷⁶ We recognize that the new NEPA provisions established in the Builder Act support the development of a single NEPA document for use, to the extent practicable, by multiple agencies³⁷⁷ and continue to allow the use of programmatic NEPA documents.³⁷⁸

293. Regarding ACEG's and SEIA's questions about how the Commission's siting process would align with projects complying with DOE's regulations implementing section 216(h) of the FPA in 10 CFR part 900, the Commission notes that recently revised § 900.1(f) specifies that part 900 applies only to qualifying projects which, as defined in § 900.2, excludes projects seeking a construction or modification permit from the Commission under section

216(b) of the FPA.³⁷⁹ However, in the event that an applicant originally complying with 10 CFR part 900 decides to seek a permit from the Commission under section 216(b) of the FPA, nothing in this final rule precludes the reuse of materials submitted to DOE. The Commission will coordinate, to the maximum extent practicable, with the applicant and DOE in order to facilitate an efficient transition.

294. As to EEI's request for the Commission to adopt categorical exclusions that match DOE's existing categorical exclusions, the Commission will establish any categorical exclusions related to our siting authority that appear appropriate after the Commission has gained experience reviewing applications, which is consistent with CEQ guidance.³⁸⁰

3. NEPA Document Procedures

i. NOPR Proposal

295. In the NOPR, the Commission did not propose any changes to the types of facilities or actions that require each type of NEPA document or how the Commission prepares, distributes, and receives comments on its NEPA documents as described in §§ 380.4 through 380.9 of the Commission's regulations.

ii. Comments

296. Public Interest Organizations assert that existing § 380.9 makes NEPA documents available to the public pursuant to the Freedom of Information Act and via the Commission's physical reading room "at a fee." They request that the Commission specify in its regulations that it will also make NEPA documents publicly available online at no charge.³⁸¹

297. Public Interest Organizations express concern that under the existing §§ 380.5 and 380.6, only those transmission projects sited in existing rights-of-way are potentially subject to an EA instead of the lengthier EIS, which creates an incentive to site in existing rights-of-way and may diminish the rigor of the assessment of a project's impacts.³⁸²

³⁷⁹ As noted above, DOE recently issued a final rule revising its regulations implementing section 216(h) of the FPA. DOE, *Coordination of Federal Authorizations for Electric Transmission Facilities*, 89 FR 35312 (May 1, 2024).

³⁸⁰ CEQ, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*, at 4 (2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

³⁸¹ Public Interest Organizations Comments at 135–136.

³⁸² Public Interest Organizations Comments at 126–131.

298. Public Interest Organizations and the Yurok Tribe request that the Commission's regulations be revised to clearly state that the public will have an opportunity to comment on any draft NEPA document that the Commission issues.³⁸³ The Yurok Tribe states that although agencies frequently provide 30-day comment periods on NEPA documents, the Commission should provide Tribes with at least 60 days to provide input, noting this longer comment period is appropriate in light of Tribes' sovereign status and limited resources.³⁸⁴

iii. Commission Determination

299. We decline to modify our regulations regarding the availability of Commission NEPA documents. Existing § 380.9 states that the Commission will make NEPA documents available to the public, and the Commission does so, at no charge, through the Commission's eLibrary system.³⁸⁵ The reference to obtaining materials "at a fee" in the regulations refers to obtaining copies of records already available through the Commission's website or for obtaining records subject to Freedom of Information Act or Critical Energy Infrastructure Information requests.

300. With respect to commenters' concerns regarding the development of an EA or EIS for a particular project affecting the rigor of the Commission's reviews and the appropriate length of time for comment periods, the Commission will make such determinations on a case-by-case basis because the appropriate approach is likely to vary based on the factual circumstances. Existing §§ 380.5 and 380.6 also include provisions to allow flexibility for Commission staff to prepare an EA or EIS based on project-specific circumstances. We note that Commission proceedings, whether involving either an EA or an EIS, typically include numerous opportunities for public comment (and, in the case of Tribes, government-to-government consultation).

4. Revisions to 18 CFR 380.16

a. Addition of New Resource Reports and General Revisions to Existing Reports

i. NOPR Proposal

301. In the NOPR, the Commission proposed to add to § 380.16 three new resource reports (*Tribal resources*, *Environmental justice* and *Air quality and environmental noise*). For this

³⁸³ Public Interest Organizations Comments at 126–131; Yurok Tribe Comments at 38–39.

³⁸⁴ Yurok Tribe Comments at 38–39.

³⁸⁵ 18 CFR 380.9 (2023).

³⁷⁵ *Rio Grande LNG, LLC*, 182 FERC ¶ 61,027 (2023) (citing 40 CFR 1501.11).

³⁷⁶ See 42 U.S.C. 4336b (describing circumstances where an agency can rely on a higher-tier programmatic environmental document); 40 CFR 1501.11(c) (describing circumstances when tiering is appropriate).

³⁷⁷ 42 U.S.C. 4336a(b).

³⁷⁸ 42 U.S.C. 4336b.

reason, the Commission proposed to redesignate all resource reports after Resource Report 5—*Socioeconomics* as follows: Resource Report 6—*Tribal resources* (§ 380.16(h)); Resource Report 7—*Environmental justice* (§ 380.16(i)); Resource Report 8—*Geological resources* (§ 380.16(j)); Resource Report 9—*Soils* (§ 380.16(k)); Resource Report 10—*Land use, recreation, and aesthetics* (§ 380.16(l)); Resource Report 11—*Air quality and environmental noise* (§ 380.16(m)); Resource Report 12—*Alternatives* (§ 380.16(n)); Resource Report 13—*Reliability and safety* (§ 380.16(o)); and Resource Report 14—*Design and engineering* (§ 380.16(p)). The Commission also proposed minor, non-substantive edits throughout § 380.16 intended to clarify or streamline existing requirements, to correct grammatical errors and cross-references, and to maintain consistency.

302. The Commission proposed to revise the *General project description* resource report to more clearly identify the types of facilities that must be depicted on the topographic maps and aerial images or photo-based alignment sheets. The Commission also proposed to add requirements to describe any proposed horizontal directional drilling and pile driving that may be necessary, indicate the days of the week and times of the day during which construction activities would occur, and describe any proposed nighttime construction activities.

303. The Commission proposed to add a requirement that the *Water use and quality* resource report describe the impact of proposed land clearing and vegetation management practices on water resources. The Commission also proposed to add a requirement that the *Soils* resource report describe any proposed mitigation measures intended to reduce the potential for adverse impacts to soils or agricultural productivity. In addition, the Commission proposed only minor, clarifying edits to the *Socioeconomics*, *Geologic resources*, and *Design and engineering* resource reports.

304. The discussion that follows this section focuses on the individual resource reports for which we received substantive comments.³⁸⁶ For each of those resource reports, we describe the NOPR proposal, comments received, and the Commission's determination.

ii. Comments

305. No comments were received on the proposed revisions to the *General project description*, *Water use and*

quality, *Socioeconomic*, *Geologic resources*, *Soils*, and *Design and engineering* resource reports.

306. Several commenters argue that the three new resource reports expand the Commission's authority beyond the scope of section 216 of the FPA, opening the door to future legal challenges.³⁸⁷ Chamber of Commerce further states that the *Tribal resources* and *Environmental justice* resource reports appear to impede rather than facilitate efficient siting and construction of necessary transmission facilities. American Chemistry Council questions whether the three new resource reports or any expansions to existing resource reports are needed as the information is already required by State partners and there is little justification for increased resources and burden.

iii. Commission Determination

307. We adopt the NOPR's proposed revisions to the *General project description*, *Water use and quality*, *Socioeconomic*, *Geologic resources*, *Soils*, and *Design and engineering* resource reports in this final rule. We continue to find that the NOPR's revisions to these reports will clarify information needed to support the Commission's NEPA analyses. In addition, this final rule adopts the proposed minor, non-substantive edits throughout § 380.16 and makes additional minor edits to clarify or streamline existing requirements, to correct grammatical errors and cross-references, and to maintain consistency.

308. We also adopt the NOPR's three new resource reports (*Tribal resources*, *Environmental justice* and *Air quality and environmental noise*). We disagree with commenters that the designation of three new resource reports alters the scope of the Commission's legal authority, or in some way impedes the Commission's consideration of applications under FPA section 216. The required information in these resource reports is necessary for the Commission to fully evaluate the effects of a proposed project and meet its statutory obligations under the FPA and NEPA. Additionally, the Commission routinely requests this type of information from applicants for natural gas and hydroelectric projects through existing regulatory requirements or data requests.

309. Regarding American Chemistry Council's concerns that information in

the new resource reports is already required by State partners, we note that not all States require the same information for their respective reviews of electric infrastructure. Regardless of the relevant State filing requirements, this information should be filed on the record for the Commission to use it in its proceeding. In the instances where information is already developed for a State review process, applicants can provide that same information to the Commission to support the Commission's NEPA review.

b. Resource Report 3—Fish, Wildlife, and Vegetation

i. NOPR Proposal

310. The *Fish, wildlife, and vegetation* resource report requires the applicant to describe aquatic life, wildlife, and vegetation in the vicinity of the proposed project; the expected impacts on these resources; and proposed mitigation measures.³⁸⁸ In the NOPR, the Commission proposed to modify existing § 380.16(e)(3) and (4) to include additional requirements in the *Fish, wildlife, and vegetation* resource report. Specifically, the Commission proposed to require that applicants describe the potential impact on interior forest (in § 380.16(e)(3)), as well as the impact of proposed land clearing and vegetation management practices on fish, wildlife, and vegetation (in § 380.16(e)(4)).

ii. Comments

311. Arizona Game and Fish requests that the Commission include additional requirements in the *Fish, wildlife, and vegetation* resource report beyond the NOPR proposal. Specifically, Arizona Game and Fish recommends that applicants identify, analyze, and develop mitigation measures to address potential impacts on wildlife connectivity and movement corridors, habitat loss and fragmentation, and the introduction and spread of noxious weeds and non-native species.³⁸⁹

312. Arizona Game and Fish also calls for revisions to existing § 380.16(e)(4) to require the resource report to include information from State Wildlife Action Plans and a description of potential impacts on species listed under State Species of Greatest Conservation Need.³⁹⁰

313. Interior supports the NOPR proposal.³⁹¹ In addition, Interior recommends that the *Fish, wildlife, and vegetation* resource report require applicants to identify all known and

³⁸⁶ See discussion *infra* Parts II.F.4.b. through II.F.4.j.

³⁸⁷ American Chemistry Council Comments at 7–8; Chamber of Commerce Comments at 3; ClearPath Comments at 6–7; ELCON Comments at 5–6; North Dakota Commission Comments at 7–8.

³⁸⁸ 18 CFR 380.16(e).

³⁸⁹ Arizona Game and Fish Comments at 1–2.

³⁹⁰ *Id.* at 2.

³⁹¹ Interior Comments at 1.

potential bald and golden eagle nesting and roosting sites, migratory bird flyways, and any sites important to migratory bird breeding, feeding, and sheltering.³⁹² Interior further requests that the resource report require commitments from applicants to implement avoidance and minimization measures to reduce the likelihood of incidental take of eagles and migratory birds. Finally, Arizona Game and Fish recommends incorporating standards established by the Avian Power Line Interaction Committee into the resource report to address the vulnerability of birds of prey to powerline strikes and electrocution.³⁹³

iii. Commission Determination

314. To support the Commission's NEPA analyses, we adopt the NOPR's proposal, with additional modifications, to revise the *Fish, wildlife, and vegetation* resource report in existing § 380.16(e) to require the applicant to describe potential impacts on interior forest as well as the impact of proposed land clearing and vegetation management practices on fish, wildlife, and vegetation. In response to comments, we modify existing § 380.16(e)(2) to include wildlife corridors and we modify existing § 380.16(e)(3) to include noxious weeds and non-native species.³⁹⁴ To support the Commission in assessments under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, we add a new provision in § 380.16(e)(7)³⁹⁵ to address migratory birds and bald and golden eagles.³⁹⁶

³⁹² *Id.*

³⁹³ Arizona Game and Fish Comments at 2.

³⁹⁴ Commission staff routinely asks applicants in natural gas and hydropower proceedings to provide information about noxious weeds and invasive species. See, e.g., Commission staff, Environmental Information Request, Docket No. CP23–536, at 4 (issued Nov. 3, 2023) (Question No. 9); Commission staff, Deficiency of License Application and Additional Information Request, Project No. 14851–003, at B–14 (issued Apr. 28, 2023) (Question No. 42(b)); see also FERC, *Guidance Manual for Environmental Report Preparation—Volume 1*, at 4–65 and 4–66 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

³⁹⁵ Because of the addition of this new requirement, the requirements in the *Fish, wildlife, and vegetation* resource report after existing § 380.16(e)(6) are redesignated from paragraphs (e)(7) and (e)(8) to paragraphs (e)(8) and (e)(9), respectively.

³⁹⁶ Commission staff routinely asks applicants in natural gas and hydropower proceedings to provide information about migratory bird species and bald and golden eagles. See, e.g., Commission staff, Environmental Information Request, Docket No. CP23–536, at 5 (issued Nov. 3, 2023) (Question Nos. 14–16); Commission staff, Deficiency of License Application and Additional Information Request, Project No. 14851–003, at B–14 through B–19 (issued Apr. 28, 2023) (Question Nos. 42(d)–(f), 43, 44(j), 45, and 47–50); see also FERC, *Guidance*

315. We agree with Arizona Game and Fish that requiring the applicant to identify and analyze potential impacts on wildlife corridors would help ensure that this specific habitat is adequately identified in support of the Commission's NEPA analyses. Therefore, we modify existing § 380.16(e)(2) to include a requirement to describe wildlife corridors. We also agree with Arizona Game and Fish that requiring the applicant to identify and analyze noxious weeds and non-native species would establish a baseline of known areas where noxious weeds and non-native species occur. Therefore, we modify existing § 380.16(e)(3) to require the resource report to describe any areas of noxious weeds and non-native species. This change will support the Commission's NEPA analysis by identifying areas that may require different restoration methods or additional vegetation management during construction, operation, and maintenance.

316. We decline to modify the requirements in the *Fish, wildlife, and vegetation* resource report to require the applicant to identify conservation or mitigation measures. We find that the existing regulations already require the applicant to address the disclosure of potential project impacts, specifically, § 380.16(e)(4) directs that the *Fish, wildlife, and vegetation* resource report describe the possibility of a major alteration to ecosystems or biodiversity.³⁹⁷ Further, a description of site-specific mitigation measures is required in redesignated § 380.16(e)(8) of this final rule. These existing regulations adequately address the potential impacts and mitigation measures.

317. Similarly, we decline Arizona Game and Fish's request to modify existing § 380.16(e)(4) to require that the *Fish, wildlife, and vegetation* resource report include State Species of Greatest Conservation Need and incorporate information from State Wildlife Action Plans. We find that the species of concern to States are already addressed. Section 380.16(e)(4) requires the applicant to describe potential impacts on all plant and animal wildlife, including species of special concern and State-listed endangered or threatened species. Therefore, we do not believe that the suggested revisions are necessary.

Manual for Environmental Report Preparation—Volume 1, at 4–62 and 4–63 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

³⁹⁷ 18 CFR 380.16(e)(4).

318. We decline Arizona Game and Fish's request to prescribe the standards established by the Avian Power Line Interaction Committee into the Commission's regulations. The Commission supports practices to protect birds; however, in the event the referenced standards are subsequently revised based on new scientific data, the Commission's regulations could become outdated or inaccurate. Commission staff will consider applicable Avian Power Line Interaction Committee standards on a project-specific basis.

319. We agree with Interior's comments that the *Fish, wildlife, and vegetation* resource report should require the identification of all known and potential bald and golden eagle nesting and roosting sites, migratory bird flyways, and any sites important to migratory bird breeding, feeding, and sheltering. We find that this information may assist the Commission in its assessments under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Accordingly, this final rule adds a new requirement in § 380.16(e)(7) to identify migratory birds and bald and golden eagles in the project area. This final rule also adopts corresponding changes in existing § 380.16(e)(4), redesignated (e)(8), and redesignated (e)(9) to include impacts, mitigation, and correspondence on migratory birds and bald and golden eagles.

c. Resource Report 4—Cultural Resources

i. NOPR Proposal

320. The *Cultural resources* resource report requires the applicant to provide information necessary for the Commission to consider the effect of a proposed project on cultural resources in furtherance of the Commission's obligations under section 106 of the National Historic Preservation Act of 1966 (NHPA).³⁹⁸ In the NOPR, the Commission proposed only minor clarifying edits to this resource report.

ii. Comments

321. Commenters suggest that Tribes be allowed to choose the assessors that will study land with the Tribes' cultural resources, and that assessors must follow all Tribal rules and guidelines for land surveys and assessments.³⁹⁹

iii. Commission Determination

322. We adopt the minor changes to the *Cultural resources* resource report as proposed in the NOPR. We decline to

³⁹⁸ 18 CFR 380.16(f).

³⁹⁹ Yurok Tribe Comments at 33; Public Interest Organizations Comments at 70 and 72.

modify the regulations to require that Tribes choose the assessors used by an applicant to study cultural resources. To complete cultural resources surveys, we encourage applicants to consider Tribal input, including recommendations on survey methodology or assessor selection. With respect to the request to specify the rules and guidelines for cultural resources surveys and assessments, applicants and consultants should follow the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation,⁴⁰⁰ and they would have to follow the appropriate State laws on private lands and the requirements of Federal land-managing agencies on Federal lands. If a proposed project would affect Tribal land, the applicant must adhere to any Tribal requirements for conducting cultural resources studies on Tribal lands.⁴⁰¹

d. Resource Report 6—Tribal Resources

i. NOPR Proposal

323. In the NOPR, the Commission stated that it recognizes the unique relationship between the United States and Indian Tribes, acknowledges its trust responsibility to Indian Tribes, and endeavors to work with Tribes on a government-to-government basis, seeking to address the effects of proposed projects on Tribal rights and resources through consultation.⁴⁰² To help the Commission evaluate the effects of proposed transmission facilities on Tribal rights and resources, the Commission's existing regulations require an applicant to submit information describing the project's effects on Tribes, Tribal lands, and Tribal resources as part of the *Land use, recreation, and aesthetics* resource report.⁴⁰³ Specifically, the applicant must identify Tribes that may attach religious and cultural significance to historic properties within the right-of-way or in the project vicinity;⁴⁰⁴ provide available information on traditional cultural and religious properties;⁴⁰⁵ and ensure that specific site or location information is not disclosed, because disclosure will create a risk of harm, theft, or destruction or violate Federal law.⁴⁰⁶

324. In the NOPR, the Commission proposed to relocate the existing Tribal

resource-related information requirements to a new, standalone resource report, Resource Report 6—*Tribal resources*, in § 380.16(h). In addition to consolidating the existing requirements in a new resource report,⁴⁰⁷ the Commission also proposed to require an applicant to identify potentially-affected Tribes; describe the impacts of project construction, operation, and maintenance on Tribes and Tribal interests, including impacts related to enumerated resource areas; and describe project impacts that may affect Tribal interests that are not necessarily associated with particular resource areas (e.g., treaties, Tribal practices, or agreements). The NOPR explained that the Commission believes this information is necessary to allow it to fully evaluate the effects of a proposed project in furtherance of the Commission's trust responsibility and the Commission's statutory obligations under the FPA and NEPA.

ii. Comments

325. CLF asks that the final rule explain how the *Tribal resources* resource report and *Cultural resources* resource report relate and interact and clarify that the *Tribal Resources* resource report is not duplicative of the *Cultural Resources* resource report, but instead addresses Tribal interests and resources that may not be considered under the NHPA.⁴⁰⁸

326. The Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe support the new *Tribal Resources* resource report but request the Commission require better supported and more detailed information than is required for a cultural resources background literature discussion.⁴⁰⁹ For example, the Tribes ask that the report be prepared using consultants with a proven track record of considering research by members of the Tribes, with the Commission evaluating the resource report considering the expertise and sufficiency of the consultant.⁴¹⁰ The Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe also suggest that applicants be required to engage with Tribes in identifying sacred areas and other culturally significant regions and to develop Tribal history. Public Interest

Organizations state that the Commission must accept Indigenous Knowledge as relevant and reliable data in all resource reports, but especially in the *Tribal Resources* resource report.⁴¹¹

327. Public Interest Organizations state that the Commission's regulations should require applicants to protect from public disclosure, to the maximum extent practicable, Tribal information, including sacred sites, locations, and Indigenous Knowledge.⁴¹²

328. CLF and the Yurok Tribe also recommend that the *Tribal resources* resource report describe any proposed mitigation measures intended to avoid or minimize impacts on Tribes, or explain why such mitigation measures were not pursued.⁴¹³

iii. Commission Determination

329. We adopt the NOPR's proposal to add Resource Report 6—*Tribal resources* with one modification to require a description of any proposed mitigation measures. These requirements will ensure that an application contains information that helps the Commission assess a project's impacts on Tribal rights and resources.

330. In response to CLF's request that we clarify the relationship between the *Tribal resources* and *Cultural resources* resource reports, we explain that the latter is intended to elicit information regarding efforts to identify and determine effects on historic properties in furtherance of the Commission's obligations under section 106 of the NHPA. The *Tribal Resources* resource report is intended to elicit information that will enable the Commission to fully evaluate the effects of a proposed project on Tribal resources in furtherance of the Commission's trust responsibility and the Commission's statutory obligations under the FPA and NEPA. It is possible that some, but not all, of the information filed in the two reports may be duplicative, but the *Tribal Resources* resource report will note Tribal interests in resources that may not be historic properties, including but not limited to treaty rights.

331. As to Tribes' comments on the qualifications of consultants that prepare the *Tribal resources* resource report, applicants should use qualified consultants that meet the expected standards, for example the National Park Service's Archeology and Historic Preservation, Secretary of the Interior's

⁴⁰⁰ Department of the Interior, National Park Service, Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines, 48 FR 44716 (Sept. 29, 1983).

⁴⁰¹ 18 CFR 380.14(a)(2).

⁴⁰² 18 CFR 2.1c (2023).

⁴⁰³ See 18 CFR 380.16(j)(5).

⁴⁰⁴ *Id.* § 380.16(j)(5)(i).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* § 380.16(j)(5)(ii).

⁴⁰⁷ See *id.* § 380.16(h)(4)–(5).

⁴⁰⁸ CLF Comments at 15.

⁴⁰⁹ Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 1.

⁴¹⁰ *Id.* at 2.

⁴¹¹ Public Interest Organizations Comments at 66–69.

⁴¹² Public Interest Organizations Comments at 73–74.

⁴¹³ CLF Comments at 15; Yurok Tribe Comments at 34–35.

Standards and Guidelines, and any other applicable standards. We encourage applicants to engage with Tribes to identify sacred areas and other culturally significant regions and to develop Tribal history. Any information filed on the record by Tribes on a project, including Indigenous Knowledge, would be reviewed and considered by the Commission.

332. Regarding public disclosure concerns, pursuant to proposed § 380.16(h)(5), applicants must ensure that the *Tribal resources* resource report does not include sensitive Tribal information—such as specific site or property locations—the disclosure of which could create a risk of harm, theft, or destruction of archaeological or Tribal cultural resources or to the site at which the resources are located, or which would violate any Federal law, including the NHPA and the Archaeological Resources Protection Act.⁴¹⁴

333. Finally, in response to commenters' feedback, we modify the proposed resource report to require a description of any proposed mitigation measures to avoid or minimize impacts on Tribal resources, including any input received from Indian Tribes regarding the proposed measures and how the input informed the proposed measures. This addition is consistent with a comparable requirement in the *Environmental justice* resource report adopted herein.⁴¹⁵

e. Resource Report 7—Environmental Justice

i. NOPR Proposal

334. In the NOPR, the Commission proposed to add new Resource Report 7—*Environmental justice*, in § 380.16(i). Specifically, the resource report would require the applicant to identify environmental justice communities within the project's area of potential impacts;⁴¹⁶ describe the impacts of project construction, operation, and maintenance on environmental justice communities, including whether any impacts would be disproportionate and adverse; discuss cumulative impacts on environmental justice communities, including whether any cumulative

impacts would be disproportionate and adverse; and describe any proposed mitigation measures intended to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed measures and how the input informed the proposed measures.

335. The Commission also proposed a corresponding addition to § 380.2, which sets forth the definitions for the Commission's NEPA regulations, to define the term “environmental justice community.”

ii. Comments

336. Several commenters support the addition of the *Environmental justice* resource report to ensure that the Commission complies with its NEPA obligations.⁴¹⁷ Other commenters object to the inclusion of the new resource report.⁴¹⁸

337. ClearPath and North Dakota Commission oppose the proposed addition of the *Environmental justice* resource report because the Commission proposes to rely on executive orders (including executive orders that do not specify the Commission as a participant), guidance, and poorly defined criteria rather than laws, statutes, and regulations, thus threatening to introduce challenges and legal vulnerabilities.⁴¹⁹

338. ClearPath states that the Commission has failed to set clear and predictable procedures for applicants to follow should updates to data and guidance be made during the pre-filing and application processes, created duplicative requirements and paperwork for applicants, and ClearPath claims that the Commission has instituted a hierarchy of treatment and consideration of project impacts across population segments that could have equal protection concerns under the Constitution.⁴²⁰ Similarly, ELCON objects to including a new resource report specific to one stakeholder type, environmental justice communities, with identification and mitigation-measure requirements when other similarly situated stakeholders do not receive such treatment.⁴²¹

339. CLF states that the Commission must commit to a policy of ensuring that environmental justice communities are not more adversely impacted by the

Commission's siting authority (including when accounting for the impacts of other, existing energy projects) than non-environmental justice communities, and to the extent that impacts are unavoidable, impacted communities should receive benefits that mitigate or compensate for those impacts.⁴²²

340. Public Interest Organizations state that proposed § 380.16(i)(3) must require an integrated cumulative impacts analysis of environmental and non-environmental stressors, independently reviewed by Commission staff.⁴²³ They also ask that the Commission ensure that flexibility in data sets and factors is not harmful to impacted communities and prevent the cherry-picking of analytical tools and methods to fit a desired outcome.⁴²⁴ Likewise, Policy Integrity requests that the Commission provide applicants with additional guidance on how to analyze cumulative impacts on environmental justice communities.⁴²⁵ It states that this guidance should define key terms and describe authoritative resources for how to perform such an analysis.

iii. Commission Determination

341. We adopt the NOPR's proposal to add Resource Report 7—*Environmental Justice*. As an initial matter, as discussed above, the Commission's authority to require submission of information to assess the potential for impacts to communities due to development of an energy infrastructure project is well-established under law, and necessary for the Commission to achieve its statutory obligations under the FPA and NEPA.⁴²⁶ Accordingly, commenters incorrectly presume that consideration of such impacts, when gathered in the form of a separate resource report, is a novel practice or treads new legal ground. These concerns are unfounded.

342. We also disagree with commenters' concerns that we have inappropriately based the addition of the *Environmental justice* resource report solely on Executive Orders and guidance. While we use Executive Orders and guidance to help establish the information Commission staff needs to perform its analysis, the Commission has a responsibility under NEPA to evaluate project-related impacts on the quality of the human environment,

⁴¹⁴ See also 18 CFR 380.16(f)(4) (directing applicants to request privileged treatment for all material filed with the Commission containing cultural resource location, character, and ownership information in accordance with the Commission's procedures in § 388.112).

⁴¹⁵ See proposed § 380.16(i)(4).

⁴¹⁶ As discussed, to identify environmental justice communities, Commission staff currently reviews U.S. Census Bureau population data for the applicable location, relevant guidance, and agency best practices. See *supra* note 166.

⁴¹⁷ See, e.g., ACEG Comments at 16; CATF Comments at 15–16.

⁴¹⁸ See, e.g., ClearPath Comments at 7; ELCON Comments at 7–8; North Dakota Commission Comments at 7–8.

⁴¹⁹ ClearPath Comments at 7; North Dakota Commission Comments at 7–8.

⁴²⁰ ClearPath Comments at 7.

⁴²¹ ELCON Comments at 8.

⁴²² CLF Comments at 11–12.

⁴²³ Public Interest Organizations Comments at 91–92.

⁴²⁴ *Id.* at 93.

⁴²⁵ Policy Integrity Comments at 2, 39–45.

⁴²⁶ *Supra* P 110.

which include impacts on environmental justice communities.

343. We disagree with comments asserting that we have failed to set clear procedures given the potential for updates to data and guidance. As with all resource reports, applicants are expected to use the best available data and follow guidance in place at the time they submit their application. By requiring an environmental justice-specific resource report, we are setting a clear expectation regarding the information Commission staff will need to adequately assess project-related impacts on environmental justice communities. Commenters provide no examples or explanation of how the new resource report creates duplicative requirements and paperwork.

344. We do not believe that the requirements institute a hierarchy of treatment and consideration of project impacts across population segments. Analyses of impacts are conducted in a manner consistent with the requirements of NEPA. NEPA requires a “hard look” at all the environmental consequences of a proposed action and consideration of whether there are steps that could be taken to mitigate any adverse environmental consequences, without mandating specific substantive outcomes.⁴²⁷ These requirements ensure the Commission has information necessary to assess the potential impacts of the project but do not dictate an approach for weighing such potential impacts or determining whether mitigation may be appropriate.

345. We decline to adopt precise methodologies to assess cumulative impacts, but instead will allow flexibility in the scope and level of analysis needed. Cumulative impacts on environmental justice communities will vary based on project- and site-specific conditions. Commission staff will use the pre-filing process to review all information filed on the record and provide feedback to applicants to assist applicants in identifying cumulative projects and resources to be addressed in this analysis. We expect applicants to follow the latest rules, guidance, and data from the Commission, CEQ, the Census Bureau, and other authoritative sources when performing this analysis.

346. Finally, we agree with Public Interest Organizations that the Commission should perform its own independent assessment of cumulative impacts on environmental justice communities. Commission-issued NEPA documents reflect Commission staff’s

independent analysis of all environmental effects of a project.

f. Resource Report 10—Land Use, Recreation, and Aesthetics

i. NOPR Proposal

347. The existing *Land use, recreation, and aesthetics* resource report requires the applicant to provide information concerning the uses of land in the project area and proposed mitigation measures to protect and enhance existing land use.⁴²⁸ In the NOPR, the Commission proposed to add a requirement to this resource report to identify the area of direct effect of the proposed facilities on interior forest. We also proposed to: (1) clarify the scope of facilities (e.g., buildings, electronic installations, airstrips, airports, and heliports) in the project vicinity that must be identified; (2) clarify the corresponding requirements to depict such facilities on the maps and photographs in *General project description* resource report; and (3) require copies of any consultation with the Federal Aviation Administration.

348. The existing *Land use, recreation, and aesthetics* resource report requires applicants to describe the visual characteristics of the lands and waters affected by the project, including how the transmission line facilities will impact the visual character of the project right-of-way and surrounding vicinity and related mitigation measures. The Commission’s existing regulations encourage, but do not require, applicants to supplement this description with visual aids.

349. In the NOPR, the Commission explained that more specific information is needed to evaluate the effects of the proposed project facilities on visual resources. Additionally, to assess visual impacts of infrastructure projects, including high-voltage transmission lines, staff has, in some cases, used the Bureau of Land Management’s Visual Resource Management methodology,⁴²⁹ and other agencies have used the Federal Highway Administration’s Visual Impact Assessment for Highway Projects.⁴³⁰ Therefore, the NOPR sought comment on whether either of these tools, or any other tool, is appropriate for our analysis. In the NOPR, the Commission

also proposed to revise the *Land use, recreation, and aesthetics* resource report to require that the applicant identify the area of potential visual effects from the proposed project; describe any visually sensitive areas, visual classifications, and key viewpoints in the project vicinity; and provide visual aids to support the evaluation of visual impacts from the proposed project.

ii. Comments

350. Arizona Game and Fish recommends including coordination with State natural resource agencies and other local stakeholders to identify potential impacts on recreation and opportunities to maintain public access.⁴³¹

351. Interior requests that § 380.16(l)(4), as revised and redesignated in the NOPR, be further modified to require the applicant to identify, by milepost and length of crossing, any National Park System units and program lands within 0.25 mile of a proposed facility.⁴³²

352. Impacted Landowners state that the *Land use, recreation, and aesthetics* resource report must identify agricultural land by acreage and use, and describe permanent and temporary impacts on agritourism, crops, yields, irrigation, drainage, soil quality, livestock, aerial application of seed, fertilizer, and pesticides.⁴³³ Impacted Landowners also ask that this resource report include estimates of financial impacts on the impacted agricultural businesses from the construction and operation of the project over its expected life and identify farmlands designated as prime, unique, or farmlands of statewide or local importance, including an explanation of how the construction of a transmission project on working farmland complies with the Farmland Protection Policy Act.⁴³⁴

353. Impacted Landowners request that the *Land use, recreation, and aesthetics* resource report require applicants to investigate transmission line interference with farm equipment electronics and GPS systems that are essential to modern precision agriculture.⁴³⁵ They further state that different positions of the transmission line in relation to the field may also produce different effects.

354. Interior recommends including National Park System units and program

⁴²⁸ 18 CFR 380.16(j).

⁴²⁹ See, e.g., Final Environmental Impact Statement for the Swan Lake North Pumped Storage Project (P-13318-003).

⁴³⁰ See, e.g., Final Environmental Impact Statement for the Susquehanna to Roseland 500kv Transmission Line Right-of-Way and Special Use Permit at 588, <https://parkplanning.nps.gov/document.cfm?documentID=49285&parkID=220&projectID=25147>.

⁴³¹ Arizona Game and Fish Comments at 3.

⁴³² Interior Comments at 2.

⁴³³ Impacted Landowners Comments at 17.

⁴³⁴ 7 U.S.C. 4201–4209.

⁴³⁵ Impacted Landowners Comments at 17.

⁴²⁷ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–351 (1989).

lands in the described areas of potential visual effects by adding the following to redesignated § 380.16(l)(6): the National Park System (54 U.S.C. 100101), National Historic Landmarks, National Natural Landmarks, Land and Water Conservation Fund State Assistance Program sites, and the Federal Lands to Parks program lands.⁴³⁶

355. In response to the Commission seeking comment in the NOPR on whether any specific tools are appropriate for our visual analysis, commenters provide various recommendations.

356. First, ACEG recommends that the Commission and other Federal agencies involved in assessing impacts from transmission facilities consistently apply the same methodologies for reviewing visual impacts (e.g., Bureau of Land Management or Federal Highway Administration visual impact assessment tools).⁴³⁷ ACEG states that consistently applying the same methodology will allow the Commission to further develop expertise with that particular methodology.

357. Interior recommends that applicants use the National Park Service Visual Impact Assessment Methodology and Guidelines when describing visually sensitive areas within the viewsheds of National Park System units.⁴³⁸

358. The Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe support the proposed requirement in the *Land use, recreation, and aesthetics* resource report that visual aids be prepared to evaluate visual impacts. The Tribes state that the regulations should expressly provide that Tribes be consulted in identifying visually sensitive areas and key viewpoints. The Tribes suggest using a combination of the Bureau of Land Management's Visual Resource Management methodology to guide on-the-ground work and the National Park Service's Visual Impact Assessment Evaluation Guide for Renewable Energy Projects to set the methodological framework to conduct the visual impacts analysis.⁴³⁹

iii. Commission Determination

359. We adopt the NOPR's proposal to revise the *Land use, recreation, and aesthetics* resource report to include interior forest, clarify the scope of structures and facilities to be identified

and depicted on maps, require copies of any consultation with the Federal Aviation Administration, and identify the area of potential visual effects and visual characteristics of the affected lands and waters, including use of visual aids. Based on commenter feedback regarding appropriate tools for performing visual analyses, we also adopt one modification to redesignated § 380.16(l)(10) to require the applicant to identify, and justify the selection of, the tools or methodologies it uses to develop the required information on visual effects. We find that adopting this modification and the changes proposed in the NOPR will assist the Commission's analysis of effects on land use and aesthetics under NEPA.

360. In response to Arizona Game and Fish's request to require coordination with State natural resource agency and other local stakeholders, under § 50.4(c), applicants are required to provide project notifications to stakeholders upon entering the pre-filing process and submitting an application to the Commission, which includes State natural resource agencies and other local stakeholders, as applicable. In addition, the Commission would include such stakeholders on project mailing lists to receive Commission notices throughout the project's review. Thus, State agencies and local stakeholders will be invited to participate in the process.

361. Regarding Interior's request for National Park System units and program lands to be identified in the *Land use, recreation, and aesthetics* resource report, the existing regulations in redesignated § 380.16(l)(4) already require applicants to identify national parks that would be directly affected or are within 0.25 mile of any proposed facility.

362. In response to Impacted Landowners' requested additions regarding agricultural lands and qualities, the *Land use, recreation, and aesthetics* resource report already requires the applicant to identify agricultural land by acreage and use (redesignated § 380.16(l)(2)) and describe permanent and temporary impacts on agricultural land use (redesignated § 380.16(l)(8)). In addition, the *Soils* resource report requires the applicant to identify prime and unique farmlands (redesignated § 380.16(k)(3)) and address soil quality/characteristics, including drainage, potential impacts on soils, and mitigation measures (redesignated §§ 380.16(k)(1) through 380.16(k)(4)). The financial impacts from crop loss are highly specific, based on the type of crop, duration of impact, and local

market conditions. Thus, these impacts are more appropriately addressed through easement negotiations or through an eminent domain proceeding.

363. As to compliance with the Farmland Protection Policy Act, this law applies to Federal programs that may permanently convert farmland to nonagricultural use, where Federal programs are activities that "involve undertaking, financing, or assisting construction or improvement projects or acquiring, managing, or disposing of Federal lands and facilities."⁴⁴⁰ Further, the regulations implementing the Farmland Protection Policy Act specifically exclude Federal permitting and licensing programs for activities on private or non-Federal lands.⁴⁴¹ Accordingly, the Farmland Protection Policy Act does not apply to the Commission's review of electric transmission projects.

364. Regarding transmission line interference with farm equipment electronics and GPS systems, § 50.7(g)(1)(v) already requires applicants to describe line design features for minimizing radio interference caused by operation of proposed facilities. In addition, redesignated §§ 380.16(o)(6) through (o)(8) under the *Reliability and safety* resource report, as proposed in the NOPR and adopted herein, include requirements to: describe the electromagnetic fields to be generated by proposed transmission lines, including strength and extent; discuss the potential for electrical noise from electric and magnetic fields as they may affect communication systems; and discuss the potential for induced or conducted currents along the transmission right-of-way from electric and magnetic fields. Therefore, the requested update to the *Land use, recreation, and aesthetics* resource report is unnecessary.

365. In response to Interior's requested additions to redesignated § 380.16(l)(6) to describe areas of potential visual effects, we note that the referenced regulation is not applicable to visual effects, but simply requires the applicant to identify National Wild and Scenic Rivers Systems, National Trails Systems, and Wilderness Act areas that would be crossed by, or within 0.25 mile of, a project. However, the *Land use, recreation, and aesthetics* resource report requires applicants to identify the area of potential visual effects, including visually sensitive areas and key viewpoints, under the NOPR's revised and redesignated § 380.16(l)(10).

⁴³⁶ Interior Comments at 2.

⁴³⁷ ACEG Comments at 19.

⁴³⁸ Interior Comments at 2.

⁴³⁹ Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe Comments at 4.

⁴⁴⁰ 7 U.S.C. 4201(c)(4).

⁴⁴¹ 7 CFR 658.2(c) (2023).

Further, the National Park System would be included on the Commission's stakeholder mailing list, if lands are in close proximity to a proposed project, and the Commission would work with the applicant during pre-filing to identify any visually sensitive areas that need to be evaluated, including any National Park System lands.

366. Considering the comments received on whether any specific tools are appropriate for our visual analysis, and additional research, we recognize that a number of Federal agencies have developed their own visual impact assessment tools or methodologies for purposes of assessing proposed infrastructure projects.⁴⁴²

367. Based on the comments received, there is no consensus on the appropriate methodology or tool that the Commission or applicants should use to assess the visual effects of proposed transmission projects. Further, proposed projects under the Commission's jurisdiction could be within the viewshed of any number of Federal lands, where relevant land management agencies may employ different methodologies. We also recognize that new or revised methodologies and tools may become available in the future. Therefore, we decline to mandate the use of a specific tool or methodology in the Commission's regulations. Instead, this final rule revises § 380.16(l)(10) to require the applicant to identify, and justify the selection of, the tools or methodologies it uses to develop the required information on visual effects. We recognize that there may be efficiency gains if applicants use the applicable Federal agency guidance, methodology, or tool for assessing visual impacts on corresponding Federal agency land (e.g., applicants use the National Park Service Visual Impact Assessment Methodology and Guidelines when analyzing visual impacts on the viewsheds of National Park System units) and we support allowing for such flexibility in the Commission's regulations.

368. Regarding Tribes' requests that Tribes be consulted in identifying visually sensitive areas and key viewpoints, we encourage applicants to seek to engage Tribes when identifying visually sensitive areas and key viewpoints. Tribes may provide comments on visually sensitive areas and key viewpoints during the

applicant's efforts to engage Tribes early in the permitting process, during government-to-government consultation with the Commission, or during any of the comment periods that occur during the Commission's pre-filing and application processes.

g. Resource Report 11—Air Quality and Environmental Noise

i. NOPR Proposal

369. The Commission explained in the NOPR that the existing *Reliability and safety* resource report requires applicants to indicate the noise level generated by the proposed transmission line and compare the noise level to any known noise ordinances for the zoning districts through which the line will pass. The NOPR further explained that the Commission's regulations do not currently require applicants to submit information on proposed project emissions and the corresponding effects on air quality and the environment.

370. The Commission stated in the NOPR that, to fully evaluate the effects of a proposed project in furtherance of the Commission's obligations under NEPA,⁴⁴³ additional information on emissions, air quality, and environmental noise is necessary. Therefore, the Commission proposed to add a new resource report, Resource Report 11—*Air quality and environmental noise*, in § 380.16(m). As proposed, the report would require the applicant to estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, estimate the impact of the proposed project on the noise environment, and describe proposed measures to mitigate the impacts. Consistent with the Commission's requirements for natural gas compressor stations,⁴⁴⁴ the NOPR also proposed to establish a noise limit for proposed substations and appurtenant facilities as experienced at pre-existing noise-sensitive areas, such as schools, hospitals, or residences.

371. Under proposed § 380.16(m)(1), the *Air quality and environmental noise* resource report must describe the existing air quality in the project area, indicate if any project facilities are located within a designated nonattainment or maintenance area under the Clean Air Act,⁴⁴⁵ and provide the distance from the project facilities to

any Class I area in the project vicinity. Under proposed § 380.16(m)(3), the resource report must estimate emissions from the proposed project and the corresponding impacts on air quality and the environment. Specifically, the applicant must provide the reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities; provide a comparison of emissions with applicable General Conformity thresholds (40 CFR part 93) for each designated nonattainment or maintenance area; identify the corresponding impacts on communities and the environment in the project area; and describe any proposed mitigation measures to control emissions.

372. Under proposed § 380.16(m)(2), the resource report must, for proposed substations and appurtenant facilities, quantitatively describe existing noise levels at nearby noise-sensitive areas. Under proposed § 380.16(m)(4), the resource report must provide a quantitative estimate of project operation (including proposed transmission lines, substations, and other appurtenant facilities) on noise levels. The operational noise estimates must demonstrate that the proposed project will comply with applicable State and local noise regulations and that noise attributable to any proposed substation or appurtenant facility does not exceed a day-night sound level of 55 decibels on the A-weighted scale at any pre-existing noise-sensitive area.⁴⁴⁶ Additionally, the resource report must describe the impact of proposed construction activities on the noise environment and any proposed mitigation measures to reduce noise impacts.

ii. Comments

373. Multiple commenters express support for the inclusion of the new *Air quality and environmental noise* resource report, stating that the Commission is well within its statutory authority to adopt NEPA regulations that include information needed to perform air quality analyses.⁴⁴⁷

⁴⁴⁶ The EPA has indicated that a day-night noise level of 55 decibels on the A-weighted scale protects the public from indoor and outdoor activity interference. The Commission has adopted this criterion and uses it to evaluate the potential noise impact from operation of natural gas compressor facilities. *Elba Express Co., LLC*, 141 FERC ¶ 61,027, at P 21 n.12 (2012). We think it is appropriate to use this same criterion to evaluate the potential noise impact from operation of substations and appurtenant facilities.

⁴⁴⁷ Arizona Game and Fish Comments at 2; Public Interest Organizations Comments at 108–114; CATF Comments at 14; Los Angeles DWP Comments at 4–5.

⁴⁴² See Bureau of Land Management's Visual Resource Management methodology, Federal Highway Administration's Visual Impact Assessment for Highway Projects, National Park Service's Visual Impact Assessment Methodology and Guidelines, and U.S. Army Corps of Engineers' Visual Resources Assessment Procedure.

⁴⁴³ NEPA requires the Commission to take a "hard look" at the environmental impacts of a proposed action. See 42 U.S.C. 4332(2)(C); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

⁴⁴⁴ 18 CFR 380.12(k)(4)(v)(A) (2023).

⁴⁴⁵ 42 U.S.C. 7401 *et seq.*

Conversely, Chamber of Commerce states that the Commission should remove the *Air quality and environmental noise* resource report because it is unclear what emissions result from the direct operation of a transmission line, and the focus on any such emissions lacks congressional direction.⁴⁴⁸

374. ClearPath opposes the proposal to estimate emissions from the project, including reasonably foreseeable emissions, because the requirements are too vague to be met or understood by applicants⁴⁴⁹ and ELCON recommends that the Commission remove the mitigation requirements.⁴⁵⁰ ACORE and ACEG recommend that the Commission apply the “rule of reason and the concept of proportionality” to emissions requirements so as not to require an in-depth disclosure of emissions for small projects.⁴⁵¹

375. Policy Integrity requests that the Commission clarify that the analysis of alternatives under NEPA include upstream emissions from changes to power-system operations as these changes are reasonably foreseeable and essential to the Commission’s public interest determination under the FPA.⁴⁵² Similarly, Sabin Center and Policy Integrity recommend requiring that applicants provide an estimate of both direct and indirect emissions, including upstream emissions associated with upstream electric generation facilities.⁴⁵³ Conversely, Representatives McMorris Rodgers and Duncan question what specific statutory authority the Commission is relying upon to require the estimation of upstream emissions.⁴⁵⁴

376. Several commenters request that the Commission consider a transmission project’s effect on greenhouse gas (GHG) emissions or climate change as part of its NEPA reviews.⁴⁵⁵ ACEG also recommends that along with the “rule of reason” for emissions disclosure, the Commission should consider the air quality benefits from a project due to

connection of renewable energy projects onto the grid.⁴⁵⁶ Several commenters state that the Commission or the applicant should include information on how a transmission project would impact the climate due to upstream GHG emissions from the generation of electricity—and the Commission’s FPA determination should consider this analysis.⁴⁵⁷ The commenters indicate that data and models exist to estimate these changes and constitute a reasonably foreseeable impact. Conversely, Senator Barrasso states that the Commission should not apply CEQ’s Interim GHG Guidance to electric transmission facility reviews, questioning its applicability to the Commission as an independent agency.⁴⁵⁸

377. Policy Integrity states that the Commission should explicitly require that cumulative impacts analyses include increased exposure to criteria pollutants even when the overall modeled impacts remain below the Clear Air Act’s National Ambient Air Quality Standards (NAAQS).⁴⁵⁹ It notes that the NAAQS are not set at a level of zero risk, and that sub-NAAQS impacts can be especially significant in environmental justice communities with certain sensitive receptors. Additionally, Policy Integrity requests that the Commission consider the health impacts that environmental justice communities face under higher levels of criteria pollutants, including from power-system impacts, even when the NAAQS are not exceeded.⁴⁶⁰

378. Interior and Arizona Game and Fish recommend considering the effect of noise from the proposed project on wildlife and habitat.⁴⁶¹ In regard to the effects of noise in sensitive wildlife habitats on threatened and endangered species, Interior recommends that the Commission require applicants to address wildlife-specific noise thresholds, like those specific to sage grouse and other avian species that may be relevant in significant wildlife areas.

iii. Commission Determination

379. We adopt the NOPR’s proposal to add Resource Report 11—*Air quality and environmental noise* with one modification to clarify noise compliance standards. We agree with commenters that the Commission’s authority to

require submission of information to assess the potential for air quality and environmental noise impacts from the development of an energy infrastructure project is well-established under law, and necessary for the Commission to achieve its statutory obligations under the FPA, NEPA, and the Clean Air Act.

380. In response to the Chamber of Commerce’s comments, we clarify that the Commission is required under NEPA to consider impacts from the proposed project that are reasonably foreseeable.⁴⁶² While the scope of project impacts that are reasonably foreseeable is a fact-specific determination, we note that such impacts may include emissions due to construction, operation, and maintenance of proposed transmission facilities.

381. In addition to NEPA, the Commission has further responsibilities under the Clean Air Act.⁴⁶³ Specifically, under EPA’s General Conformity regulations,⁴⁶⁴ the Commission must address whether an action will result in construction or operation emissions that exceed de minimis thresholds in areas designated as having poor or recovering air quality.

382. We are adopting the proposed requirement for applicants to provide an estimate of reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities to ensure that the Commission meets its NEPA obligation to take a “hard look” at environmental impacts and so that the Commission can satisfy its Clean Air Act obligations. In response to ELCON’s comments, we clarify that the *Air quality and environmental noise* resource report does not require an applicant to mitigate impacts, but rather requires the applicant to submit information about any proposed mitigation of impacts. We also clarify, in response to ACORE’s and ACEG’s comments, that the necessary analysis of emissions impacts will vary based on the factual circumstances, including whether such impacts are reasonably foreseeable.⁴⁶⁵

383. We disagree that upstream emissions, including GHGs, from a proposed project should always be provided by the applicant. As noted above, the proposed *Air quality and environmental noise* resource report requires applicants to estimate the

⁴⁴⁸ Chamber of Commerce Comments at 3.

⁴⁴⁹ ClearPath Comments at 7–8.

⁴⁵⁰ ELCON Comments at 9–10.

⁴⁵¹ ACORE Comments at 5 (citing CEQ’s Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 FR 1196 (Jan. 9, 2023) (CEQ’s Interim GHG Guidance)); ACEG Comments at 19–20 (same).

⁴⁵² Policy Integrity Comments at 2 and 4–17.

⁴⁵³ Sabin Center Comments at 2 and 6–8; Policy Integrity Comments at 12–17.

⁴⁵⁴ Representatives McMorris Rodgers and Duncan Comments at 2.

⁴⁵⁵ Sabin Center Comments at 2 and 5–8; Public Interest Organizations Comments at 108–114; CATF Comments at 16 (recommending that the Commission follow the CEQ’s Interim GHG Guidance).

⁴⁵⁶ ACEG Comments at 19–20.

⁴⁵⁷ Sabin Center Comments at 2 and 5; Public Interest Organizations Comments at 108–114; Policy Integrity Comments at 2 and 4–17.

⁴⁵⁸ Senator Barrasso Comments at 2 and 6.

⁴⁵⁹ Policy Integrity Comments at 43–44.

⁴⁶⁰ Policy Integrity Comments at 44.

⁴⁶¹ Interior Comments at 1; Arizona Game and Fish Comments at 2.

⁴⁶² 42 U.S.C. 4332(2)(C).

⁴⁶³ 42 U.S.C. 7506(c).

⁴⁶⁴ 40 CFR 93.150–93.165 (2023).

⁴⁶⁵ We will not opine on the applicability of CEQ’s Interim GHG Guidance in this final rule, which relates to the Commission’s own evaluation of GHG emissions and not the information that applicants must file in the resource report.

reasonably foreseeable emissions from the proposed project, and the scope of project effects that are reasonably foreseeable is a fact-specific determination made on a case-by-case basis. We find that the NOPR's proposed regulations are sufficient to afford the flexibility needed for applicants to include the appropriate scope of emissions to support the Commission's NEPA analysis, which will use relevant and applicable guidance at the time of each analysis. If upstream emissions are determined, based on the factual circumstances, to be reasonably foreseeable and caused by the proposed project, the Commission may request any needed information and assess those emissions under NEPA.

384. We decline Policy Integrity's request to specify the content of cumulative impacts analyses because Policy Integrity's comments appear to focus on the Commission's cumulative impact analyses under NEPA and not the information that applicants must file in the resource report. The proposed *Air quality and environmental noise* resource report requires sufficient information for Commission staff to review the magnitude and nature of emissions on a project-by-project basis to determine whether those emissions will have an impact on, among other things, local and regional air quality and environmental justice communities. If case-specific circumstances require more information to address cumulative air quality impacts, Commission staff may request supplemental information from the applicant.

385. We decline to adopt specific requirements in the *Air quality and environmental noise* resource report to address wildlife-specific noise impacts. We note that Commission staff consults with relevant resource agencies to identify potential impacts, including noise impacts, on sensitive habitats and federally listed threatened or endangered species during the NEPA review process and the consultation process under section 7 of the Endangered Species Act⁴⁶⁶ for a proposed project. Accordingly, impacts on wildlife and wildlife-specific noise thresholds are best considered on a case-by-case basis while working with applicable agencies.

386. Finally, this final rule modifies proposed § 380.16(m)(4)(i)(D) to clarify the applicant's responsibilities regarding operational noise estimates and applicable State and local noise regulations, consistent with the Commission's noise analyses in natural

gas proceedings.⁴⁶⁷ Specifically, we clarify that the applicant must demonstrate that noise attributable to any proposed substation or appurtenant facility does not exceed a day-night sound level of 55 decibels on the A-weighted scale at any pre-existing noise sensitive area and compare the proposed project's operational noise estimates with applicable State and local noise regulations.

h. Resource Report 12—Alternatives

i. NOPR Proposal

387. This resource report requires the applicant to describe alternatives to the project, including the “no action” alternative, and to compare the environmental impacts of such alternatives. In the NOPR, the Commission proposed only minor, clarifying edits to this resource report.

ii. Comments

388. California Commission states that the Commission should consider non-wire alternatives.⁴⁶⁸ Similarly, North Carolina Commission and Staff urge the Commission to require applicants to demonstrate that the project is preferable to reasonably available alternatives to reduce congestion, including additional generation, non-wire alternatives, and other less-intrusive or less-costly transmission projects.⁴⁶⁹

389. Public Interest Organizations advocate for a robust consideration of alternatives, and request that the Commission amend its regulations to require the consideration of accomplishing the proposed objectives of a transmission project through the use of other systems or energy conservation, and require an analysis of alternative routes, similar to the Commission's requirement for natural gas pipeline projects.⁴⁷⁰ Commenters further state that although the Commission may only approve transmission projects within National Corridors, considering alternative routes outside of National Corridors is still

⁴⁶⁷ Commission staff routinely asks applicants in natural gas proceedings to provide information about State and local noise regulations. See, e.g., Commission staff, Environmental Data Request, Docket No. CP16–486, at 7 (issued Oct. 7, 2016) (Question No. 6); Commission staff, Environmental Data Request, Docket No. CP18–548, at 15 (issued Dec. 18, 2018) (Question No. 60); see also FERC, *Guidance Manual for Environmental Report Preparation—Volume 1*, at 4–130 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

⁴⁶⁸ California Commission Comments at 4.

⁴⁶⁹ North Carolina Commission and Staff Comments at 14.

⁴⁷⁰ Public Interest Organizations Comments at 123–125.

necessary, and that the Commission should ensure that alternatives proposed by the public during the NEPA process and those developed within the State siting process are considered.⁴⁷¹ Noting that many States require the consideration of multiple routes, OMS seeks clarity on whether the Commission will evaluate multiple routes and how the Commission defines alternatives.⁴⁷²

390. The Yurok Tribe states that the Commission must require consideration of alternatives that do not negatively affect Tribes, including alternative routes or significant mitigation measures.⁴⁷³ The Yurok Tribe further requests the Commission require among the alternatives at least one alternative that includes mitigation measures for which Tribes have communicated explicit support.⁴⁷⁴ The Yurok Tribe states that a robust study of alternatives is critical not only to NEPA compliance, but also to implement the FPA's mandate that approved projects be “sound national energy policy” and “consistent with the public interest.”⁴⁷⁵ The Yurok Tribe states that consideration of alternatives put forth by Tribes is a fundamental part of the NEPA process, the Tribal consultation process, and the Federal trust duty. Finally, the Yurok Tribe states that it would be antithetical to the rulemaking for the Commission to not incorporate a requirement to consider any alternatives put forth by Tribes and not provide in-depth explanation if that alternative is not pursued.⁴⁷⁶

391. Impacted Landowners and Rail Electrification Council state that the Commission should require at least one alternative exploring the use of existing road or rail rights-of-way, including the consideration of buried transmission lines to reduce environmental and economic impacts, and reliability and safety hazards.⁴⁷⁷ Rail Electrification Council argues that the consideration of proposed transmission lines within or alongside existing rights-of-way serves as a means of mitigating or avoiding altogether potentially adverse environmental, socio-economic, reliability, or other impacts of a project; promotes an efficient use of resources; advances regional plans; and averts or

⁴⁷¹ California Commission Comments at 7; Public Interest Organizations Comments at 123–125.

⁴⁷² OMS Comments at 5.

⁴⁷³ Yurok Tribe Comments at 40–42.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 41.

⁴⁷⁶ *Id.* at 41–42.

⁴⁷⁷ Impacted Landowners Comments at 18; Rail Electrification Council Comments at 7–9.

⁴⁶⁶ 16 U.S.C. 1536(a)(2).

minimizes undue harm to communities.⁴⁷⁸

392. Conversely, Public Interest Organizations state that the Commission's regulations should clarify how the requirement to consider using existing rights-of-way can be rendered more equitable through the consideration of alternatives that mitigate impacts to communities and habitats that already bear burdens from existing infrastructure.⁴⁷⁹ Public Interest Organizations notes that, when facilities are located in existing rights-of-way, the NEPA analysis must include alternatives that reduce cumulative impacts in these rights-of-way.

iii. Commission Determination

393. We adopt the NOPR's proposal to make minor, clarifying edits to the *Alternatives* resource report. As discussed below, we find it unnecessary to add new requirements to this report as suggested by commenters.

394. In response to comments regarding non-wire, system, and energy conservation alternatives; multiple route alternatives; alternatives that use existing rights-of-way; alternatives outside of National Corridors; and alternatives put forth by Tribes and other stakeholders, NEPA requires the Commission to consider and discuss only reasonable alternatives.⁴⁸⁰ Based on the Commission's experience in hydropower and natural gas pipeline proceedings, the range of reasonable alternatives can best be determined based upon the facts of a specific siting proposal. Under NEPA, an alternative that the Commission considers must be able to meet the action's purpose and need and must be technically and economically feasible (*i.e.*, not merely speculative), both which vary based on the circumstances.⁴⁸¹ We therefore decline requests to determine, on a generic basis, reasonable alternatives that must be analyzed in every case.

395. In response to comments requesting that the Commission's regulations include information and findings regarding alternatives as developed within the State siting process, we again note that the

Commission will consider all reasonable alternatives raised in a Commission proceeding.

i. Resource Report 13—Reliability and Safety

i. NOPR Proposal

396. This resource report requires the applicant to address reliability and safety considerations, including the potential hazard to the public from the proposed facilities resulting from accidents or natural catastrophes; how these events would affect reliability; and the procedures and design features employed to reduce potential hazards.⁴⁸²

397. In the NOPR, the Commission proposed to add a requirement that the *Reliability and safety* resource report include a discussion of any proposed measures intended to ensure that the facilities proposed by the applicant would be resilient with respect to future climate change impacts. The Commission also proposed to clarify the existing requirement that the *Reliability and safety* resource report discuss contingency plans for maintaining service or reducing downtime by adding that such contingency plans should ensure that the proposed facilities would not adversely affect the bulk electric system in accordance with applicable North American Electric Reliability Corporation reliability standards. Finally, given the proposed addition of a new *Air quality and environmental noise* resource report, the NOPR also proposed to eliminate a redundant requirement from the *Reliability and safety* resource report that the applicant must indicate the noise level generated by the transmission line.

ii. Comments

398. Sabin Center recommends that the Commission require applicants to submit information on expected future climate change impacts and the proposed project's risk from and resilience to future climate change impacts.⁴⁸³

399. Impacted Landowners express concern about the impact on workers and farmers from exposure to the electromagnetic fields from proposed transmission lines, which would be greater than the sporadic exposure to the public, and request that this additional hazard be considered.⁴⁸⁴

400. Impacted Landowners state that this resource report should be expanded to address the applicant's efforts to prevent intentional physical acts to destroy electric infrastructure.⁴⁸⁵ Additionally, Impacted Landowners recommend that this resource report explore the potential for the increased reliability and safety of transmission lines when buried on existing linear rights-of-way or installed under bodies of water.⁴⁸⁶

iii. Commission Determination

401. We adopt the NOPR's proposed changes to the *Reliability and safety* resource report. No commenter raised concerns with the proposed changes, and we find that requiring this additional information will support the evaluation of the reliability and safety of proposed projects. As discussed below, we find it unnecessary to add new requirements to this report in response to comments.

402. In response to comments regarding future climate change impacts, no additional changes to the regulations are needed because § 380.16(o)(3), as proposed and adopted herein, requires applicants to disclose any proposed measures to ensure that the project facilities would be resilient against future impacts—such as subsidence, slope slumping, wildfires, flooding, and storms—that could be exacerbated by climate change. As part of the NEPA analysis, Commission staff would evaluate the site-specific risks of the existing and future environment on the proposed facilities.

403. As to Impacted Landowners' comments urging consideration of impacts from situational exposure to electromagnetic fields, we decline to adopt specific requirements in the resource reports. The EPA⁴⁸⁷ and the National Institute of Environmental Health Sciences⁴⁸⁸ have concluded that studies have not consistently shown that exposure to electromagnetic fields, even for workers over a typical workday, constitutes a carcinogenic risk. Therefore, we find it more appropriate to address related concerns as they are raised on a project-specific basis.

404. Similarly, regarding intentional physical attacks on infrastructure, we

⁴⁷⁸ Rail Electrification Council Comments at 8 (referencing <https://nextgenhighways.org/>; see also ACEG, Report: Recommended Siting Practices for Electric Transmission Developers, Sec. 4 "Co-Location in Existing Rights-of-Way" (Feb. 2023), <https://cleanenergygrid.org/portfolio/recommended-siting-practices-electric-transmission-developers/>).

⁴⁷⁹ Public Interest Organizations Comments at 130–131.

⁴⁸⁰ See *American Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 2000).

⁴⁸¹ See 42 U.S.C. 4332(C)(iii) (as amended by the Builder Act).

⁴⁸² 18 CFR 380.16(l).

⁴⁸³ Sabin Center Comments at 2, 9–10; National Wildlife Federation Action Fund Comments at 1; National Wildlife Federation Outdoors Comments at 1.

⁴⁸⁴ Impacted Landowners Comments at 18.

⁴⁸⁵ *Id.* at 18–19.

⁴⁸⁶ *Id.*

⁴⁸⁷ EPA, *Electric and Magnetic Fields from Power Lines*, <https://www.epa.gov/radtown/electric-and-magnetic-fields-power-lines>.

⁴⁸⁸ National Institute of Environmental Health Sciences, *EMF Electric and Magnetic Fields Associated with the Use of Electric Power* (June 2002), <https://www.niehs.nih.gov/health/topics/agents/emf>.

decline to adopt additional requirements in the resource report. Based on our experience in natural gas and hydroelectric proceedings, the risk and potential impact of intentional physical attacks are more appropriately analyzed on a project-specific basis. As part of the NEPA analysis for a particular project, Commission staff would identify the impact of the proposed facilities on public safety risk. Additionally, staff would analyze reasonable project-specific alternatives, such as undergrounding transmission lines. During this analysis, each alternative's impact on public safety would be considered.

j. Cumulative Impacts

i. NOPR Proposal

405. In addition to the substance of the individual resource reports described above, existing § 380.16 includes general requirements that apply to each resource report. In the NOPR, the Commission proposed a revision to § 380.16(b)(3) to clarify the scope of cumulative effects that must be identified in each resource report for consistency with the definition of cumulative effects in CEQ's NEPA regulations.⁴⁸⁹

ii. Comments

406. Several commenters request that the Commission apply a robust cumulative impacts analysis when reviewing transmission proposals and minimize and mitigate impacts on wildlife, with clear evaluation methodologies informed by the most updated data and best available science, including Indigenous Knowledge and information from local communities.⁴⁹⁰ Arizona Game and Fish encourages the Commission to further clarify that the cumulative effects identified under 380.16(b)(3) consider all known or potential projects that could occur within the vicinity of the transmission line and potential impacts on natural resources, including wildlife habitat and fragmentation.⁴⁹¹

407. The Yurok Tribe states that the Commission must recognize a broad range of cumulative impacts.⁴⁹² The Tribe indicates that fragmented lands are a form of cumulative environmental injustice often experienced by Tribes; therefore, the cumulative effects analyses must also consider the

cumulative disruption that projects can cause to cultural resources, cultural landscapes, and sacred sites.⁴⁹³ The Tribe further claims that the Commission must evaluate a transmission project's impacts in the context of all prior harms that Tribes' lands, cultural resources, and cultural landscapes have sustained, and that to properly study cumulative effects, the Commission must build in time for Tribal feedback in the development and review of NEPA documents.⁴⁹⁴ Public Interest Organizations also indicate that placing new infrastructure in existing rights-of-way can exacerbate existing impacts on habitats and communities, which may already bear disproportionate burdens.⁴⁹⁵

iii. Commission Determination

408. We adopt the revision to § 380.16(b)(3) as proposed in the NOPR. As proposed and adopted herein, § 380.16(b)(3) requires each resource report to identify the effects of construction, operation, and maintenance, as well as cumulative effects resulting from the incremental effects of the project when added to the effects of other past, present, and reasonably foreseeable actions. We find this language appropriately defines the scope of cumulative impact analyses, as is defined in CEQ's NEPA regulations.

409. We acknowledge the Commission's responsibility to conduct a cumulative impact analysis independent from the applicant's input, consistent with the Commission's responsibilities under NEPA and CEQ's regulations. The scope of each cumulative impact analysis, including other projects to consider, past Tribal harms, and the specific resources that may be impacted, will vary on a case-by-case basis.

410. In response to comments, we note that concerns regarding fragmented lands and siting new infrastructure in existing rights-of-way as potential forms of cumulative environmental injustice and disproportionate burdens will be addressed in project-specific proceedings. Commission staff would evaluate these concerns, as appropriate, in its cumulative impacts analysis pursuant to NEPA.

5. Revisions to 18 CFR 380.13 and 380.14

411. We adopt the NOPR's proposed amendments to §§ 380.13 (Compliance with the Endangered Species Act) and

380.14 (Compliance with the NHPA) to add cross-references to the appropriate paragraphs of § 380.16. As the Commission explained in the NOPR, the prior omission of these cross-references appears to be an oversight. We also adopt the NOPR's proposed revision to § 380.14 to correct the legal citation for section 106 of the NHPA,⁴⁹⁶ following the act's recodification in title 54 of the U.S. Code.

III. Information Collection Statement

412. The Paperwork Reduction Act⁴⁹⁷ requires each Federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the **Federal Register**.⁴⁹⁸ Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

413. *Public Reporting Burden:* The Commission is revising its regulations governing applications for permits to site transmission facilities under section 216 of the FPA. This final rule modifies certain reporting and recordkeeping requirements included in FERC-729 (OMB Control No. 1902-0238).⁴⁹⁹

414. The revisions to the Commission's regulations associated with the FERC-729 information collection are intended to ensure consistency with section 216 of the FPA, as amended by the IIJA. The revisions are also intended to modernize certain regulatory requirements and to incorporate other updates and clarifications to provide for the efficient and timely review of permit applications. Several of the revisions have information collection implications. For example, the final rule requires an applicant to:

- maintain an affected landowner contact log, provide certain information to affected landowners, file an affirmative statement with the Commission indicating the applicant's intent to comply with the Applicant Code of Conduct, and submit monthly

⁴⁸⁹ See 40 CFR 1508.1(g)(3) (2023).

⁴⁹⁰ National Wildlife Federation Comments at 2; National Wildlife Federation Action Fund Comments at 1; National Wildlife Federation Outdoors Comments at 1.

⁴⁹¹ Arizona Game and Fish Comments at 2.

⁴⁹² Yurok Tribe Comments at 39–40.

⁴⁹³ *Id.* at 39.

⁴⁹⁴ *Id.* at 39–40.

⁴⁹⁵ Public Interest Organizations Comments at 126–131.

⁴⁹⁶ 54 U.S.C. 306108.

⁴⁹⁷ 44 U.S.C. 3501–3521.

⁴⁹⁸ See 5 CFR 1320.12 (2023).

⁴⁹⁹ FERC-729 includes the reporting and recordkeeping requirements for "Electric Transmission Facilities."

compliance updates during the pre-filing and application review processes;⁵⁰⁰

- provide additional congestion and system analysis information during the pre-filing process and as part of the application;
- develop and file, as part of the Project Participation Plan, an Environmental Justice Public Engagement Plan describing completed and planned targeted outreach to environmental justice communities;
- Develop and file, as part of the Project Participation Plan, a Tribal Engagement Plan describing completed and planned targeted outreach to identified Indian Tribes;
- include in mailed notifications to landowners written translations under certain circumstances, publish project

notifications in online or hard copy periodicals and submit the same to available county and municipal government online bulletin boards, and provide the Commission with proof of publication;

- develop and file a new resource report describing the proposed project's impacts on Tribal resources;
- develop and file a new resource report describing the proposed project's impacts on environmental justice communities;
- develop and file a new resource report describing the proposed project's impact on air quality and environmental noise;
- provide additional information describing the proposed project's visual impacts; and

• provide additional information as part of the following existing resource reports: *General project description; Water use and quality; Fish, wildlife, and vegetation; Soils; Land use, recreation, and aesthetics; and Reliability and safety.*

These revisions represent an increase in information collection requirements and burden for FERC-729.

415. The Commission recognizes that some of the information collection activities proposed in the NOPR and updated in this final rule are novel. Therefore, the Commission sought comments on the burden hours and costs associated with the requirements contained in the NOPR.

416. The estimated burden and cost for the requirements contained in this final rule follow.

ANNUAL CHANGES RESULTING FROM THE FINAL RULE IN DOCKET NO. RM22-7-000

	Number of respondents	Number of responses ⁵⁰¹ per respondent	Total number of responses	Avg. burden hrs. & cost per response ⁵⁰²	Total annual burden hours & total annual cost
	(1)	(2)	(1) × (2) = (3)	(4)	(3) × (4) = 5
Current FERC 729 Collection					
FERC-729	1	1	1	9,600 hrs.; \$960,000 ..	9,600 hrs.; \$960,000.
Revisions in RM22-7-000					
Applicant Code of Conduct ⁵⁰³	504 1	1	1	160 hrs.; \$16,000	160 hrs.; \$16,000.
Environmental Justice Public Engagement Plan	1	1	1	24 hrs.; \$2,400	24 hrs.; \$2,400.
Tribal Engagement Plan	1	1	1	24 hrs.; \$2,400	24 hrs.; \$2,400.
Project Notification Requirements ⁵⁰⁵	1	1	1	144 hrs.; \$14,400	144 hrs.; \$14,400.
Congestion and System Analysis Data ⁵⁰⁶	1	1	1	165 hrs.; \$16,500	165 hrs.; \$16,500.
Other Updates to 18 CFR pt. 50 ⁵⁰⁷	1	1	1	20 hrs.; \$2,000	20 hrs.; \$2,000.
Resource Report: Tribal Resources	1	1	1	43 hrs.; \$4,300	43 hrs.; \$4,300.
Resource Report: Environmental Justice	1	1	1	80 hrs.; \$8,000	80 hrs.; \$8,000.
Resource Report: Air Quality & Environmental Noise	1	1	1	296 hrs.; \$29,600	296 hrs.; \$29,600.
Information on Visual Impacts	1	1	1	104 hrs.; \$10,400	104 hrs.; \$10,400.
Other Updates to 18 CFR pt. 380 ⁵⁰⁸	1	1	1	182 hrs.; \$18,200	182 hrs.; \$18,200.
REQUESTED TOTAL .....	.....	.....	11	.....	1,242 hrs.; \$124,200.
PREVIOUSLY APPROVED PLUS REQUESTED TOTAL .....	.....	.....	12	.....	10,842 hrs.; \$1,084,200.

417. *Titles:* FERC-729—*Electric Transmission Facilities.*

418. *Action:* Revisions to information collection FERC-729.

⁵⁰⁰ These requirements would only apply to applicants who elect to comply with the Applicant Code of Conduct set forth in proposed § 50.12.

⁵⁰¹ We consider the filing of an application, including the mandatory pre-filing information, to be a "response."

⁵⁰² The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$100 per Hour = Average Cost per Response. The hourly cost figure is the FY2024 FERC average annual salary plus benefits (\$207,786/year or \$100/hour). Commission staff estimates that industry costs for salary plus benefits are similar to Commission costs. We note that the NOPR provided cost estimates in 2022 dollars.

⁵⁰³ Notwithstanding that compliance with the Applicant Code of Conduct is voluntary, we are providing the estimated burden hours associated with such compliance.

419. *OMB Control Nos.:* 1902-0238 (FERC-729).

420. *Respondents:* Entities proposing to construct electric transmission

⁵⁰⁴ After implementation of this final rule, we estimate one application for a permit to site electric transmission facilities will be filed per year.

⁵⁰⁵ This category covers the updates to the project notification requirements in § 50.4(c) that require an applicant to provide written translation under certain circumstances, publish project notifications in other appropriate print and digital media outlets in addition to newspaper publication, submit proof of publication, and include additional material in the project notifications mailed to affected landowners (e.g., the Landowner Bill of Rights).

⁵⁰⁶ This category covers the updates to the congestion and system analysis data that an applicant must provide during the pre-filing process and as part of the application in Exhibit H, *System analysis data.*

⁵⁰⁷ This category covers additional updates to part 50 of the Commission's regulations that involve minor increases in burden (e.g., adding an

facilities pursuant to the Commission's authority under section 216 of the FPA.

421. *Frequency of Information:* Ongoing.

interactive mapping feature to an applicant's project website), a reduction in burden (eliminating the requirement that an applicant provide seven paper copies of an application, exhibits, and other submittals), and no change in burden (revising the requirement to provide proposals for prospective third-party contractors). We note that eight burden hours that the NOPR reported in this category have been relocated to "Project Notification Requirements," a new category added to reflect several project notification requirements adopted in this final rule.

⁵⁰⁸ This category covers a variety of updates to § 380.16 of the Commission's regulations that require an applicant to develop and submit additional information as part of the following existing resource reports: *General project description; Water use and quality; Fish, wildlife, and vegetation; Soils; Land use, recreation, and aesthetics; and Reliability and safety.*

422. *Necessity of Information:* The new information collection requirements are necessary for the Commission to carry out its responsibilities under the FPA, as amended by the IJIA, and NEPA. The required information would enable the Commission to review the features of the proposed project and determine whether the proposed project meets the statutory criteria enumerated in section 216(b) of the FPA. In addition, the revisions to the Commission's mandatory pre-filing process that would require certain information to be filed earlier in the process would help ensure that an application can be acted on no later than one year after the date of filing in compliance with section 216(h)(4)(B). The revised regulations would affect only the number of entities that would pursue a permit to site electric transmission facilities.

423. *Internal Review:* The Commission has reviewed the revisions and has determined that they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

424. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Jean Sonneman, Office of the Executive Director], by email to DataClearance@ferc.gov or by phone (202) 502-8663.

425. Comments concerning the collections of information and the associated burden estimates may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: oir_submission@omb.eop.gov. Comments submitted to OMB should refer to FERC-729 (OMB Control No. 1902-0238).

IV. Environmental Analysis

426. The Commission is required to prepare an EA or an EIS for any action that may have a significant effect on the human environment.⁵⁰⁹ The

Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment, including the promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.⁵¹⁰ Because the final rule falls within this categorical exclusion, preparation of an EA or an EIS is not required.

V. Regulatory Flexibility Act

427. The Regulatory Flexibility Act of 1980 (RFA)⁵¹¹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of applicable statutes and minimize any significant economic impact on small entities.⁵¹² In lieu of preparing a regulatory flexibility analysis, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities.⁵¹³

428. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.⁵¹⁴ The SBA size standard for electric utilities is based on the number of employees, including affiliates.⁵¹⁵ Under SBA's size standards, a transmission owner covered under the category of Electric Bulk Power Transmission and Control (NAICS code 221121)⁵¹⁶ is small if, including its affiliates, it employs 500 or fewer people.⁵¹⁷

429. In Order No. 689, the Commission expected that entities seeking approval for transmission siting projects under FPA section 216 would be major transmission utilities capable of financing complex and costly transmission projects.⁵¹⁸ At that time, the Commission anticipated that the high cost of constructing transmission facilities would preclude entry into this field by small entities as defined by the

RFA.⁵¹⁹ Though the SBA size standard for electric utilities has changed from megawatt hours to number of employees since Order No. 689 was issued, we continue to find it unlikely that small entities in any number, let alone a substantial number, will pursue the permitting of transmission projects before the Commission. Since Order No. 689, only Southern California Edison, which would not qualify as a small entity under the SBA's current size standards, has participated in the Commission's pre-filing process for applications to site transmission facilities under section 216. To date, the Commission has not received any applications for permits to site transmission facilities under section 216.

430. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this final rule would not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

431. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>).

432. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

433. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

VII. Effective Date and Congressional Notification

434. These regulations are effective July 29, 2024. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement

⁵¹⁰ 18 CFR 380.4(a)(2)(ii) (2023).

⁵¹¹ 5 U.S.C. 601-612.

⁵¹² *Id.* 603(c).

⁵¹³ *Id.* 605(b).

⁵¹⁴ 13 CFR 121.101 (2023).

⁵¹⁵ *Id.* 121.201.

⁵¹⁶ The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System*, <https://www.census.gov/eos/www/naics/>.

⁵¹⁷ 13 CFR 121.201 (Sector 22—Utilities).

⁵¹⁸ Order No. 689, 117 FERC ¶ 61,202 at P 73.

⁵¹⁹ *Id.*

⁵⁰⁹ *Regs. Implementing the Nat'l Env'l Pol'y Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 10, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

Fairness Act of 1996.⁵²⁰ This rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

By the Commission.

Issued May 13, 2024.

Debbie-Anne A. Reese,
Acting Secretary.

List of Subjects

18 CFR Part 50

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 380

Environmental impact statements, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends parts 50 and 380, chapter I, title 18, Code of Federal Regulations, as follows.

PART 50—APPLICATIONS FOR PERMITS TO SITE INTERSTATE ELECTRIC TRANSMISSION FACILITIES

■ 1. The authority citation for part 50 is revised to read as follows:

Authority: 16 U.S.C. 824p; DOE Delegation Order No. S1–DEL–FERC–2006.

■ 2. Amend § 50.1 as follows:

- a. Add a definition in alphabetical order for “Environmental justice community”;
- b. Remove the words “special use authorization” in the definition of “Federal authorization” and add in its place the words “special use authorizations”;
- c. Add a definition in alphabetical order for “Indian Tribe”; and
- d. Revise the definitions of “National interest electric transmission corridor”, “Permitting entity”, and “Stakeholder”.

The additions and revisions read as follows:

§ 50.1 Definitions.

* * * * *

Environmental justice community means any community that has been historically marginalized and overburdened by pollution.

Environmental justice communities include, but may not be limited to, minority populations, low-income populations, or indigenous peoples.

* * * * *

Indian Tribe means an Indian Tribe that is recognized by treaty with the United States, by Federal statute, or by the U.S. Department of the Interior in its periodic listing of Tribal entities in the

Federal Register in accordance with 25 CFR 83.6(a), and whose Tribal interests may be affected by the development and operation of the proposed transmission facilities.

National interest electric transmission corridor means any geographic area that is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers or is expected to experience such energy transmission capacity constraints or congestion, as designated by the Secretary of Energy.

Permitting entity means any Federal or State agency, Indian Tribe, or multistate entity that is responsible for issuing separate authorizations pursuant to Federal law that are required to construct electric transmission facilities in a national interest electric transmission corridor.

Stakeholder means any Federal, State, interstate, or local agency; any Indian Tribe; any affected landowner; any environmental justice community member; or any other interested person or organization.

* * * * *

§ 50.2 [Amended]

■ 3. Amend § 50.2 as follows:

- a. Remove the word “tribes” in the third sentence of paragraph (a) and add in its place the word “Tribes”; and
- b. Remove the word “which” in paragraph (c) and add in its place the word “that”.

■ 4. Amend § 50.3 by revising paragraph (b) to read as follows:

§ 50.3 Applications/pre-filing; rules and format.

* * * * *

(b) Applications, amendments, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this part must be submitted in electronic format.

* * * * *

■ 5. Amend § 50.4 as follows:

- a. Revise paragraphs (a)(1) through (3);
- b. Add paragraphs (a)(4) and (5); and
- c. Revise paragraphs (b)(1)(ii) and (c)(1) through (4).

The revisions and addition read as follows:

§ 50.4 Stakeholder participation.

* * * * *

(a) * * *

(1) Identifies specific tools and actions to facilitate stakeholder communications and public information, including an up-to-date project website with an interactive mapping component, and a readily accessible, single point of contact for the applicant;

(2) Lists all central locations in each county throughout the project area where the applicant will provide copies of all its filings related to the proposed project;

(3) Includes a description and schedule explaining how the applicant intends to respond to requests for information from the public, permitting entities, and other legal entities with local authorization requirements; and

(4) Includes an Environmental Justice Public Engagement Plan that addresses all targeted outreach to identified environmental justice communities. This plan must summarize comments received from potentially impacted environmental justice communities during any previous outreach activities and describe planned targeted outreach activities with such communities during the pre-filing process and after the filing of an application, including efforts to identify, engage, and accommodate people with limited English proficiency. This plan must also describe how the applicant will conduct outreach to environmental justice communities about any potential mitigation measures.

(5) Includes a Tribal Engagement Plan that addresses all targeted outreach to identified Indian Tribes. This plan must summarize comments received from potentially affected Indian Tribes during any previous outreach activities and describe planned targeted outreach activities with such communities during the pre-filing process and after the filing of an application. This plan must also describe how the applicant will engage Indian Tribes about any potential mitigation measures.

(b) * * *

(1) * * *

(ii) Complete copies of all filed materials are available on the project website.

* * * * *

(c) * * *

(1) The applicant must make a good faith effort to notify all: affected landowners; landowners with a residence within a quarter mile of the edge of the construction right-of-way of the proposed project; municipalities in the project area; permitting entities; other local, State, and Federal governments and agencies involved in the project; Indian Tribes; electric utilities and transmission owners and operators that are, or may be, connected to the proposed transmission facilities; any known individuals or organizations that have expressed an interest in the State siting proceeding; and any other individuals or organizations that have expressed to the applicant, or its

⁵²⁰ 5 U.S.C. 804(2).

representatives, an interest in the proposed project. Notification must be made:

(i) By certified or first class mail, sent:

(A) Within 14 days after the Director notifies the applicant of the commencement of the pre-filing process under § 50.5(d) (Pre-filing Notification);

(B) Within 3 business days after the Commission notices the application under § 50.9 (Application Notification); and

(C) With written translations in the applicable language(s) to all affected landowners and landowners with a residence within a quarter mile of the edge of the construction right-of-way of the proposed project in a census block group in which the number of limited English proficiency households that speak the same language constitutes at least five percent of the census block group or 1,000 people, whichever is less.

(ii) By twice publishing a Pre-filing Notification and Application Notification, in a daily or weekly newspaper of general circulation in each county in which the project is located and, as appropriate, Tribal newspapers and other online or hard copy periodicals of general circulation serving the affected area. These notifications must also be submitted to any available county and municipal government online bulletin boards and other similar community resources. All such publications and submittals should occur no later than 14 days after the date that a docket number is assigned for the pre-filing process or to the application. The applicant must promptly provide the Commission with proof of any publication.

(2) Project notifications must include specified content.

(i) Any Pre-filing Notification sent by mail or published in a newspaper, periodical, or county/municipal online bulletin board or community resource must, at a minimum, include:

(A) The docket number assigned to the proceeding;

(B) The most recent edition of the Commission's pamphlet *Electric Transmission Facilities Permit Process*. The newspaper notification need only refer to the pamphlet and indicate the website address where it is available on the Commission's website;

(C) A description of the applicant and a description of the proposed project, its location (including a general location map), its purpose, and the proposed project schedule;

(D) Contact information for the applicant, including a local or toll-free telephone number, the name of a specific contact person who is

knowledgeable about the project, and information on how to access the project website;

(E) Information on how to get a copy of the pre-filing information from the applicant and the location(s) where copies of the pre-filing information may be found as specified in paragraph (b) of this section;

(F) A copy of the Director's notification of commencement of the pre-filing process, the Commission's internet address, and contact information for the Commission's Office of Public Participation;

(G) Information explaining the pre-filing and application processes and when and how to intervene in the application proceedings; and

(H) Information explaining that the Commission's pre-filing and application processes are separate from any ongoing State siting proceeding(s) and describing the status of any such State siting proceeding(s).

(ii) In addition to the requirements of paragraph (c)(2)(i) of this section, any Pre-filing Notification sent by mail to an affected landowner must also include:

(A) A general description of the property the applicant will need from an affected landowner if the project is approved;

(B) The most recent edition of the document entitled "*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings*," on its own page(s) in at least 12-point font, legible, and contained within the first 10 pages of the notification; and

(C) A brief summary of what specific rights the affected landowner has in proceedings under the eminent domain rules of the relevant State.

(iii) The Application Notification must include the Commission's notice issued under § 50.9 and restate, or clearly identify the location of, the comment and intervention instructions provided in the Commission's notice.

(3) If, for any reason, a person or entity entitled to these notifications has not yet been identified when the notifications under this paragraph (c) are sent or published, the applicant must supply the information required under paragraphs (c)(2)(i) through (iii) of this section, as applicable, when the person or entity is identified.

(4) If the notification is returned as undeliverable, the applicant must make a reasonable attempt to find the correct address and re-send the notification.

* * * * *

■ 6. Amend § 50.5 as follows:

■ a. Revise paragraph (c) introductory text, the first sentence of paragraph

(c)(3) introductory text, paragraph (c)(3)(i), the first sentence of paragraph (c)(5), and revise paragraph (c)(6);

■ b. Add paragraphs (c)(8) and (9);

■ c. Revise paragraphs (d)(1)(i) and (e)(3)(i);

■ d. Remove paragraph (e)(3)(ii);

■ e. Redesignate paragraph (e)(3)(iii) as (e)(3)(ii);

■ f. Revise the first sentence of paragraph (e)(4);

■ g. Redesignate paragraphs (e)(7) and (8) as paragraphs (e)(10) and (11), respectively;

■ h. Add new paragraphs (e)(7) and (8) and add paragraph (9); and

■ i. Revise the first sentence of newly redesignated paragraph (e)(11).

The revisions and additions read as follows:

§ 50.5 Pre-filing procedures.

* * * * *

(c) * * * An applicant's pre-filing request cannot be filed prior to the initial consultation and must include the following information:

* * * * *

(3) A list of the permitting entities responsible for conducting separate Federal permitting and environmental reviews and authorizations for the project, including contact names and telephone numbers, and a list of Tribal, State, and local entities with authorization requirements. * * *

(i) How the applicant intends to account for each of the relevant entity's permitting and environmental review schedules, including its progress in the Department of Energy's pre-application process; and

* * * * *

(5) A description of completed work, including engagement with Federal, State, and local agencies, Indian Tribes, and stakeholders; project engineering; route planning; environmental and engineering contractor engagement; environmental surveys/studies; open houses; and any work completed or actions taken in conjunction with a State proceeding. * * *

(6) Proposals for all prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document, if the Director determined a third-party contractor would be necessary in the Initial Consultation meeting.

* * * * *

(8) A detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system.

(9) A statement indicating whether the applicant intends to comply with

the Applicant Code of Conduct described in § 50.12, and, if not, how the applicant intends to ensure good faith dealings with affected landowners.

(d) * * *

(1) * * *

(i) The notification will designate the third-party contractor, if applicable, and

* * * * *

(e) * * *

(3) * * *

(i) Provide project notification in compliance with the requirements of § 50.4(c); and

* * * * *

(4) Within 30 days, submit a mailing list of all notifications made under paragraph (e)(3) of this section, including the names of the Federal, State, Tribal, and local jurisdictions' representatives. * * *

* * * * *

(7) Within 30 days, file supporting information showing how the proposed project will reduce capacity constraints and congestion on the transmission system, including:

(i) For each transmission planning region that would be crossed by the proposed project, the most recent regional transmission plan; and

(ii) Expert witness testimony and other relevant information submitted with the State siting application(s), where applicable.

(8) Within 30 days, file the full reports of the System Impact Study for the proposed project if the reports are already completed. If the reports are not already completed at this time, the applicant must alternatively submit a status report that includes when during the pre-filing process the full reports will be submitted.

(9) Within 30 days of submission of the full System Impact Study reports, file a draft Exhibit H—System analysis data required in § 50.7. The pre-filing process will not be concluded until all submittals required in paragraphs (e)(8) and (9) of this section are submitted.

* * * * *

(11) On a monthly basis, file status reports detailing the applicant's project activities, including surveys, stakeholder communications, agency and Tribal meetings, and updates on the status of other required permits or authorizations. * * *

* * * * *

■ 7. Amend § 50.6 as follows:

■ a. Revise paragraph (b), the second sentence of paragraph (c), and paragraphs (d), (e)(1), and (e)(3)(i) and (ii);

■ b. Add paragraph (e)(3)(iii); and

■ c. Revise paragraph (i).

The revisions and addition read as follows:

§ 50.6 Applications: general content.

* * * * *

(b) A concise description of applicant's existing operations, if applicable.

(c) * * * The description must, at a minimum: identify the proposed geographic location of the principal project features and the planned routing of the transmission line; contain the general characteristics of the transmission line, including voltage, types of towers, point of receipt and point of delivery, and the geographic character of the area traversed by the line; and be accompanied by an overview map of sufficient scale to show the entire transmission route on one (or a few) 8.5 by 11-inch sheets.

(d) Verification that the proposed route lies within a national interest electric transmission corridor designated by the Secretary of the Department of Energy under section 216 of the Federal Power Act, including the date on which the relevant corridor was designated.

(e) * * *

(1) A State in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting of the facilities or consider the interstate benefits or interregional benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

* * * * *

(3) * * *

(i) Not made a determination on an application seeking approval pursuant to applicable law;

(ii) Conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or

(iii) Denied an application seeking approval pursuant to applicable law.

* * * * *

(i) A full statement as to whether any other application to supplement or effectuate the applicant's proposal must be (or is to be) filed by the applicant, any of the applicant's customers, or any other person with any other Federal, State, Tribal, or other regulatory body; and if so, the nature and status of each such application.

* * * * *

■ 8. Amend § 50.7 as follows:

■ a. Revise the introductory text and paragraphs (g)(1)(i) and (vi), (g)(2)(ii)

and (vi), (g)(3)(iii), (g)(4)(iii), (g)(5) introductory text, (g)(6) introductory text, (g)(6)(ii), (g)(8), (h)(1), the first sentence of paragraph (h)(2) introductory text, and paragraph (h)(2)(ii);

■ b. Remove paragraphs (h)(3) and (4);

■ c. Redesignate paragraphs (h)(5) and (6) as paragraphs (h)(3) and (4); and

■ d. Revise newly redesignated paragraphs (h)(3) and (4) and paragraphs (i)(2) and (j).

The revisions read as follows:

§ 50.7 Applications: exhibits.

Each exhibit must contain a title page showing the applicant's name, the title of the exhibit, and the proper letter designation of the exhibit. If an exhibit is 10 or more pages in length, it must include a table of contents citing (by page, section number, or subdivision) the component elements or matters contained in the exhibit.

* * * * *

(g) * * *

(1) * * *

(i) Name, point of receipt, and point of delivery of the project;

* * * * *

(vi) Line design features that minimize audible corona noise during fog/rain caused by operation of the proposed facilities.

(2) * * *

(ii) Type of structures, including overhead and underground structures;

* * * * *

(vi) A list of the names of all new (and existing, if applicable) substations or switching stations that will be associated with the proposed transmission line.

(3) * * *

(iii) Width of the right-of-way; and

* * * * *

(4) * * *

(iii) Conductor size, conductor type, and number of conductors per phase.

(5) If the proposed project includes an overhead transmission line, the following additional information also must be provided:

* * * * *

(6) If an underground or underwater transmission line is proposed, the following additional information also must be provided:

* * * * *

(ii) Type of cable and a description of any required supporting equipment, such as pressurizing plants;

* * * * *

(8) Any other data or information identified as a minimum requirement for the siting of a transmission line in the State in which the facility will be located.

(h) * * *

(1) An analysis of the existing and expected capacity constraints and congestion on the electric transmission system.

(2) Steady-state, short-circuit, and dynamic power flow cases, as applicable, used to analyze the existing transmission system, proposed project, and future transmission system under anticipated load growth, operating conditions, variations in power import and export levels, generation additions and retirements, and additional transmission facilities required for system reliability. * * *

* * * * *

(ii) State the assumptions, criteria, and guidelines upon which the models are based and take into consideration transmission facility loading, planned and forecasted forced outage rate for generation and transmission, generation dispatch scenarios, system protection, and system stability.

(3) A concise analysis of how the proposed project will:

(i) Improve system reliability over the long and short term;

(ii) Impact long-term regional transmission expansion plans;

(iii) Impact congestion on the system where the proposed project will be located and, as relevant, the neighboring systems; and

(iv) Incorporate any advanced technology design features, if applicable.

(4) Single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements, in relation to the project and other principal interconnected system elements, as well as power flow and loss data that represent system operating conditions.

(i) * * *

(2) The estimated capital cost and estimated annual operations and maintenance expense of each proposed mitigation measure.

* * * * *

(j) *Exhibit J—Construction, operation, and management.* A concise statement providing arrangements for supervision, management, engineering, accounting, legal, or other similar services to be rendered in connection with the construction, operation, and maintenance of the project, if not to be performed by employees of the applicant, including reference to any existing or contemplated agreements, together with a statement showing any affiliation between the applicant and any parties to the agreements or arrangements.

§ 50.8 [Amended]

■ 9. Amend § 50.8 as follows:

■ a. Remove the word “applicant’s” in the second sentence of paragraph (b) and add in its place the word “applicant”; and

■ b. Remove the comma following the word “rejected” in paragraph (c).

■ 10. Amend § 50.9 by revising paragraph (b) to read as follows:

§ 50.9 Notice of application.

* * * * *

(b) The notice will establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facilities.

■ 11. Amend § 50.11 as follows:

■ a. Revise paragraph (a) and the second sentence of paragraph (b);

■ b. Add a sentence at the end of paragraph (d) and add paragraphs (d)(1) and (2);

■ c. Remove the word “permittee” in the first sentence of paragraph I and add in its place the word “permittee”;

■ d. Remove the word “Order” in the first sentence of paragraph (g) introductory text and add in its place the word “order”; and

■ e. Remove the word “Orders” in paragraph (g)(2) and add in its place the word “orders”.

The revisions and addition read as follows:

§ 50.11 General conditions applicable to permits.

(a) The following terms and conditions, along with others that the Commission finds are required by the public interest, will attach to the issuance of each permit and to the exercise of the rights granted under the permit.

(b) * * * *Provided that*, when an applicant files for rehearing of the order in accordance with FPA section 313(a), the acceptance must be filed within 30 days after final disposition of the request for rehearing. * * *

* * * * *

(d) * * * *Provided that*, no authorization to proceed with construction activities will be issued:

(1) Until the time for the filing of a request for rehearing under 16 U.S.C. 825(a) has expired with no such request being filed, or

(2) If a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, until:

(i) The request is no longer pending before the Commission;

(ii) The record of the proceeding is filed with the court of appeals; or

(iii) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 16 U.S.C. 825(a).

* * * * *

■ 12. Add § 50.12 to read as follows:

§ 50.12 Applicant code of conduct for landowner engagement.

Under section 216(e)(1) of the Federal Power Act, any applicant that may, upon receipt of a permit, seek to acquire the necessary right-of-way by the exercise of the right of eminent domain must demonstrate to the Commission that it has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process. An applicant’s commitment to and compliance with the Applicant Code of Conduct during the permitting process is one way to demonstrate to the Commission that such good faith efforts have been made with respect to affected landowners.

(a) *Applicant code of conduct.* To promote good faith engagement with affected landowners, applicants committing to comply with the Applicant Code of Conduct must for the duration of the pre-filing and application review processes:

(1) Develop and maintain a log of discussions with affected landowners, organized by name and property address, that includes:

(i) The name of the affected landowner;

(ii) The substance of the items discussed;

(iii) The nature of the contact (such as in-person, virtual meeting, telephone, electronic mail);

(iv) The date of the contact; and

(v) The status of discussions with the affected landowner following the contact, including any permissions granted, negotiations, or future meetings scheduled.

(2) In addition to the Pre-filing Notification required by § 50.4(c)(1)(i) and (ii), provide to each affected landowner, prior to, during, or within 3 business days of the first contact, a document that, at a minimum, includes: a description of the project, a description of the Commission and its role, a map of the project route, an explanation that affected landowners may request from applicants copies of discussion log entries that pertain to their property and how to make such requests, and the Landowner Bill of Rights in the form described in § 50.4(c)(2)(ii)(B). If the first contact with the affected landowner is in-person, the applicant must offer to provide the affected landowner at least one paper copy of the document. If the

first contact with the affected landowner is by telephone, text, or electronic mail, the applicant may provide the affected landowner with a copy of the document by electronic means or by first class mail, at the affected landowner's preference. The applicant must review the provisions of the document with the affected landowner upon request.

(3) Ensure that any representative acting on the applicant's behalf states their full name, title, and employer, as well as the name of the applicant that they represent, and presents a photo identification badge at the beginning of any discussion with an affected landowner, and provides the representative's and applicant's contact information, including mailing address, telephone number, and electronic mail address, prior to the end of the discussion.

(4) Ensure that all communications with affected landowners are factually correct. The applicant must correct any statements made by it or any representative acting on its behalf that it becomes aware were:

- (i) Inaccurate when made; or
- (ii) Have been rendered inaccurate based on subsequent events, within three business days of discovery of any such inaccuracy.

(5) Ensure that communications with affected landowners do not misrepresent the status of the discussions or negotiations between the parties. Provide an affected landowner upon request a copy of any discussion log entries that pertain to that affected landowner's property.

(6) Provide affected landowners with updated contact information whenever an applicant's contact information changes.

(7) Communicate respectfully with affected landowners and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics.

(8) Except as otherwise provided by State, Tribal, or local law, abide by an affected landowner's request to end the communication or for the applicant or its representative to leave the affected landowner's property.

(9) Except as otherwise provided by State, Tribal, or local law, obtain an affected landowner's permission prior to entering the property, including for survey or environmental assessment, and leave the property without argument or delay if the affected landowner revokes permission.

(10) Refrain from discussing an affected landowner's communications or negotiations status with any other affected landowner.

(11) Provide the affected landowner with a copy of any appraisal that has been prepared by, or on behalf of, the applicant for that affected landowner's property, if any, before discussing the value of the property in question.

(12) Ensure that any representative acting on the applicant's behalf complies with all provisions of the Applicant Code of Conduct described in this paragraph (a).

(b) *Compliance with Applicant Code of Conduct.* Applicants committing to comply with the Applicant Code of Conduct must:

(1) File, as part of the pre-filing request required by § 50.5(c), an affirmative statement that the applicant intends to comply with the Applicant Code of Conduct.

(2) Include, as part of the monthly status reports required by § 50.5(e)(11):

(i) An affirmation that the applicant and its representatives have, to the best of their knowledge, complied with the Applicant Code of Conduct during the month in question; or

(ii) A detailed explanation of any instances of non-compliance with the Applicant Code of Conduct during the month in question and any remedial actions taken or planned.

(3) Identify, in a filing with the Commission or as part of the monthly status reports required by § 50.5(e)(11), any known instances of non-compliance that were not disclosed in prior monthly status reports and explain any remedial actions taken in the current month to address instances of non-compliance occurring in prior months.

(4) File monthly status reports providing the information required in paragraphs (b)(2) and (3) of this section, for the duration of the application review process.

(c) *Compliance with an alternative method.* Applicants not committing to comply with the Applicant Code of Conduct must:

(1) File, as part of the pre-filing request required by § 50.5(c):

(i) An affirmative statement that the applicant intends to rely on an alternative method of demonstrating that it meets the good faith efforts standard;

(ii) A detailed explanation of the alternative method of demonstrating that it meets the good faith efforts standard, including any commitments to recordkeeping, information-sharing, or other conduct;

(iii) An explanation of how the alternative method is equal to or better than compliance with the Applicant Code of Conduct as a means to ensure the good faith efforts standard is met;

(iv) An explanation, for each component of the Applicant Code of Conduct with which it does not comply, why it did not follow that component; and

(v) An explanation, for each component of the Applicant Code of Conduct with which it does not comply, why the alternative method is an equal or better means to ensure the good faith standard is met notwithstanding that deviation from the Applicant Code of Conduct.

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

■ 13. The authority citation for part 380 continues to read as follows:

Authority: 42 U.S.C. 4321–4370h, 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

■ 14. Amend § 380.2 by redesignating paragraphs (f) and (g) as paragraphs (g) and (h) and adding a new paragraph (f). The addition reads as follows:

§ 380.2 Definitions and terminology.

* * * * *

(f) *Environmental justice community* means any community that has been historically marginalized and overburdened by pollution. Environmental justice communities include, but may not be limited to, minority populations, low-income populations, or indigenous peoples.

* * * * *

§ 380.13 [Amended]

■ 15. Amend § 380.13 in paragraph (b)(2)(i) by adding “or § 380.16, as applicable” after the reference to “§ 380.12”.

§ 380.14 [Amended]

■ 16. Amend § 380.14 in paragraph (a) introductory text as follows:

■ a. Remove the reference “(16 U.S.C. 470(f))” in the first sentence and add in its place the reference “(54 U.S.C. 306108)”; and

■ b. Add “or § 380.16(f), as applicable” after the reference “380.12(f)” in the second sentence.

■ 17. Amend § 380.16 as follows:

■ a. Revise the second sentence of paragraph (a)(1), revise paragraph (b)(3), revise the first sentence of paragraph (c) introductory text and the first sentence of paragraph (c)(1), and revise paragraphs (c)(2)(i) through (iii) and (c)(3) and (4);

■ b. Revise paragraph (d)(6) and the second sentence of paragraph (d)(7);

■ c. Revise paragraphs (e)(2) and (3), the first two sentences of paragraph (e)(4), the first and third sentences of

paragraph (e)(5), and revise paragraph (e)(6);

■ d. Redesignate paragraphs (e)(7) and (8) as paragraphs (e)(8) and (9);

■ e. Add new paragraph (e)(7);

■ f. Revise newly redesignated paragraphs (e)(8) and (9);

■ g. Revise paragraphs (f)(1)(i), (iii), (iv), and (v), (f)(2) introductory text, and the first sentence of paragraph (f)(4);

■ h. Revise the first sentence of paragraph (g) introductory text and paragraphs (g)(2), (3) and (6);

■ i. Redesignate paragraphs (k) through (m) as paragraphs (n) through (p);

■ j. Redesignate paragraphs (h) through (j) as paragraphs (j) through (l);

■ k. Add new paragraphs (h) and (i);

■ l. Revise the heading for newly redesignated paragraph (j), remove "Resource Report 6 must:" and add in its place "Resource Report 8 must:" in newly redesignated paragraph (j) introductory text, and revise newly redesignated paragraph (j)(3);

■ m. Revise the heading for newly redesignated paragraph (k) and revise paragraphs (k) introductory text and (k)(2) and (3);

■ n. Add paragraph (k)(4);

■ o. Revise newly redesignated paragraph (l);

■ p. Add new paragraph (m);

■ q. In newly redesignated paragraph (n):

■ i. Revise the heading;

■ ii. Revise the first sentence of the introductory text and remove "Resource Report 9 must:" and add in its place "Resource Report 12 must:" in the introductory text;

■ iii. Revise the second sentences in paragraphs (n)(2)(i) and (ii);

■ r. Revise the heading for newly redesignated paragraph (o) and its introductory text, newly redesignated paragraphs (o)(1) through (4), the first sentence of newly redesignated paragraph (o)(5), and revise newly redesignated paragraph (o)(7); and

■ s. Revise the heading for newly redesignated paragraph (p), the second sentence of newly redesignated paragraph (p) introductory text, the third sentence of newly redesignated paragraph (p)(2), and revise newly redesignated paragraphs (p)(3)(i) and (iii) and (p)(4).

The revisions and additions read as follows:

§ 380.16 Environmental reports for Section 216 Federal Power Act Permits.

(a) * * *

(1) * * * The environmental report must include the 14 resource reports and related material described in this section.

* * * * *

(b) * * *

(3) Identify the effects of construction, operation (including malfunctions), and maintenance, as well as cumulative effects resulting from the incremental effects of the project when added to the effects of other past, present, and reasonably foreseeable actions;

* * * * *

(c) * * * This report must describe facilities associated with the project; special construction, operation, and maintenance procedures; construction timetables; future plans for related construction; compliance with regulations and codes; and permits that must be obtained. * * *

(1) Describe and provide location maps of all project facilities (such as transmission line towers, substations, and any appurtenant facilities) to be constructed, modified, replaced, or removed, and related construction and operational support activities and areas, such as maintenance bases, staging areas, communications towers, power lines, and new access roads (roads to be built or modified). * * *

(2) * * *

(i) Current, original United States Geological Survey (USGS) 7.5-minute series topographic maps, or maps of equivalent detail, covering at least a 0.5-mile-wide corridor centered on the electric transmission facility centerline, with integer mileposts identified, showing the location of rights-of-way, new access roads, other linear construction areas, substations, and construction materials storage areas. Nonlinear construction areas must be shown on maps at a scale of 1:3,600, or larger, keyed graphically and by milepost to the right-of-way maps. The topographic maps must depict the facilities identified under paragraph (l)(5) of this section, including any facilities located outside of the 0.5-mile-wide corridor.

(ii) Original aerial images or photographs or photo-based alignment sheets based on these sources, not more than one year old (unless older ones accurately depict current land use and development) and with a scale of 1:6,000, or larger, showing the proposed transmission line route and location of transmission line towers, substations and appurtenant facilities, covering at least a 0.5-mile-wide corridor, and including mileposts. The aerial images or photographs or photo-based alignment sheets must show all existing transmission facilities located in the area of the proposed facilities and the facilities identified under paragraph (l)(5) of this section, including any facilities located outside of the 0.5-mile-

wide corridor. Older images/photographs/alignment sheets must be modified to show any facilities not depicted in the original. Alternative formats (e.g., blue-line prints of acceptable resolution) need prior approval by the environmental staff of the Commission's Office of Energy Projects.

(iii) In addition to the requirements under § 50.3(b) of this chapter, the applicant must contact the environmental staff of the Office of Energy Projects regarding the need for any additional copies of topographic maps and aerial images/photographs.

(3) Describe and identify, by milepost, proposed general construction and restoration methods, and any special methods to be used in areas of rugged topography, residential areas, active croplands, and sites where explosives are likely to be used. Describe any proposed horizontal directional drilling and pile driving that may be necessary.

(4) Identify the number of construction spreads, average workforce requirements for each construction spread and estimated duration of construction from initial clearing to final restoration. Indicate the days of the week and times of the day that proposed construction activities would occur and describe any proposed nighttime construction activities.

* * * * *

(d) * * *

(6) Discuss proposed mitigation measures to reduce the potential for adverse impacts to surface water, wetlands, or groundwater quality. Discuss the potential for blasting or contamination/spills to affect water wells, springs, and wetlands, and measures to be taken to detect and remedy such effects. Describe the impact of proposed land clearing and vegetation management practices, including herbicide treatment, in the project area on water resources.

(7) * * * Identify locations of Environmental Protection Agency or State-designated, sole-source aquifers and wellhead protection areas crossed by the proposed transmission line facilities.

(e) * * *

(2) Describe terrestrial habitats, including wetlands, typical wildlife habitats and corridors, and rare, unique, or otherwise significant habitats that might be affected by the proposed action. Describe typical species that have commercial, recreational, or aesthetic value.

(3) Describe and provide the acreage of vegetation cover types that would be affected, including unique ecosystems

or communities, such as remnant prairie, interior forest, or old-growth forest, or significant individual plants, such as old-growth specimen trees. Describe any areas of noxious weeds and non-native species in the project area.

(4) Describe the impact of construction, operation, and maintenance on aquatic and terrestrial species and their habitats, including the possibility of a major alteration to ecosystems or biodiversity, and any potential impact on State-listed endangered or threatened species. Describe the impact of proposed land clearing and vegetation management practices, including herbicide treatment, in the project area on fish; wildlife, including migratory birds and bald and golden eagles; and vegetation. * * *

(5) Identify all federally listed or proposed threatened or endangered species and critical habitat that potentially occur in the vicinity of the project. * * * The application must include the results of any required surveys unless seasonal considerations make this impractical. * * *

(6) Identify all federally listed essential fish habitat (EFH) that potentially occurs in the vicinity of the project. Provide information on all EFH, as identified by the pertinent Federal fishery management plans, that may be adversely affected by the project and the results of abbreviated consultations with the National Marine Fisheries Service, and any resulting EFH assessments.

(7) Identify migratory bird species and bald and golden eagles that potentially occur in the vicinity of the project, including bald and golden eagle nesting and roosting sites, migratory bird flyways, and any habitat/sites important to migratory bird breeding, feeding, and sheltering.

(8) Describe proposed, site-specific mitigation measures to minimize impacts on fisheries; wildlife, including migratory birds and bald and golden eagles; and vegetation.

(9) Include copies of correspondence not provided under paragraph (e)(5) of this section, containing recommendations from appropriate Federal and State fish and wildlife agencies to avoid or limit impacts on wildlife, including migratory birds and bald and golden eagles; fisheries; and vegetation, and the applicant's response to the recommendations.

(f) * * *

(1) * * *

(i) Documentation of the applicant's initial cultural resource consultations, including engagement with Indian

Tribes and other interested persons (if appropriate);

* * * * *

(iii) An Evaluation Report, as appropriate;

(iv) A Treatment Plan, as appropriate; and

(v) Written comments from State Historic Preservation Officer(s) (SHPO), Tribal Historic Preservation Officers (THPO), as appropriate, and applicable land-management agencies on the reports in paragraphs (f)(1)(i) through (iv) of this section.

(2) The application or pre-filing documents, as applicable, must include the documentation of initial cultural resource consultation(s), the Overview and Survey Reports, if required, and written comments from SHPOs, THPOs, and land-management agencies, if available. The initial cultural resource consultations should establish the need for surveys. If surveys are deemed necessary by the consultation with the SHPO/THPO, the survey reports must be filed with the application or pre-filing documents.

* * * * *

(4) The applicant must request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources in accordance with § 388.112 of this chapter. * * *

* * * * *

(g) * * * This report must identify and quantify the impacts of project construction, operation, and maintenance on factors affecting municipalities and counties in the vicinity of the project. * * *

* * * * *

(2) Evaluate the impact of any substantial migration of people on governmental facilities and services and plans to reduce the impact on the local infrastructure.

(3) Describe on-site manpower requirements and payroll during construction, operation, and maintenance, including the number of construction personnel who currently reside within the impact area, will commute daily to the site from outside the impact area, or will relocate temporarily within the impact area.

* * * * *

(6) Conduct a fiscal impact analysis evaluating incremental local government expenditures in relation to incremental local government revenues that will result from the project. Incremental expenditures include, but are not limited to, school operation, road maintenance and repair, public safety, and public utilities.

(h) *Resource Report 6—Tribal resources.* This report must describe Indian Tribes, Tribal lands, and Tribal interests that may be affected by the proposed project. Resource Report 6 must:

(1) Identify Indian Tribes that may be affected by the construction, operation, and maintenance of the proposed transmission facilities.

(2) Describe the impacts of construction, operation, and maintenance of the project on Indian Tribes and Tribal interests, including those related to: water use and quality; wildlife and vegetation; cultural and historic resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and environmental noise; traffic; and health.

(3) Identify project impacts that may affect Tribal interests not necessarily associated with resources specified in paragraph (h)(2) of this section, *e.g.*, treaties, Tribal practices, or agreements between the Indian Tribe and entities other than the applicant.

(4) Identify Indian Tribes that may attach religious and cultural significance to historic properties within the proposed project right-of-way or in the project vicinity, as well as available information on Tribal traditional cultural and religious properties, whether on or off of any Indian reservation.

(5) Ensure that information made available under this section does not include specific site or property locations, the disclosure of which will create a risk of harm, theft, or destruction of archaeological or Tribal cultural resources or to the site at which the resources are located, or which would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470hh, and the National Historic Preservation Act of 1966, 54 U.S.C. 307103.

(6) Describe any proposed mitigation measures to avoid or minimize impacts on Tribal resources, including any input received from Indian Tribes on the proposed measures and how the input informed the proposed measures.

(i) *Resource Report 7—Environmental justice.* This report must address the effects of the proposed project on environmental justice communities, as defined in § 380.2 of this chapter. Resource Report 7 must:

(1) Identify environmental justice communities within the area of potential project impacts using current guidance and data, including localized data, from the Environmental Protection Agency, the Council, the Census Bureau, and other authoritative sources.

Provide maps depicting identified environmental justice communities in relation to the proposed project facilities using localized data.

(2) Describe the impacts of construction, operation, and maintenance of the project on environmental justice communities, including those related to: water use and quality; wildlife and vegetation; cultural and historic resources; socioeconomic; geological resources; soils; land use, recreation, and aesthetics; air quality and environmental noise; traffic; and health. Identify any disproportionate and adverse impacts on environmental justice communities.

(3) Discuss any cumulative impacts on environmental justice communities, regarding resources affected by the project, including whether any cumulative impacts would be disproportionate and adverse. Describe the proposed project's impacts in relation to the aggregation of past, present, and reasonably foreseeable actions taken by Federal or non-Federal entities, and the environmental justice communities' capacity to tolerate additional impacts.

(4) Describe any proposed mitigation measures to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed measures and how the input informed the proposed measures.

(j) *Resource Report 8—Geological resources.*

* * * * *

(3) Describe how the project will be located or designed to avoid or minimize adverse effects to geological resources or risk to itself. Describe any geotechnical investigations and monitoring that would be conducted before, during, and after construction. Discuss the potential for blasting to affect structures and the proposed measures to be taken to remedy such effects.

* * * * *

(k) *Resource Report 9—Soils.* This report must describe the soils that will be affected by the proposed project, the effect on those soils, and measures proposed to minimize or avoid impacts. Resource Report 9 must:

* * * * *

(2) Identify, by milepost, potential impacts from: soil erosion due to water, wind, or loss of vegetation; soil compaction and damage to soil structure resulting from movement of construction vehicles; wet soils and soils with poor drainage that are especially prone to structural damage;

damage to drainage tile systems due to movement of construction vehicles and excavating activities; and interference with the operation of agricultural equipment due to the possibility of large stones or blasted rock occurring on or near the surface as a result of construction.

(3) Identify, by milepost, cropland and residential areas where project construction may result in the loss of soil fertility, including any land classified as prime or unique farmland by the U.S. Department of Agriculture, Natural Resources Conservation Service.

(4) Describe any proposed mitigation measures to reduce the potential for adverse impacts to soils or agricultural productivity.

(l) *Resource Report 10—Land use, recreation, and aesthetics.* This report must describe the existing uses of land in the project vicinity and changes to those land uses that will occur if the project is approved. The report must discuss proposed mitigation measures, including the protection and enhancement of existing land use. Resource Report 10 must:

(1) Describe the width and acreage requirements of all construction and permanent rights-of-way for project construction, operation and maintenance.

(i) List, by milepost, locations where the proposed construction or permanent rights-of-way would be adjacent to existing rights-of-way of any kind.

(ii) Identify, preferably by diagrams, existing rights-of-way that will be used for a portion of the construction or permanent rights-of-way, the overlap and how much additional width will be required.

(iii) Identify the total amount of land to be purchased or leased for each project facility; the amount of land that would be disturbed for construction, operation, and maintenance of the facility; and the proposed use of the remaining land not required for project operation and maintenance, if any.

(iv) Identify the size of typical staging areas and expanded work areas, such as those at railroad, road, and waterbody crossings, and the size and location of all construction materials storage yards and access roads.

(2) Identify, by milepost, the existing use of lands crossed by, or adjacent to, the proposed project facilities or rights-of-way.

(3) Describe planned development on land crossed by, or within 0.25 mile of, the proposed facilities, the time frame (if available) for such development, and proposed coordination to minimize impacts on land use. Planned development means development that is

included in a master plan or is on file with the local planning board or the county.

(4) Identify, by milepost and length of crossing, the area of direct effect of each proposed facility and operational site on sugar maple stands; orchards and nurseries; landfills; operating mines; hazardous waste sites; State wild and scenic rivers; State or local designated trails; nature preserves; game management areas; remnant prairie; old-growth forest; interior forest; national or State forests or parks; golf courses; designated natural, recreational or scenic areas; registered natural landmarks; Native American religious sites and traditional cultural properties (to the extent they are known to the public at large) and reservations; lands identified under the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration; and lands owned or controlled by Federal or State agencies or private preservation groups. Also identify if any of those areas are located within 0.25 mile of any proposed facility.

(5) Identify and describe buildings, electronic installations, airstrips, airports, and heliports in the project vicinity. The facilities identified under this paragraph must be depicted on the maps and photographs in Resource Report 1, as required by paragraph (c)(2) of this section.

(i) *Buildings.* List all single-family and multi-family dwellings and related structures, mobile homes, apartment buildings, commercial structures, industrial structures, business structures, churches, hospitals, nursing homes, schools, or other structures normally inhabited by humans or intended to be inhabited by humans on a daily or regular basis within a 0.5-mile-wide corridor centered on the proposed transmission line alignment. Provide a general description of each habitable structure and its distance from the centerline of the proposed project. In cities, towns, or rural subdivisions, houses can be identified in groups. Provide the number of habitable structures in each group and list the distance from the centerline to the closest habitable structure in the group. Provide a list of all habitable structures within 200 feet of a proposed construction work area for all proposed project facilities, including transmission line towers, substations, access roads, and appurtenant facilities; a general description of each habitable structure; and the distance of each habitable structure from the proposed construction work area.

(ii) *Electronic installations.* List all commercial AM radio transmitters located within 10,000 feet of the centerline of the proposed project and all FM radio transmitters, microwave relay stations, or other similar electronic installations located within 2,000 feet of the centerline of the proposed project. Provide a general description of each installation and its distance from the centerline of the proposed project.

(iii) *Airstrips, airports, and heliports.* List all known private airstrips within 10,000 feet of the centerline of the project. List all airports registered with the Federal Aviation Administration (FAA), with at least one runway more than 3,200 feet in length, that are located within 20,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 100:1 horizontal slope (one foot in height for each 100 feet in distance) from the closest point of the closest runway. List all airports registered with the FAA having no runway more than 3,200 feet in length that are located within 10,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 50:1 horizontal slope from the closest point of the closest runway. List all heliports located within 5,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 25:1 horizontal slope from the closest point of the closest landing and takeoff area of the heliport. Provide a general description of each private airstrip, registered airport, and registered heliport, and state the distance of each from the centerline of the proposed transmission line. Include copies of any consultation with the FAA.

(6) Describe any areas crossed by, or within 0.25 mile of, the proposed transmission project facilities that are included in, or are designated for study for inclusion in: the National Wild and Scenic Rivers System (16 U.S.C. 1271), the National Trails System (16 U.S.C. 1241), or a wilderness area designated under the Wilderness Act (16 U.S.C. 1132).

(7) For facilities within a designated coastal zone management area, provide a consistency determination or evidence that the applicant has requested a consistency determination from the State's coastal zone management program.

(8) Describe the impact the project will have on present uses of the affected areas as identified above, including commercial uses, mineral resources, recreational areas, public health and safety, and the aesthetic value of the land and its features. Describe any

temporary or permanent restrictions on land use resulting from the project.

(9) Describe proposed mitigation measures intended for all special use areas identified under this section.

(10) Identify the area of potential visual effects from the proposed project. Describe the visual characteristics of the lands and waters affected by the project, including any visually sensitive areas, visual classifications, and key viewpoints in the project vicinity. Describe how the transmission line project facilities will impact the visual character and scenic quality of the landscape and proposed mitigation measures to lessen these impacts. Provide visual aids to support the textual descriptions required by this paragraph. Identify, and justify the selection of, the tools or methodologies used to develop the information required in this paragraph.

(11) Demonstrate that applications for rights-of-way authorizations or other proposed land uses have been, or soon will be, filed with Federal land-management agencies with jurisdiction over land that would be affected by the project.

(m) *Resource Report 11—Air quality and environmental noise.* This report must estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, estimate the impact of the proposed project on the noise environment, and describe proposed measures to mitigate the impacts. Resource Report 11 must:

(1) Describe the existing air quality in the project area, indicate if any project facilities are located within a designated nonattainment or maintenance area under the Clean Air Act (42 U.S.C. 7401 *et seq.*), and provide the distance from the project facilities to any Class I area in the project vicinity.

(2) For proposed substations and appurtenant facilities, quantitatively describe existing noise levels at nearby noise-sensitive areas, such as schools, hospitals, or residences.

(i) Report existing noise levels as the Leq (day), Leq (night), and Ldn (day-night) and include the basis for the data or estimates.

(ii) Include a plot plan that identifies the locations and duration of noise measurements, time of day, weather conditions, wind speed and direction, engine load, and other noise sources present during each measurement.

(iii) Identify any State or local noise regulations that may be applicable to the project facilities.

(3) Estimate emissions from the proposed project and the corresponding

impacts on air quality and the environment.

(i) Estimate the reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities (such as emissions from tailpipes, equipment, fugitive dust, open burning, and substations) expressed in tons per year. Include supporting calculations, emissions factors, fuel consumption rates, and annual hours of operation.

(ii) For each designated nonattainment or maintenance area, provide a comparison of the emissions from construction, operation, and maintenance of the project facilities with the applicable General Conformity thresholds (40 CFR part 93).

(iii) Identify the corresponding impacts on communities and the environment in the project area from the estimated emissions.

(iv) Describe any proposed mitigation measures to control emissions identified under this section.

(4) Estimate the impact of the proposed project on the noise environment.

(i) Provide a quantitative estimate of the impact of transmission line operation on noise levels at the edge of the proposed right-of-way, including corona, insulator, and Aeolian noise. For proposed substations and appurtenant facilities, provide a quantitative estimate of the impact of operations on noise levels at nearby noise-sensitive areas, including discrete tones.

(A) Include step-by-step supporting calculations or identify the computer program used to model the noise levels, input and raw output data and all assumptions made when running the model, far-field sound level data for maximum facility operation, and source of the data.

(B) Include sound pressure levels for project facilities, dynamic insertion loss for structures, and sound attenuation from the project facilities to the edge of the right-of-way or to nearby noise-sensitive areas (as applicable).

(C) Far-field sound level data measured from similar project facilities in service elsewhere, when available, may be substituted for manufacturer's far-field sound level data.

(D) The operational noise estimates must demonstrate that noise attributable to any proposed substation or appurtenant facility does not exceed a day-night sound level (Ldn) of 55 decibels on the A-weighted scale (dBA) at any pre-existing noise-sensitive area. Compare the proposed project's operational noise estimates with applicable State and local noise regulations.

(ii) Describe the impact of proposed construction activities, including any nighttime construction, on the noise environment. Estimate the impact of any horizontal directional drilling, pile driving, or blasting on noise levels at nearby noise-sensitive areas and include supporting assumptions and calculations.

(iii) Describe any proposed mitigation measures to reduce noise impacts identified under this section.

(n) *Resource Report 12—Alternatives.* This report must describe alternatives to the project and compare the environmental impacts (as identified in Resource Reports 1 through 11 of this section) of such alternatives to those of the proposal. * * *

* * * * *

(2) * * *

(i) * * * Where applicable, identify the location of such alternatives on maps of sufficient scale to depict their relationship to the proposed action and existing rights-of-way; and

(ii) * * * Provide comparative tables showing the differences in environmental characteristics for the alternatives and proposed action. * * *

(o) *Resource Report 13—Reliability and safety.* This report must address the potential hazards to the public from failure of facility components resulting from, among other things, accidents or natural catastrophes; how these events would affect reliability; and proposed procedures and design features to reduce potential hazards. Resource Report 13 must:

(1) Discuss hazards, environmental impacts, and service interruptions that could reasonably ensue from failure of the proposed facilities.

(2) Describe proposed measures to protect the public from failure of the proposed facilities (including coordination with local agencies).

(3) Discuss proposed design and operational measures to avoid or reduce risk, including any measures to ensure that the proposed project facilities would be resilient against future climate change impacts in the project area.

(4) Discuss proposed contingency plans for maintaining service or reducing downtime to ensure that the proposed facilities would not adversely affect the bulk electric system in accordance with applicable North American Electric Reliability Corporation reliability standards.

(5) Describe proposed measures to exclude the public from hazardous areas. * * *

* * * * *

(7) Discuss the potential for electrical noise from electric and magnetic fields, including shadowing and reradiation, as they may affect health or communication systems along the transmission right-of-way.

* * * * *

(p) *Resource Report 14—Design and engineering.* * * * If the version of this report submitted with the application is preliminary in nature, the applicant must state that in the application. * * *

* * * * *

(2) * * * If a permit is granted on the basis of preliminary designs, the applicant must submit final design drawings for written approval by the Director of the Office of Energy Projects prior to commencement of any construction of the project.

(3) * * *

(i) An assessment of the suitability of the locations of proposed transmission line towers, substations, and appurtenant structures based on geological and subsurface investigations, including investigations of soils and rock borings and tests evaluating all foundations and construction materials;

* * * * *

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material; and

* * * * *

(4) The applicant must submit the supporting design report described in paragraph (p)(3) of this section at the time preliminary and final design drawings are filed. If the report contains preliminary drawings, it must be designated as a “Preliminary Supporting Design Report.”

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings

1. You have the right to receive compensation if your property is necessary for the construction or modification of an authorized project. The amount of such compensation would be determined through a negotiated easement agreement between you and the entity applying to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line (applicant) or through an eminent domain proceeding in the appropriate Federal or State court. The applicant cannot seek to take a property by eminent domain unless and until the

Commission approves the application, unless otherwise provided by State or local law.

2. You have the right to request the full name, title, contact information including email address and phone number, and employer of every representative of the applicant that contacts you about your property.

3. You have the right to access information about the proposed project through a variety of methods, including by accessing the project website that the applicant must maintain and keep current, by visiting a central location in your county designated by the applicant for review of project documents, or by accessing the Commission’s eLibrary online document information system at www.ferc.gov.

4. You have the right to participate, including by filing comments and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission’s Office of Public Participation by phone (202–502–6595 or toll free at 1–866–208–3372) or by email (OPP@ferc.gov).

5. When contacted by the applicant or a representative of the applicant either in person, by phone, or in writing, you have the right to communicate or not to communicate. You also have the right to hire counsel to represent you in your dealings with the applicant and to direct the applicant and its representatives to communicate with you only through your counsel.

6. The applicant may seek to negotiate a written easement agreement with you that would govern the applicant’s and your rights to access and use the property that is at issue and describe other rights and responsibilities. You have the right to negotiate or to decline to negotiate an easement agreement with the applicant; however, if the Commission approves the proposed project and negotiations fail or you chose not to engage in negotiations, there is a possibility that your property could be taken through an eminent domain proceeding, in which case the appropriate Federal or State court would determine fair compensation.

7. You have the right to hire your own appraiser or other professional to appraise the value of your property or to assist you in any easement negotiations with the applicant or in an eminent domain proceeding before a court.

8. Except as otherwise provided by State or local law, you have the right to grant or deny access to your property by the applicant or its representatives for preliminary survey work or environmental assessments, and to limit any such grant in time and scope.

9. In addition to the above rights, you may have additional rights under Federal, State, or local laws.

Appendix B: Abbreviated Names of Commenters

Advanced Energy United	Advanced Energy United.
Alabama Public Service Commission	Alabama Commission.
American Chemistry Council	American Chemistry Council.
American Clean Power Association	ACP.
American Council on Renewable Energy	ACORE.
American Farm Bureau Federation, Illinois Farm Bureau, Iowa Farm Bureau, Kansas Farm Bureau, Missouri Farm Bureau Federation, and other State Farm Bureaus.	Farm Bureaus.
Americans for a Clean Energy Grid	ACEG.
Arizona Game and Fish Department	Arizona Game and Fish.
California Public Utilities Commission	California Commission.
Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe.	Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe.
Clean Air Task Force	CATF.
Clean Energy Buyers Association	Clean Energy Buyers.
ClearPath, Inc	ClearPath.
Conservation Law Foundation	CLF.
Earthjustice, National Wildlife Federation, Natural Resources Defense Council, NW Energy Coalition, Sierra Club, Sustainable FERC Project, Union of Concerned Scientists, and WE ACT for Environmental Justice.	Public Interest Organizations.
Edison Electric Institute and WIRES	EEL.
Electricity Consumers Resource Council	ELCON.
Environmental Defense Fund	EDF.
Environmental Law and Policy Center, National Audubon Society, and Vote Solar	Environmental Law & Policy Center.
Georgia Public Service Commission	Georgia Commission.
Impacted Landowners	Impacted Landowners.
Institute for Policy Integrity at New York University School of Law	Policy Integrity.
Kansas Corporation Commission	Kansas Commission.
Kentucky Public Service Commission	Kentucky Commission.
Land Trust Alliance	Land Trust Alliance.
Los Angeles Department of Water & Power	Los Angeles DWP.
Louisiana Public Service Commission	Louisiana Commission.
Maryland Public Service Commission	Maryland Commission.
Michigan Public Service Commission	Michigan Commission.
National Wildlife Federation Action Fund (submitting 10,753 comments by fund supporters) and National Wildlife Federation Outdoors (submitting 332 comments by hunter and angler members).	National Wildlife Federation Members.
National Wildlife Federation, Environmental League of Massachusetts, Montana Wildlife Federation, and Nevada Wildlife Federation.	National Wildlife Federation.
New England States Committee on Electricity	NESCOE.
New Jersey Board of Public Utilities	New Jersey Board.
New Jersey Division of Rate Counsel, Maryland Office of the People's Counsel, and Delaware Division of the Public Advocate.	Joint Consumer Advocates.
New York State Public Service Commission	New York Commission.
Niskanen Center	Niskanen.
North Carolina Utilities Commission and North Carolina Utilities Commission Public Staff.	North Carolina Commission and Staff.
North Dakota Public Service Commission	North Dakota Commission.
Organization of MISO States, Inc	OMS.
Pennsylvania Office of Consumer Advocate	Pennsylvania Consumer Advocate.
Pennsylvania Public Utility Commission	Pennsylvania Commission.
Public Utility Commission of Texas	Texas Commission.
Rail Electrification Council	Rail Electrification Council.
Sabin Center for Climate Change Law, Columbia Law School	Sabin Center.
Solar Energy Industries Association	SEIA.
Southern Company Services, Inc	Southern.
U.S. Chamber of Commerce, Global Energy Institute	Chamber of Commerce.
U.S. Department of the Interior	Interior.
U.S. Representatives Cathy McMorris Rodgers and Jeff Duncan	Representatives McMorris Rodgers and Duncan.
U.S. Senator Charles Schumer	Senator Schumer.
U.S. Senator John Barrasso	Senator Barrasso.
Yurok Tribe	Yurok Tribe.

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Part V

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1239, et al.

Efficient Case and Docket Management in Immigration Proceedings; Final Rule

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1239, and 1240

[Docket No. EOIR 021–0410; AG Order No. 5930–2024]

RIN 1125–AB18

Efficient Case and Docket Management in Immigration Proceedings

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On September 8, 2023, the Department of Justice (“Department”) published a notice of proposed rulemaking (“NPRM”) proposing to rescind an enjoined December 2020 rule (the “AA96 Final Rule”) that imposed novel limits on the authority of immigration judges and the Board of Immigration Appeals (“BIA” or “Board”) to efficiently dispose of cases. Because the AA96 Final Rule has been enjoined since shortly after its issuance, the proposed rule was designed to largely codify the currently operative status quo. After reviewing and considering the public comments received during the comment period, the Department is finalizing the proposed rule with the limited changes described in the preamble. The Department believes that this rule will promote the efficient and expeditious adjudication of cases, afford immigration judges and the Board flexibility to efficiently allocate their limited resources, and protect due process for parties before immigration judges and the Board.

DATES: This rule is effective July 29, 2024.

FOR FURTHER INFORMATION CONTACT: Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041, telephone (703) 305–0289.

SUPPLEMENTARY INFORMATION:

I. Background

On December 16, 2020, the Department published a final rule that amended Executive Office for Immigration Review (“EOIR”) regulations regarding the handling of appeals and motions before the Board, as well as the authority of immigration judges and Appellate Immigration Judges to administratively close cases. See Appellate Procedures and

Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588 (Dec. 16, 2020) (“AA96 Final Rule”). The AA96 Final Rule changes included: (1) implementing simultaneous briefing schedules at the Board for both detained and non-detained cases; (2) limiting adjudicators’ freestanding authority to administratively close cases; (3) curtailing adjudicators’ sua sponte authority to reopen or reconsider cases; (4) allowing for more expansive factfinding before the Board; (5) restricting the Board’s authority to remand cases to the immigration judge; (6) modifying the background checks process at the Board; (7) implementing regulatory internal appeal processing deadlines at the Board; (8) providing the EOIR Director with authority to adjudicate cases in specific circumstances; and (9) allowing for quality case certifications from an immigration judge to the EOIR Director.

The AA96 Final Rule’s effective date was January 15, 2021, but the rule was preliminarily enjoined on March 10, 2021, and has not been in effect since that date. See *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). The United States District Court for the Northern District of California determined that the plaintiffs were likely to succeed on the merits of their challenge to the AA96 Final Rule. *Id.* at 928. Specifically, the court concluded that plaintiffs were likely to succeed in claiming that (1) changes implemented by the rule were arbitrary and capricious; (2) the rule violated the Regulatory Flexibility Act; and (3) the rule’s delegation of rulemaking authority to the EOIR Director violated the Administrative Procedure Act (“APA”). *Id.* at 962–76.

On September 8, 2023, after reconsidering the AA96 Final Rule, including the comments received during that rulemaking, and the issues identified in the *Centro Legal de la Raza* litigation, the Department published an NPRM in the **Federal Register** proposing to largely rescind the changes made by the AA96 Final Rule, as well as setting standards for administrative closure and the termination of proceedings. See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 FR 62242 (Sept. 8, 2023). The NPRM also proposed to retain, with modifications, a limited number of AA96 Final Rule changes, including: (1) allowing the Board to review voluntary departure issues de novo and to issue final decisions on voluntary departure requests in some instances, *id.* at 62267;

(2) allowing the Board to retain an appeal while background checks are pending, rather than remand to the immigration judge, *id.* at 62270; (3) modifying the Board’s 180-day adjudication timeline for three-member panels to begin running after completion of the record, *id.* at 62270–71; and (4) retaining some technical changes from the AA96 Final Rule, *id.* at 62273. Further, the NPRM also proposed adding definitions for the terms “noncitizen” and “unaccompanied child,” as well as proposed minor technical changes. *Id.* at 62272–73.

As explained more fully in the NPRM, the Department believes that rescinding the AA96 Final Rule will promote the efficient and expeditious adjudication of cases, afford immigration judges and the Board flexibility to efficiently allocate their limited resources, and protect due process for parties before immigration judges and the Board. See generally *id.* at 62254–73 (explaining bases for each proposed change).

The comment period for the NPRM opened on September 8, 2023, and closed on November 7, 2023, with 851 comments received.¹ The Department summarizes and responds to the public comments in section III of this preamble, followed by a description of changes made to the NPRM in this final rule in section IV.

II. Legal Authority

The Department issues this rule pursuant to section 103(g) of the Immigration and Nationality Act (“INA” or “the Act”), 8 U.S.C. 1103(g), as amended by the Homeland Security Act of 2002 (“HSA”), Public Law 107–296, 116 Stat. 2135 (as amended). Under the HSA, the Attorney General retains authority to “establish such regulations, . . . issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out” the Attorney General’s authorities under the INA. HSA 1102, 116 Stat. at 2273–74; INA 103(g)(2), 8 U.S.C. 1103(g)(2).

III. Public Comments and Responses

Comments received on the NPRM are organized by topic below. Most commenters were supportive of the rule, stating, for example, that administrative closure and termination authority

¹ Of these 851 comments, 849 comments were available on <https://www.regulations.gov> for public inspection. The Department did not post one comment because it was a duplicate and withdrew another comment because it contained an inappropriate hyperlink.

would provide adjudicators with needed flexibility to help manage overburdened immigration court dockets, and that rescinding the AA96 Final Rule's appeal-related provisions would help noncitizens more effectively present appeals. In contrast, commenters opposing the rule primarily raised concerns about the administrative closure and termination provisions, which these commenters believed would exacerbate the immigration court backlog, needlessly delay proceedings, and increase incentives for irregular immigration into the United States. The Department addresses these comments below.

A. Briefing Schedule Changes

Comment: Most commenters expressed support for the proposed rule's provisions rescinding the AA96 Final Rule's changes to briefing schedules before the Board and reinstating longstanding consecutive briefing schedules for noncitizens who are not detained and simultaneous briefing schedules for detained noncitizens.

In doing so, some commenters also proposed a number of changes to briefing schedule procedures. First, commenters suggested increasing the opening briefing schedule from 21 days to 30, 40, or 45 days to provide noncitizens with additional time to submit their briefs. Second, for cases involving detained noncitizens, commenters proposed implementing consecutive rather than simultaneous briefing schedules or, alternatively, allowing reply briefs as a matter of right, rather than as permitted after the filing of a motion, to allow the parties to best address opposing arguments. Third, commenters recommended creating a presumption to automatically extend the brief filing period for pro se applicants to the full extended 90-day period. Fourth, commenters recommended removing the 90-day limit on briefing extensions, stating that there may be good cause for extending beyond that time limit, in up to 90-day increments. Lastly, commenters recommended modifying briefing extension timelines at the Board to ensure meaningful access to additional preparation time, including by relaxing the standards for granting second briefing extensions and using the EOIR Courts & Appeals System ("ECAS") to streamline extension requests so that they may be granted more expeditiously.

Commenters also recommended implementing a "mailbox rule" for paper filings at the immigration courts and the Board, which would treat a document as filed upon mailing instead

of upon arrival or receipt. Commenters explained that a mailbox rule would help alleviate burdens on pro se noncitizens filing in paper, particularly when filing deadlines begin from the date of the immigration judge or Board decision, which may not reach the noncitizen by mail for several days. Alternatively, commenters recommended a limited "mailbox rule," whereby use of overnight delivery services or private couriers would create a presumption that any delivery failure qualifies as an extraordinary circumstance allowing for late filing.

Commenters opposed to this rule's briefing schedule changes stated that the AA96 Final Rule's briefing schedule provisions were more efficient, while still providing for briefing extensions when warranted.

Response: The Department is finalizing the NPRM's proposed changes to briefing schedules and extensions without further amendment. The Department believes that the briefing procedures in this rule—which recodifies longstanding practices in place prior to the publication of AA96 Final Rule and which have again been in use since the AA96 Final Rule was enjoined—allow necessary flexibility for the Board to set a briefing schedule as appropriate for each appeal in a manner that will serve both fairness and efficiency interests. *See* 8 CFR 1003.3(c)(1).

As an initial matter, the Department believes 21 days to be a generally sufficient baseline, with which parties are familiar, for submitting initial appeal briefs. This longstanding 21-day filing timeline allows those parties who are prepared to submit briefing on schedule to proceed efficiently, while preserving the availability of briefing extensions when necessary. *See* BIA Practice Manual ch. 4.7(c) (Oct. 25, 2023) ("Extensions"). Further, the Department continues to believe that simultaneous briefing is appropriate in detained cases given the need for expeditious resolution of such cases implicating liberty interests. *Id.*

Additionally, the Department declines to codify procedures allowing for the filing of reply briefs in detained cases as a matter of right. Under this rule, in all non-detained cases, appellees are provided the same time period to file a reply brief that was initially granted to the appellant to file their brief. *See* 8 CFR 1003.3(c)(1). For detained cases, the Board provides a simultaneous 21-day time period for the submission of briefs. *Id.* The Department believes that, in such cases, the simultaneous briefing schedule provides both parties sufficient opportunity to address any

issues needed to be resolved on appeal or to identify any reasons for opposing the appeal, while balancing the need to expeditiously resolve the case.

Further, whether briefs are filed consecutively or simultaneously, the party appealing the immigration judge's decision is tasked with pointing out factual or legal error in the decision warranting remand or reversal, while the party opposing the appeal generally argues in the vast majority of cases that the immigration judge's decision is correct based on the reasoning contained within that decision. Thus, the Department does not believe that the arguments in the opposing party's brief will take the appellant by surprise such that a reply brief would be needed to fairly resolve the appeal in most instances. When rare circumstances arise such that the appeal cannot be fairly adjudicated without additional briefing, in either detained or non-detained cases, the Department believes that the Board has the expertise to determine whether additional briefing—including reply briefing, supplemental briefing, or amicus briefing—is needed to resolve the appeal in any individual case and the flexibility to request such briefing. Moreover, the Department believes that the Board's internal practices and procedures are sufficient to address any additional briefing issues in each individual case. *See generally* BIA Practice Manual chs. 4.6 ("Appeal Briefs"), 4.7 ("Briefing Deadlines").

The Department also declines to automatically extend briefing timelines for pro se noncitizens. Such a provision presents significant administrability concerns, as many noncitizens are searching for, or obtain, representation during the initial appeal and briefing time frame.² Automatically providing an extended briefing timeline would result in different briefing timelines for noncitizens depending on whether they obtained counsel before or after briefing schedules were set. That said, in the event that a pro se noncitizen obtains counsel subsequent to the briefing schedule being set, then the noncitizen's counsel may request a briefing extension if needed.

The Department also declines to remove the 90-day limit on briefing extensions. The Department believes

² The Department is cognizant of the challenges faced by unrepresented detained noncitizens who wish to file an appeal before the Board. Accordingly, since 2001, EOIR has operated the BIA Pro Bono Project to increase pro bono representation for detained noncitizens whose cases are on appeal. *See* EOIR, BIA Pro Bono Project, <https://www.justice.gov/eoir/bia-pro-bono-project> (explaining that the Pro Bono Project "continues to provide a highly valuable service connecting pro se respondents to pro bono counsel").

that this longstanding pre-AA96 Final Rule limit ensures that parties are provided sufficient time to file their briefs, while also helping ensure that the record on appeal is completed and ready for adjudication in a reasonable time frame. *See, e.g.*, Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 FR 54878, 54878, 54895 (Aug. 26, 2002) (maintaining the then-existing 90-day Board briefing limits as part of a rule intended to efficiently “improve the adjudicatory process for the Board”).

However, the rule retains the Board’s ability to extend filing deadlines. *See* 8 CFR 1003.3(c)(1). Should the Board wish to accept briefing extension requests via ECAS, as suggested by commenters, then the Department need not amend the regulations; rather, the Board may update its procedures within the BIA Practice Manual to implement this change. *See generally* BIA Practice Manual chs. 4.6 (“Appeal Briefs”), 4.7 (“Briefing Deadlines”). The rule also preserves the Board’s ability to consider, in its discretion, a brief that has been filed out of time, as well as to request supplemental briefing from the parties after the expiration of the briefing deadline. 8 CFR 1003.3(c)(1). The Department believes that both the regulations and the Board’s application of the regulations through internal practices and procedures allow the parties sufficient opportunity to submit relevant arguments via briefing before the Board.

Additionally, comments regarding a “mailbox rule” for paper filings before the immigration courts or the Board are outside of the scope of this rulemaking. This rule focused on the changes made by the AA96 Final Rule to briefing schedules and whether to retain, modify, or rescind those specific provisions. *See* 88 FR at 62254. However, the Department is always considering potential regulatory changes to improve EOIR processes and will take commenter suggestions regarding a “mailbox rule” under advisement.

In response to commenters in favor of the AA96 Final Rule’s briefing schedule provisions, the Department believes that this rule’s briefing schedule provisions better balance efficient appeal processing with procedural fairness. In general, the Department does not anticipate that retaining the longstanding pre-AA96 Final Rule briefing schedules will draw out or lengthen proceedings, but rather will ensure that parties have adequate time to prepare and file briefs before the Board that will best serve Board members in their adjudications.

The Department also notes that maintaining these longstanding briefing schedules strikes an appropriate balance of providing the parties adequate time for initial briefing, while preserving the opportunity for briefing extensions, as well as the Board’s ability to request additional briefing, if such extensions or additional briefing would aid in the ultimate resolution of the case. Further, maintaining these longstanding briefing schedules and procedures may, for example, allow parties to have adequate time to obtain counsel for assistance with the appeal or to submit more detailed briefs that adequately address complex issues. Both of these factors may ultimately increase the efficiency with which Board members can issue a decision in a case because the issues may be more clearly articulated and thoroughly presented. *Cf.* EOIR DM 22–01, *Encouraging and Facilitating Pro Bono Legal Services* 1 (Nov. 5, 2021) (“Competent legal representation provides the court with a clearer record and can save hearing time through more focused testimony and evidence, which in turn allows the judge to make better-informed and more expeditious rulings.”).

In sum, the Department believes that the rule’s retention of the longstanding briefing procedures before the Board strikes an appropriate balance between the need for expeditious resolution of cases, while maintaining procedural fairness for all parties seeking appellate review before the Board. Accordingly, the Department declines to make further amendments to the regulatory provisions governing briefing before the Board.

B. Administrative Closure

1. Authority for Administrative Closure

Comment: Some commenters claimed that this rule’s administrative closure provisions are unlawful, stating that administrative closure is not authorized by statute. Commenters favorably cited language from the now-overruled decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), as support for their position that there is no statutory basis for administrative closure in the INA. Commenters further stated that any regulatory administrative closure provision would be contrary to statutory language providing procedures for the completion of removal proceedings, citing INA 240, 8 U.S.C. 1229a. Another commenter stated that, to be consistent with the INA, administrative closure authority should be limited to cases where the noncitizen has a pending application outside of EOIR which, if

granted, would obviate the need for removal proceedings.

Response: Authorizing administrative closure falls within the Attorney General’s broad authority under the INA. The INA not only directs immigration judges to adjudicate cases and sets forth some specific procedures for adjudicating removal proceedings, it also charges the Attorney General with supervising that adjudication system, *see* INA 240, 8 U.S.C. 1229a; INA 103(g)(1), 8 U.S.C. 1103(g)(1), and authorizes the Attorney General, broadly, to “establish such regulations . . . as the Attorney General determines to be necessary” for carrying out his duties in implementing the INA, *see* INA 103(g)(2), 8 U.S.C. 1103(g)(2). That authority comfortably encompasses establishing additional procedural rules that the Attorney General deems will promote the fair and efficient functioning of the adjudication system, especially on the many procedural issues that the INA itself does not address. Indeed, the Attorney General for decades has exercised that authority in myriad ways, including, for example, providing for Board review of most immigration judge decisions, *see generally* 8 CFR 1003.1(b) (“Appellate jurisdiction”), and generally conferring on adjudicators the power to take any action “appropriate and necessary” for the disposition or alternative resolution of a case, as consistent with the law, *id.* §§ 1003.1(d)(1)(ii), 1003.10(b); *see also* Miscellaneous Amendments to Chapter, 23 FR 2670, 2671 (Apr. 23, 1958) (original 1958 regulatory provision authorizing EOIR adjudicators to exercise their discretion as may be “appropriate and necessary” for the disposition of a case). Given the Attorney General’s clear and broad authority, and the long history of its exercise to establish similar procedural rules, the only question is whether Congress precluded the Attorney General from using this authority to provide for administrative closure. Congress has not precluded the Attorney General from doing so.

In a more specific way, too, history confirms that the Attorney General’s broad authority under the INA encompasses administrative closure. Since at least the 1980s, immigration judges and the Board have exercised their authority, where appropriate, to use administrative closure as a docketing tool. *See Arcos Sanchez v. Att’y Gen.*, 997 F.3d 113, 116–17 (3d Cir. 2021); *see also* 88 FR 62243–46 (describing the history of administrative closure). And in the HSA, Congress specified that the Attorney General has “such authorities and functions under

[the INA] relating to the immigration and naturalization of [noncitizens] as were exercised by [EOIR], or by the Attorney General with respect to [EOIR]" prior to the HSA. HSA 1102, 116 Stat. at 2274; INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see also* 6 U.S.C. 521. The HSA confirms that the Attorney General may continue to provide for the administrative closure authority that EOIR adjudicators in fact exercised prior to the HSA.

Administrative closure is also a reasonable exercise of the Attorney General's authority to "establish such regulations . . . as [he] determines to be necessary" for carrying out his duties in overseeing the EOIR adjudication system, *see* INA 103(g)(2), 8 U.S.C. 1103(g)(2). Administrative closure authority "is not limited to the immigration context" and is "utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket." *Matter of Avetisyan*, 25 I&N Dec. 688, 690 n.2 (BIA 2012). And immigration adjudicators, like other adjudicators, can in appropriate circumstances use administrative closure to promote the fair and efficient management of their dockets. For example, an immigration judge or an Appellate Immigration Judge may determine that a case may be most efficiently and fairly completed by administratively closing the case to first allow U.S. Citizenship and Immigration Services ("USCIS") to adjudicate a relief application, which, if granted, may provide the noncitizen with legal status or some other basis that would prevent enforcing an order of removal, thus eliminating the need for further removal proceedings, reducing the immediate need to conclude removal proceedings, or otherwise narrowing the issues before EOIR. As a result, EOIR adjudicators, and EOIR more generally, can direct resources to other cases ripe for adjudication. Commenters have not identified anything that would withdraw administrative closure from the measures that the Attorney General may determine are "necessary." Administrative closure, like the other actions described previously, is a regulatory action the Attorney General has determined should be available for adjudicators to use, to fulfill their statutory responsibilities under the INA and in accordance with due process.

The Department also does not agree that, to be consistent with the INA, administrative closure authority should be limited to cases where the noncitizen has a pending application outside of EOIR, which, if granted, would obviate the need for removal proceedings. Commenters did not point to any

provision in the INA that would suggest that administrative closure should be limited in such a way. The Department has previously entered into judicially approved, binding settlement agreements and issued numerous regulations, in compliance with the INA, that provide for administrative closure in a variety of specified situations. *See generally* 88 FR 62244–45. Further, EOIR adjudicators have long had authority to use administrative closure to pause removal proceedings to give noncitizens an opportunity to pursue newly available pathways to lawful status. *See, e.g., Veliz v. Caplinger*, No. 96–1508, 1997 WL 61456, at *1 (E.D. La. Feb. 12, 1997) (noting that the removal proceedings before the agency were administratively closed to allow noncitizens to apply for legalization under the Immigration Reform and Control Act of 1986).

Contrary to any commenter suggestions otherwise, administrative closure does not prevent the ultimate adjudication of removal proceedings, as the case remains pending with EOIR while administratively closed. *See, e.g.,* 8 CFR 1003.18(c) (defining administrative closure as the "temporary suspension of a case"). Rather, administrative closure temporarily pauses the case until a party files a motion to recalendar the case and the motion is granted. Once recalendarred, the case is completed through an order of relief, removal, termination, or dismissal, as warranted by the circumstances of each case. *See, e.g., Arevalo v. Barr*, 950 F.3d 15, 18 (1st Cir. 2020) (noting that once the Board recalendarred, the case was "awaiting only the entry of a final decision by the BIA").

Additionally, commenters' reliance on a portion of an Attorney General decision, *Matter of Castro-Tum*, for the proposition that administrative closure is unauthorized by statute is misplaced. *See* 27 I&N Dec. at 283 (citing *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118 (9th Cir. 2009); *Hernandez v. Holder*, 579 F.3d 864, 877 (8th Cir. 2009), *vacated in part*, 606 F.3d 900 (8th Cir. 2010); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018); *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010)). The Attorney General has overruled *Matter of Castro-Tum* in its entirety. *See Matter of Cruz-Valdez*, 28 I&N Dec. 326, 328–29 (A.G. 2021) (indicating that because various courts of appeals had rejected the reasoning in *Matter of Castro-Tum* and because that decision departed from long-standing practice, the Attorney General found it appropriate to overrule *Matter of Castro-Tum* in its entirety).

Even taken on its own terms, *Matter of Castro-Tum* did not suggest that administrative closure is unauthorized by statute. First, although that decision significantly limited EOIR adjudicators' administrative closure authority, it did not call into question the validity of regulatory provisions expressly authorizing administrative closure. 27 I&N Dec. at 272 (holding that EOIR adjudicators may "only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action"). Second, none of the four Federal courts of appeals cases cited by *Matter of Castro-Tum* determined that administrative closure was a statutorily invalid procedural tool in immigration court. *See Diaz-Covarrubias*, 551 F.3d at 1116–20; *Gonzalez-Caraveo*, 882 F.3d at 891–94; *Vahora*, 626 F.3d at 914–19; *Hernandez*, 579 F.3d at 877. Rather, each of these decisions addressed the narrow jurisdictional question of whether courts had authority to review an immigration court's denial of administrative closure. All four cases simply referenced, in dicta, the INA's silence on administrative closure in determining whether the INA included statutory language that would provide a meaningful standard by which to review claims challenging administrative closure decisions. *See Diaz-Covarrubias*, 551 F.3d at 1118; *Gonzalez-Caraveo*, 882 F.3d at 891–94; *Vahora*, 626 F.3d at 914–19; *Hernandez*, 579 F.3d at 877–78. Notably, none of these decisions questioned the availability of administrative closure as an immigration court procedural tool. *See Diaz-Covarrubias*, 551 F.3d at 1116–20; *Gonzalez-Caraveo*, 882 F.3d at 889–94; *Vahora*, 626 F.3d at 914–21; *Hernandez*, 579 F.3d at 877–78. For example, in *Vahora*, the court held EOIR's administrative closure determinations to be unreviewable as "a procedural device, not unlike the myriad other procedural devices employed by quasi-judicial bodies in administrative agencies and in the Executive Office for Immigration Review in particular." 626 F.3d at 917.

For these reasons, contrary to commenter claims, administrative closure falls squarely within the authority the INA grants to the Attorney General to establish regulations deemed necessary to administering the immigration laws, INA 240, 8 U.S.C. 1229a; and no provision of the INA prohibits the Attorney General from exercising his broad authority to provide for administrative closure by regulation.

Comment: One commenter expressed that EOIR adjudicators should not take

on prosecutorial discretion functions by determining which cases should be adjudicated and which should not, citing separation-of-function principles. Separately, another commenter claimed that the rule would allow immigration judges to unilaterally decline to adjudicate cases rather than ruling on all cases brought before them, which the commenter claimed violates separation of powers.

Response: The Department disagrees with commenter assertions that this rule would raise concerns by allowing EOIR adjudicators to decline to adjudicate cases or exercise prosecutorial discretion functions belonging to DHS. The Department is cognizant of and respects the different roles and responsibilities of DHS and EOIR adjudicators in removal proceedings, *see* 88 FR at 62258, and this rule neither alters, impacts, nor diminishes DHS's prosecutorial authority or discretion, nor does the rule authorize immigration judges or Appellate Immigration Judges to unilaterally decline to adjudicate cases, as administratively closed cases still remain pending on EOIR's docket, without actively drawing resources, until a case becomes ripe for adjudication and a decision is issued, *see id.* at 62264–65 (explaining that the rule “would not change the longstanding principle that immigration judges and Appellate Immigration Judges have no authority to review or second-guess DHS's exercise of prosecutorial discretion, including its decision whether to commence removal proceedings”).

DHS “exercises its prosecutorial discretion when it decides whether to commence removal proceedings and what charges to lodge against a respondent.” *Matter of Avetisyan*, 25 I&N Dec. at 694 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) and *Wayte v. United States*, 470 U.S. 598, 607 (1985)). This rule does not impede, preclude, or alter DHS's authority or ability to initiate proceedings in the exercise of prosecutorial discretion or authority. Once DHS decides to institute proceedings, that decision is not reviewable by an EOIR adjudicator. *Id.*; *see also Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000). However, after DHS exercises its authority to initiate proceedings and jurisdiction over removal proceedings vests with the immigration judge, the immigration judge has the authority to regulate the proceedings, consistent with applicable law and regulations. *Matter of Avetisyan*, 25 I&N Dec. at 694; 8 CFR 1003.14(a) (stating that jurisdiction vests when a charging document is filed with the immigration court), 1240.1(a)(iv)

(providing immigration judges with the authority to take any action “consistent with applicable law and regulations as may be appropriate”), 1240.1(c) (providing immigration judges with the authority to “regulate the course of the hearing”).

Further, EOIR does not use administrative closure as a prosecutorial function. As stated previously, administrative closure has been “utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket,” underscoring that the use of administrative closure is not a prosecutorial tool and therefore does not violate separation-of-functions principles. *See Matter of Avetisyan*, 25 I&N Dec. at 690 n.2. Administrative closure is a docket-management tool for EOIR adjudicators, separate and distinct from DHS's prosecutorial discretion authority, and is one such way for EOIR adjudicators to manage and regulate proceedings and, more broadly, an immigration judge's calendar or the Board's docket. Accordingly, the rule includes guidelines for specific docket-management tools that are available to EOIR adjudicators as necessary or appropriate to improve the fairness and efficiency of proceedings before them. For example, administrative closure is a tool that can be used, where necessary or appropriate, to temporarily suspend a case that may not be ripe for active adjudication; where there may be pending alternative resolutions to removal that, once resolved, could obviate the need for further proceedings or significantly narrow the issues before EOIR, thus improving fairness and reducing the resources required to ultimately resolve the case; or where the above circumstances are not present but one party requests the case be removed from the active docket or calendar and the other party joins in the request or affirmatively indicates its non-opposition.

For those cases that are administratively closed, either party may file a motion to recalendar, and where the EOIR adjudicator determines that the case should be recalendared, proceedings will be put back on the active docket or calendar. *See* 8 CFR 1003.1(l)(2), 1003.18(c)(2). Thus, while administrative closure may impact the course of proceedings, it does not impact DHS's ability to initiate proceedings, and therefore, does not amount to an exercise of prosecutorial discretion by an EOIR adjudicator. *See Matter of Avetisyan*, 25 I&N Dec. at 694 (“Although administrative closure impacts the course removal proceedings may take, it does not preclude the DHS

from instituting or pursuing those proceedings and so does not infringe on the DHS's prosecutorial discretion.”).

In addition, this rulemaking does not infringe on separation of powers. The rule does not impermissibly assign a judicial role to the Executive Branch because immigration judges and Appellate Immigration Judges are not part of the Judicial Branch. Rather, they are attorneys whom the Attorney General appoints as administrative judges within EOIR, *see* INA 101(b)(4), 8 U.S.C. 1101(b)(4), and who conduct administrative adjudications within the Executive Branch. Furthermore, there continues to be judicial review over EOIR's administrative adjudications unless otherwise directed by law. *See* Immigration Court Practice Manual ch. 1.4(g) (Oct. 25, 2023).

2. Efficiency and Immigration Court Backlog

Comment: Many commenters supported explicitly authorizing administrative closure by regulation to help ease the immigration court backlog. Commenters stated that, previously, in cases where noncitizens were awaiting USCIS processing of an application or benefit request, those noncitizens would have to appear in immigration court for multiple master calendar hearings to provide status updates to the immigration judge. Commenters explained that these immigration court appearances were an inefficient use of resources for noncitizens, attorneys, and immigration judges. Thus, commenters stated that the rule's administrative closure provisions would increase efficiency by avoiding unnecessary immigration court hearings while awaiting USCIS adjudication of applications.

In contrast, other commenters opposed codifying administrative closure authority, claiming that the use of administrative closure only serves to delay proceedings because it does not dispose of a case on the merits. Commenters stated that immigration judges should instead focus on concluding removal proceedings through a substantive order of relief or removal. Commenters expressed concern that administrative closure would act as a de facto amnesty provision, creating a permanent class of noncitizens without legal status in the United States, and would further incentivize illegal migration. To support this contention, commenters pointed to statistics on existing administratively closed cases that have been closed for many years. These commenters stated that, instead of providing for administrative closure, the Department

should have considered the use of status dockets, continuances, and limited termination authority, which commenters stated would be more appropriate tools when noncitizens are waiting for, or have obtained, relief outside of EOIR.

Response: The Department believes that the rule's provisions explicitly codifying administrative closure authority help promote the efficient use of EOIR resources, including valuable docket time. As explained in the NPRM, requiring immigration judges or Appellate Immigration Judges to adjudicate cases where the noncitizen in proceedings has a pending application or petition with USCIS is often an inefficient use of resources, as many of these noncitizens may obtain legal status that obviates the need for further removal proceedings. *See generally* 88 FR at 62257 (explaining that there are scenarios where "it would be wasteful to commit judicial resources to cases where there are pending alternative resolutions to the case that would obviate the need for, or significantly narrow the issues in, removal proceedings"). When administratively closed cases are removed from the immigration court's active calendar or the Board's docket, EOIR adjudicators can then reallocate that docket time to cases ripe for adjudication, including those where DHS has prioritized the removal of the noncitizen or where there are no pending alternative resolutions to removal, thereby helping to reduce the overall number of cases pending before the immigration courts and the Board. Further, once administratively closed cases are recalendared, they often require fewer resources to resolve, as they are often near final completion due to the narrowing of issues resulting from any external adjudications, and for the same reasons, often have a reduced need for any additional continuances.

Moreover, alternatives to administrative closure, including continuances, status dockets, and motions to reopen, are comparatively less efficient than administrative closure in many cases. *See, e.g., id.* at 62257. For example, while a relief application is pending with USCIS, the use of multiple continuances in removal proceedings would require repeatedly rescheduling hearings as each successive continuance is granted. *See Matter of Hashmi*, 24 I&N Dec. 785, 791 n.4 (BIA 2009) (noting that administrative closure can "avoid the repeated rescheduling of a case that is clearly not ready to be concluded"). Status dockets may also be less efficient in such cases, as the immigration court

would be spending valuable time repeatedly requesting status updates for the case, rather than considering whether the case is ripe for adjudication once a party moves to recalendar proceedings after any outside actions have been completed.

Similarly, if the EOIR adjudicator was required to complete adjudication of removal proceedings while a relief application was pending with USCIS, the noncitizen might need to file a motion to reopen the concluded removal proceedings if USCIS ultimately granted their application. This process would require EOIR adjudicators to adjudicate the removal proceeding, a potential appeal, and then a subsequent motion to reopen, which is far less efficient than administratively closing the proceeding until the USCIS adjudication is completed. Such efficiency concerns are further supported by the fairness benefits provided by administrative closure. *See* 88 FR at 62256 (explaining that, in many circumstances, administrative closure allows noncitizens who are prima facie eligible for relief to pursue such relief without threat of immediate removal).

Additionally, the Department believes that administrative closure furthers finality goals, as it helps ensure that, when necessary or appropriate, noncitizens are able to pursue options for reasonably available legal status before removal proceedings are concluded. This helps ensure that the conclusion of removal proceedings, and any related appeals, will be the final determination on a noncitizen's ability to remain in the United States.

Further, the Department rejects commenters' assertion that the use of administrative closure is inefficient because it delays proceedings and does not dispose of a case on the merits. As the Department has explained, administrative closure allows EOIR adjudicators to focus resources on cases that are ripe for adjudication, including those cases with no pending alternative resolutions to removal, thereby improving efficiency in the aggregate. *See id.* at 62256 ("Efficiency also encompasses consideration of prioritization and allocation of resources among different cases.").

By contrast, commenters opposed to the use of administrative closure authority described an excessively narrow view of "efficiency," focusing solely on completing some individual removal proceedings as quickly as possible, with no concern for (1) the resources needed to facilitate those proceedings on an EOIR adjudicator's active docket or calendar; (2) whether

the noncitizen is a priority for removal; (3) whether pausing proceedings to allow for the result of collateral dispositions could obviate the need for continued proceedings or significantly narrow the issues; and (4) whether such temporary removal from the active docket or calendar is necessary or appropriate to the fairness of the proceedings. Additionally, by primarily focusing on some individual cases in removal proceedings, these commenters have not accounted for the larger, systemic efficiencies that administrative closure may create for EOIR in the aggregate. In the Department's view, focusing docket time and other resources on actively adjudicating cases ripe for resolution while cases with other possible resolutions remain pending—like a case with an outstanding petition or application before USCIS as described previously—often results in the overall most efficient use of resources.

Moreover, these regulations do not permit administrative closure to be used as a de facto "amnesty" provision. Rather, they permit adjudicators to use administrative closure to temporarily remove cases from EOIR's active docket only until such cases are ripe for adjudication or resolution. 8 CFR 1003.1(l), 1003.18(c) (defining administrative closure as "the temporary suspension of a case"). While a case is administratively closed, the proceedings remain pending, and the administrative closure itself confers no status upon a noncitizen. Administrative closure is solely a procedural tool to permit the efficient use of resources.

3. General Standards for Administrative Closure

Comment: Commenters provided several suggestions regarding the general standards for administrative closure. For example, commenters recommended requiring EOIR adjudicators to grant joint and affirmatively unopposed motions and removing the provision providing EOIR adjudicators with the ability to deny such motions based on unusual, clearly identified, and supported reasons. Commenters were concerned that EOIR adjudicators would use this exception to improperly deny such motions when neither party wished to proceed with the removal proceeding.

Relatedly, commenters recommended that, similar to the proposed standard governing joint and affirmatively unopposed motions, granting motions should also be favored when DHS does not respond to a noncitizen's motion for administrative closure in a timely

manner. Commenters stated that favoring the grant of a motion when DHS does not indicate its response would prevent a situation where motions that would otherwise be granted would remain pending indefinitely due to DHS's failure to respond.

Response: The regulatory language governing joint and affirmatively unopposed motions sets forth that EOIR adjudicators shall grant motions to administratively close or recalendar that have either been filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition. 8 CFR 1003.1(l)(3), 1003.18(c)(3). EOIR adjudicators may only deny such motions where they have articulated unusual, clearly identified, and supported reasons for doing so. *Id.* The Department declines to remove the exception allowing an EOIR adjudicator to deny the motion for unusual, clearly identified, and supported reasons. As explained in the NPRM, EOIR adjudicators are in the best position to determine how a case should proceed, and there may be circumstances in which the removal proceeding should continue despite the parties' motion. See 88 FR at 62260 (explaining that this exception "provides adjudicators the flexibility to address the complexities of an individual case, while requiring the adjudicator to issue a reasoned explanation that provides the parties with due notice of the basis for a denial" of a joint motion to administratively close proceedings).

Moreover, the Department does not share commenters' concerns that EOIR adjudicators would use this exception to improperly deny joint or affirmatively unopposed motions. The Department expects all of its adjudicators to make decisions in accordance with the Act and the regulations, and that they will not improperly deny joint or affirmatively unopposed motions. 8 CFR 1003.1(d)(1) ("The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations."); 8 CFR 1003.10(b) (same). Additionally, there is a presumption of regularity that attaches to the actions of Government agencies, see *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), and adjudicators such as immigration judges are "assumed to be . . . capable of judging a particular controversy fairly, on the basis of its own circumstances," *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (internal quotation mark omitted). Moreover, adjudicators are required to clearly identify and support the reasons for denying such motions,

thereby creating a record that could be subject to further review.

The Department also declines to treat motions without a DHS response in the same manner as joint and affirmatively unopposed motions and declines to expand the termination ground for joint and affirmatively unopposed motions further. See *id.* at 62259–60 (explaining the joint and affirmatively unopposed standard). While joint and affirmatively unopposed motions should generally be granted in the interests of efficiency given the lack of an adversarial posture, a lack of DHS response to a motion, alone, is not the same as DHS's affirmative expression of non-opposition and does not necessarily convey that DHS maintains no adversarial interest in the case.

Additionally, as this rule does not supplant the immigration courts' or the Board's procedures for processing motions, the Department notes that a motion for administrative closure will not remain pending indefinitely in the event that DHS does not respond. Rather, as is consistent with EOIR's motions practice, the EOIR adjudicator will rule upon the motion once any time limits for responses to motions have passed. See 8 CFR 1003.23(a) ("The Immigration Judge may set and extend time limits for the making of motions and replies thereto."); see also Immigration Court Practice Manual ch. 5.12 (Oct. 25, 2023) (governing responses to motions); BIA Practice Manual ch. 5.11 (May 8, 2023) (providing that an opposing party has 13 days to respond after being served with the motion and noting that a failure to oppose "will not necessarily result in a grant of [the] motion").

Comment: Commenters recommended that the Department specify that a motion to withdraw or substitute representation can be filed and adjudicated while a case remains administratively closed. According to commenters, current practice requires an administratively closed case to be recalendarred before a motion to withdraw or substitute can be filed and adjudicated, and then requires the case to be administratively closed again. Other commenters indicated that providing clarity on this issue would improve pro bono representation rates by reducing uncertainty over a representative's ability to move for withdrawal or substitution without risking premature recalendarred of an administratively closed case.

Response: In response to comments regarding motions to withdraw or substitute counsel while a case is administratively closed, the Department clarifies that the EOIR adjudicator may

adjudicate such motions without recalendarred the case. Additionally, the Department notes that recalendarred must be upon the motion of a party, and an immigration judge would not be authorized under this rule to recalendar sua sponte to adjudicate a motion to withdraw or substitute counsel. 8 CFR 1003.1(l)(2), 1003.18(c)(2) (authorizing EOIR adjudicators to "recalendar [a] case pursuant to a party's motion to recalendar").

The Department further notes that motions to withdraw or substitute counsel should comply with standards for such motions. See Immigration Court Practice Manual ch. 2.1(b)(3)(B) (June 20, 2023) (motions to substitute), (C) (motions to withdraw). Consistent with existing standards, attorneys requesting withdrawal from representation should provide evidence with their motion that they notified, or attempted to notify, the noncitizen of the ongoing nature of their proceedings and any upcoming deadlines or hearings, which would reasonably include an explanation that their case is administratively closed but may be recalendarred in the future. See *id.* ch. 2.1(b)(3)(C) (calling for notification of pending deadlines; the date, time, and place of the next scheduled hearing; the necessity of meeting deadlines and appearing at scheduled hearings; and the consequences of failing to meet deadlines or appear at scheduled hearings). The Department believes that this rule, which does not impose any limitations on adjudication of such motions, provides sufficient guidance for counsel to make determinations about whether to engage in representation.

Comment: Commenters also recommended clarifying that administrative closure is available to detained noncitizens, who may be pursuing alternative relief with USCIS.

Response: As an initial matter, the Department notes that the rule, in general, does not distinguish between detained and non-detained cases regarding the exercise of administrative closure authority, as the Department does not believe such an explicit distinction is necessary. Rather, the rule provides that EOIR adjudicators may, in their discretion, administratively close cases after consideration of the totality of the circumstances. See 8 CFR 1003.1(l), 1003.18(c) (administrative closure standards).

However, after further consideration, the Department is adding an additional factor—the U.S. Immigration and Customs Enforcement ("ICE") detention status of the noncitizen—to the nonexhaustive list of factors for EOIR

adjudicators to consider as part of the totality of the circumstances when evaluating motions to administratively close or recalendar a case. *See id.* § 1003.1(l)(3)(i)(H) (administrative closure before the Board), 1003.18(c)(3)(i)(H) (administrative closure before immigration judges), 1003.1(l)(3)(ii)(H) (recalending before the Board), 1003.18(c)(3)(ii)(H) (recalending before immigration judges). Accordingly, where relevant and in addition to other factors applicable to a particular case, EOIR adjudicators must consider a noncitizen's ICE detention status when making a determination about whether to administratively close or recalendar a case.

Several considerations warrant adding this factor for EOIR adjudicators to consider when adjudicating motions to administratively close or recalendar cases where the “totality-of-the-circumstances” standard applies. *See infra* section IV.A of this preamble (providing additional explanation of this change). Administrative closure in cases involving a detained noncitizen may prolong the noncitizen's detention, imposing a greater burden on the noncitizen and additional costs to the Government during the pendency of a case. For those reasons, detained cases present a heightened need for stringent monitoring and continuous reevaluation regarding whether a case is ready to proceed to minimize, to the greatest extent possible, the risk of lengthier than necessary detention and the resulting costs. Accordingly, although the Department reiterates that no single factor is dispositive or more heavily weighted than others in adjudicating a motion to administratively close or recalendar a case, *see* 8 CFR 1003.1(l)(3), 1003.18(c)(3), the fact that a noncitizen is detained in ICE custody will generally weigh against the appropriateness of administrative closure. Conversely, for detained cases that are already administratively closed, the noncitizen's detention status will generally weigh in favor of recalending in order to resume proceedings. In most detained cases, granting continuances as needed while maintaining the case on—or returning the case to—the active docket will be the most appropriate course of action.

That said, this rule does not expressly preclude the administrative closure of a case involving a noncitizen in ICE detention. Again, because a noncitizen's status in ICE detention is not a dispositive factor, there may be some cases where administrative closure is necessary or appropriate despite the noncitizen's detention in ICE custody.

As explained below, *see infra* section IV.A of this preamble, such circumstances may include, for example, permitting a detained noncitizen to pursue available relief with USCIS, such as a Form I–601A, Provisional Unlawful Presence Waiver, or to permit evaluations or treatment related to mental competency concerns. Moreover, the Department is cognizant that there may be unique or compelling circumstances warranting the administrative closure of a case involving a noncitizen in ICE detention based on the totality of the circumstances. Though the Department anticipates that such compelling circumstances will be rare, the Department believes that EOIR adjudicators have the expertise and judgment to evaluate the individual facts and circumstances in each case, including in cases where noncitizens are in ICE detention, to identify whether administrative closure is necessary or appropriate in that particular case.

In sum, the Department believes that the ICE detention status of a noncitizen is a crucial factor for EOIR adjudicators to carefully evaluate when considering a motion to administratively close or recalendar a case. Adding ICE detention status as an explicit factor for EOIR adjudicators to consider when applying the “totality-of-the-circumstances” standard ensures that detained cases will continue to be monitored in the most appropriate fashion, while maintaining EOIR adjudicator discretion to administratively close detained cases in the limited scenarios where it may be appropriate.

Comment: Commenters recommended clarifying that both written and oral motions for administrative closure are acceptable. In addition, one commenter raised concerns about a lack of guidance distinguishing when administrative closure or discretionary termination should be used.

Response: With regard to written and oral motions, the Department concludes that the proposed regulatory text is sufficient as written to make clear that an administrative closure motion need not take a particular form and can therefore include both written and oral motions. *See* 8 CFR 1003.1(l)(1) (“Board members may, in the exercise of discretion, administratively close a case upon the motion of a party”), 1003.18(c)(1) (“An immigration judge may, in the exercise of discretion, administratively close a case upon the motion of a party”). If the Department had intended to permit only written motions, the proposed regulatory text would have explicitly stated that limitation.

In response to a commenter's request to provide EOIR adjudicators with more guidance on the differences between administrative closure and termination, the Department believes the rule provides clear standards for the applicability of both administrative closure and termination. *See generally* 8 CFR 1003.18(c), 1003.18(d). The Department notes that there may be limited circumstances where both options are available in a particular case, namely when a noncitizen is pursuing outside relief with USCIS. *Compare* 8 CFR 1003.18(c)(3)(i)(D) (administrative closure factor requiring demonstrating a likelihood of success on outside relief, but not requiring a filing with USCIS), *with* 8 CFR 1003.18(d)(1)(ii)(B) (discretionary termination provision requiring a *prima facie* showing on outside relief, and requiring a filing with USCIS).

For example, if the noncitizen is seeking discretionary termination, has a pending filing with USCIS, and is *prima facie* eligible, the adjudicator may still deny termination as a matter of discretion, but, depending on the individual facts and circumstances of the case, may determine that administrative closure is more appropriate. Because the Department believes that adjudicators are in the best position to determine which procedural tool is most appropriate in a particular case, the Department does not wish to constrain the EOIR adjudicator's discretion, beyond what is already delineated in this rule, by dictating which procedural tool may be necessary or appropriate in any individual case. *See id.* § 1003.1(d)(1)(ii) (requiring adjudicators to use their “independent judgment and discretion” to resolve cases before them), 8 CFR 1003.10(b) (same); *see also Matter of Avetisyan*, 25 I&N Dec. at 695 (explaining that the decision to “administratively close proceedings “involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board,” which falls squarely within the duties of EOIR adjudicators).

However, as explained further in section III.C.4 of this preamble, the Department has provided additional guidance on this discretionary termination ground that the Department believes will better assist EOIR adjudicators in weighing whether administrative closure or termination is most appropriate if both tools are potentially available in a particular case. *See* 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii). For example, the rule now includes a requirement that the noncitizen file any associated petition,

application, or other action with USCIS, with limited exception, before discretionary termination may be granted, which is not required for the similar administrative closure factor. *See id.* §§ 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). Additionally, the final rule clarifies that EOIR adjudicators do not have sua sponte authority to grant termination and must consider the basis for any opposition to termination raised by a party, which will also help EOIR adjudicators to determine whether termination, as opposed to administrative closure, is the most appropriate option if both tools are available in the case. *See id.* §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).

4. Totality-of-the-Circumstances Factors for Administrative Closure

Comment: Numerous commenters raised concerns with specific factors being dispositive to a request for administrative closure.

Response: As a general matter, the Department first emphasizes that the proposed administrative closure factors are encompassed within a broader totality-of-the-circumstances analysis, and no single factor is dispositive. To the extent that commenters raised concerns with specific factors included in the rule, the Department notes that the totality analysis allows adjudicators to consider all relevant factors holistically. For example, the totality analysis allows for the adjudicator to consider and weigh relevant factors, as appropriate, given the particular facts of a given case, including parties' arguments and evidence on how much weight to give a certain factor or why a certain factor may be outweighed by other factors.

Fundamentally, the factors enumerated in the rule, along with any other relevant considerations, are intended to elicit evidence relevant to answering straightforward questions, such as: would administrative closure efficiently and fairly help a case reach its ultimate resolution or alternative disposition? *See* 8 CFR 1003.1(l)(3)(i)(A) and (B), (G) and (H), 1003.18(c)(3)(i)(A) and (B), (G) and (H). Is there an outside application, petition, or action that needs to be adjudicated to determine if further removal proceedings are warranted? *See id.* §§ 1003.1(l)(3)(i)(C), 1003.18(c)(3)(i)(C). If so, how likely is the noncitizen to succeed on such a petition, application, or other action? *See id.* §§ 1003.1(l)(3)(i)(D), 1003.18(c)(3)(i)(D). And is the noncitizen being diligent in pursuing such petition, application, or action? *See id.* §§ 1003.1(l)(3)(i)(F), 1003.18(c)(3)(i)(F). The Department

believes the factors enumerated in the rule help provide EOIR adjudicators with guidance to answer such questions. Commenters' concerns regarding each of the specific factors will be addressed in greater detail elsewhere in this section of this preamble.

Comment: Commenters provided a number of suggested revisions to the proposed administrative closure factors. One commenter recommended modifying the "reason administrative closure is sought" factor to explicitly state that a noncitizen's employment authorization is a valid consideration for the adjudicator. The commenter explained that employment authorization considerations should weigh in favor of administrative closure when a noncitizen has an application pending with EOIR that serves as the basis for their employment authorization. Commenters noted that, in this situation, dismissing or terminating the noncitizen's proceedings can withdraw the underlying pending application for relief on which the noncitizen's employment authorization eligibility is based.

Response: The Department declines to explicitly include employment authorization eligibility as a factor for administrative closure. The Department believes that the totality-of-the-circumstances analysis broadly covers any relevant considerations EOIR adjudicators may assess, and noncitizens may raise such issues identified by commenters if they believe they are relevant to an administrative closure determination. This rule does not preclude EOIR adjudicators from considering employment authorization eligibility as part of the totality of the circumstances for administrative closure where relevant to a particular case. However, the Department notes that employment authorization does not constitute relief, protection, lawful status, deferred action, or similar benefits that would typically have any bearing on removability or relief from removability.

Comment: Commenters also recommended broadening the factor focusing on "any requirement that a case be administratively closed in order for a petitioner, application, or other action to be filed with, or granted by DHS." Commenters recommended broadening this to include any outside agency. Commenters explained that noncitizens may be pursuing collateral relief with agencies other than DHS, and that administrative closure should be available in such instances. Other commenters stated that this factor should clarify that administrative

closure is available even when it is not required for USCIS to adjudicate a specific application.

Response: The Department declines to broaden the factor focusing on any "requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS" to include any outside agency, and not just DHS. This factor is intended to include situations similar to the I-601A, Application for Provisional Unlawful Presence Waiver, where the regulations require administrative closure as a prerequisite to consider that type of waiver. Commenters did not provide, and the Department is unaware of, any specific examples of other entities or agencies where administrative closure is a prerequisite for the petition, application, or other action to be considered or granted.

Lastly, in response to comments stating that administrative closure should be available even when not required for USCIS to adjudicate a specific application, the Department notes that EOIR adjudicators are permitted to administratively close a case when necessary or appropriate, considering the totality of the circumstances, including all relevant factors. 8 CFR 1003.1(d)(1)(ii) (authority of Board), (l)(3) (general administrative closure standards for Board), 1003.10(b) (authority of immigration judges), 1003.18(c)(3) (general administrative closure standards for immigration judges). Thus, the rule does not limit administrative closure in the way commenters suggest, and the Department declines to make any further changes to this specific factor relevant to DHS petitions, applications, or other actions.

Comment: Regarding the "likelihood of success" factor, commenters stated that immigration judges should not be required to consider the likelihood of success of any relief outside of EOIR when determining whether to grant administrative closure, as that ultimate relief determination is made by another adjudicative body, and any initial determination by an immigration judge would be speculative. Instead, one commenter recommended focusing this factor simply on whether the noncitizen filed their application with USCIS. Other commenters recommending retaining, but modifying, this "likelihood of success" factor to focus on the likelihood of "eligibility" or "prima facie eligibility" for relief before USCIS, rather than a likelihood of "success." These commenters believed that such a change would better focus on a noncitizens' prima facie eligibility

for relief, and not whether they would ultimately prevail before USCIS. Additional commenters stated that, while EOIR adjudicators may consider the likelihood of success on any relief outside of EOIR when determining whether to grant administrative closure, this factor should not be relied upon to deny administrative closure. Similarly, another commenter stated that certain evidence, such as bona fide determinations made by USCIS, should be dispositive of this factor, although not required.

Additionally, one commenter recommended explicitly stating that applications filed on behalf of another, such as under the Central American Minors (“CAM”) program, should be considered under the “likelihood of success” factor.

Response: Regarding concerns about the factor addressing the likelihood of success on a petition, application, or other action outside of EOIR, 8 CFR 1003.1(l)(3)(i)(D), 1003.18(c)(3)(i)(D), the Department first notes that this factor has long existed in administrative closure jurisprudence. *See Matter of Avetisyan*, 25 I&N Dec. at 696. Accordingly, as this factor has long been relevant to the determination of whether to grant or deny a request for administrative closure, the Department declines to preclude EOIR adjudicators from considering the “likelihood of success” factor as part of the totality of the circumstances in a decision denying administrative closure, as commenters suggested. Moreover, the Department believes that this factor will help ensure that administrative closure is reserved for cases with a realistic possibility of relief outside of EOIR and is not used as a tool to delay removal proceedings. In practice, this factor can be used to distinguish cases where potential relief is clearly unavailable or so speculative that administrative closure is unwarranted. *See, e.g., id.* (explaining that administrative closure is not appropriate if, for example, “the request is based on a purely speculative event or action (such as a possible change in a law or regulation); an event or action that is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family-based visa); or an event or action that may or may not affect the course of [a noncitizen’s] immigration proceedings (such as a collateral attack on a criminal conviction)”).

Accordingly, the Department declines to modify the “likelihood of success” factor to likelihood of “eligibility” or “prima facie eligibility” as commenters suggested. In retaining this factor, the

Department also generally notes that no factor alone is dispositive, and the consideration of this factor is not intended to be a full adjudication of the merits of the outside relief. Rather, the rule instructs adjudicators to consider the likelihood of success outside of EOIR along with any other relevant factors in the totality of the circumstances.

Furthermore, the Department also declines to make any specific evidence dispositive of this factor, such as bona fide determinations by USCIS. Although such evidence may often weigh heavily in favor of this factor, the Department does not believe it should be treated as dispositive, and notes that the weight given to this factor will be dependent upon a totality analysis. *See generally Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010) (“Immigration Judges have broad discretion . . . to admit and consider relevant and probative evidence.”).

In response to commenters’ concerns regarding the applicability of the “likelihood of success” factor to the CAM program, the Department clarifies that adjudicators may consider any petition, application, or other action outside of EOIR proceedings, which can include programs such as CAM. The totality analysis would allow the adjudicator to consider all relevant considerations related to such a program, including whether the noncitizen would likely succeed in qualifying for such a program and what effects such a program would have on the noncitizen’s removal proceeding, among others.

Comment: With regard to the anticipated duration factor, commenters recommended explicitly stating that adjudicatory timelines or delays at USCIS should not be considered, as those are outside the control of the noncitizen. Other commenters recommended omitting this factor altogether, claiming that the length of administrative closure is outside of a noncitizens’ control when it involves waiting on another adjudicative agency. Another commenter recommended making explicit that administrative closure is appropriate to await visa availability, which may otherwise be viewed as a negative under this factor.

Response: After further consideration, the Department declines to add additional language to the regulatory text for the “anticipated duration” factor, or to remove this factor altogether. Despite commenter suggestions, the Department has decided against adding language explicitly barring EOIR adjudicators from considering adjudicatory timelines

or delays at USCIS. As written, the “anticipated duration” factor is a longstanding consideration imported from *Matter of Avetisyan*, 25 I&N Dec. at 696.

The Department acknowledges that the NPRM preamble explained that DHS adjudication timelines should not be considered as a negative factor weighing against administrative closure. *See* 88 FR at 62261 (“Moreover, the potential duration of the administrative closure while awaiting DHS adjudication, for example, of a pending application before USCIS, should not weigh against the decision to administratively close proceedings.”); 8 CFR 1003.1(l)(3)(i)(E), 1003.18(c)(3)(i)(E) (anticipated duration). However, the Department does not believe it is appropriate to foreclose all consideration of USCIS adjudicatory timelines under this factor, and therefore declines to remove or further limit this provision. For example, remote visa availability may weigh against administrative closure if visa availability is so distant as to be speculative, while an otherwise ready-to-adjudicate application merely waiting on USCIS processing may weigh in favor of administrative closure, despite a potentially lengthy processing time. *See, e.g., Matter of Avetisyan*, 25 I&N Dec. at 696 (explaining that administrative closure was not appropriate when an event or action “is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family-based visa)”). More generally, USCIS adjudicatory timelines will be given appropriate weight depending upon the totality of the circumstances of each particular case. Accordingly, the Department also declines to include explicit language stating that administrative closure is appropriate to await visa availability, or any other specific adjudication. By not listing specific examples in the regulatory text, EOIR adjudicators may determine whether administrative closure is appropriate after consideration of the individual facts and circumstances of each case.

Comment: Some commenters recommended omitting the factor focusing on the responsibility of the parties in contributing to any current or anticipated delays, which commenters believed would be used to fault noncitizens for delays outside of their control, such as adjudications with outside agencies or time to obtain counsel.

Response: In response to commenter concerns about the consideration of parties’ contribution to any delays, the

Department notes that the parties may submit arguments and evidence explaining any delays or potential delays. For example, a noncitizen may submit evidence demonstrating that their relief application was not immediately filed with USCIS because it was particularly complex or required certain additional supporting evidence. The EOIR adjudicator may then consider such evidence in the totality of the circumstances. The Department notes that the NPRM preamble explained that EOIR adjudicators “should consider both the noncitizen’s and DHS’s responsibility for any delay.” 88 FR at 62261. Accordingly, the Department declines to omit this factor altogether from the regulatory text because whether either party contributed to any delay is relevant to an EOIR adjudicator’s assessment of the totality of the circumstances.

Comment: Commenters recommended removing the factor focusing on the ultimate anticipated outcome of the case. Commenters explained that this factor may fail to consider circumstances, such as prosecutorial discretion, where administrative closure itself is the ultimate outcome of the case. Additionally, commenters stated that the term “case” is ambiguous as to whether it refers to removal proceedings before EOIR or other relief the noncitizen may be pursuing outside of EOIR.

Response: The Department declines to remove the “ultimate anticipated outcome of the case” factor. 8 CFR 1003.1(l)(3)(i)(G), 1003.18(c)(3)(i)(G). This factor is intended to help adjudicators determine whether administrative closure would ultimately assist in efficiently concluding removal proceedings. For example, if a case is administratively closed for the noncitizen to pursue relief that would result in lawful status if granted, once recalendared, the case would be able to conclude efficiently by terminating proceedings. *See id.*

§§ 1003.1(m)(1)(i)(D) (requiring termination where the noncitizen has, since the initiation of proceedings, obtained status), 1003.18(d)(1)(i)(D) (same). In contrast, if the underlying basis for the administrative closure request would have little to no effect on the need for continued removal proceedings, then this would weigh against the administrative closure request, although other potential options, such as termination or dismissal, may be available. *See, e.g.,* 8 CFR 239.2(a)(6) (dismissing improvidently issued Notice to Appear).

Additionally, to the extent that DHS requests administrative closure

pursuant to their prosecutorial discretion authority, the Department notes that such a request would not change the ultimate anticipated outcome of the case, which ultimately must be resolved through an order of relief, removal, termination, or dismissal once recalendared.

Finally, to further clarify, the term “case” refers to the removal proceeding before EOIR. By looking at the ultimate anticipated outcome of the case before EOIR, this factor is intended to help adjudicators determine what effect, if any, administrative closure would have in helping adjudicators ultimately complete removal proceedings, whether through an order of relief, removal, dismissal, or termination, as relevant.

5. Specific Calls for Comments

i. Weighing in Favor of Granting Certain Motions for Administrative Closure

Comment: Commenters were supportive of adding language favoring granting motions for administrative closure when the noncitizen demonstrates prima facie eligibility for relief and has demonstrated reasonable diligence in pursuing such relief. Other commenters went further, stating that a pending application with USCIS should be a dispositive factor for granting administrative closure, or that administrative closure should be generally granted so long as the noncitizen states which relief they will be pursuing. These commenters explained that requiring a prima facie eligibility showing was unnecessary, and particularly burdensome for pro se noncitizens.

Moreover, one commenter suggested that, rather than requiring pro se noncitizens to demonstrate a reasonable likelihood of success on the merits—which the commenter stated requires responding to questions of law—and diligence in pursuing any available relief, EOIR instead require that pro se noncitizens demonstrate the basis for the petition, application, or other action and an explanation of the steps that a pro se noncitizen has pursued or intends to pursue within a reasonable time of the administrative closure in furtherance of the petition, application, or other action for adjudication.

Another commenter recommended clarifying that “reasonable diligence” should not consider any adjudicatory delays outside the noncitizen’s control. One commenter requested clarification as to what would constitute “reasonably diligent.”

Response: Upon further consideration, including consideration of the comments received, the

Department declines to further amend this provision to weigh in favor of granting certain motions for administrative closure, other than joint motions, as set forth in 8 CFR 1003.1(l)(3) and 1003.18(c)(3). The Department does not believe that any single factor should be dispositive, nor required to be weighed more heavily than another, in the “totality-of-the-circumstances” determination. Rather, the totality determination allows the adjudicator to consider all relevant factors and weigh them accordingly. Treating a single factor as dispositive, or requiring it to be weighed more heavily, would unnecessarily limit adjudicator discretion to determine the best course of action in each individual case. *See, e.g., Matter of Avetisyan*, 25 I&N Dec. at 694 (explaining that EOIR adjudicators have “the responsibility to exercise independent judgment and discretion” in adjudicating the cases before them). For example, in many cases, a pending application with USCIS may ultimately be a determinative factor weighing in favor of administrative closure while that application is being adjudicated by USCIS, while in other cases, administrative closure may not be necessary or appropriate where there is such a pending application with USCIS.

Because the Department is codifying a totality analysis, wherein the adjudicator may consider, and weigh accordingly, a noncitizen’s reasonable likelihood of success on the merits and reasonable diligence in pursuing such relief, rather than ascribing the weight of such considerations in the rule, the Department declines to further address concerns related to the “reasonable likelihood of success” or “reasonable diligence” standards.

ii. Specific Scenarios Allowing Administrative Closure With No Pending Relief Outside of EOIR

Comment: Some commenters were in favor of adding explicit scenarios allowing for administrative closure when there is no pending relief outside of EOIR, which they believed would help provide consistency to adjudicators. For example, commenters recommended adding the following non-exclusive scenarios: (1) the noncitizen marries a U.S. citizen and intends to pursue an I-130 petition followed by adjustment of status or consular processing; (2) the noncitizen has been a victim of a qualifying crime for U nonimmigrant status and intends to pursue a law enforcement certification; (3) the noncitizen is prima facie eligible for Special Immigrant Juvenile classification (“SIJ”) and intends to pursue an SIJ predicate order

in State court; (4) the noncitizen intends to seek mental health treatment and there is a reasonable possibility that such treatment could assist with the noncitizen's pursuit of relief from removal; (5) the noncitizen has suffered abuse in their country of origin but is not able to discuss the details of the abuse with their attorney, though the incident could make them eligible for asylum; (6) the noncitizen is otherwise eligible for cancellation of removal but needs to accrue additional physical presence; (7) the noncitizen is in withholding-only proceedings but is not considered a removal priority by DHS; or (8) the noncitizen believes that they are stateless.

Another commenter stated that limiting administrative closure to specific scenarios was unnecessary, while another commenter stated that they did not have concerns with doing so, as long as the scenarios were not exclusive. Moreover, another commenter recommended clarifying that, in scenarios where the noncitizen is not pursuing outside relief, any reasons for requesting administrative closure should be considered.

Response: After further consideration, the Department has decided against adding explicit scenarios in which administrative closure may be appropriate outside of a pending relief application. Commenters provided several examples of scenarios that may warrant administrative closure, depending on the circumstances of the individual case. EOIR may, as appropriate, issue further nonregulatory case examples or training to adjudicators regarding administrative closure and other docket management tools. However, the Department believes that retaining the overall totality-of-the-circumstances analysis will best allow EOIR adjudicators to determine whether a specific request for administrative closure should be granted. Certain totality factors may be more relevant than others in a specific case, such as the speculative nature of the underlying reason for requesting administrative closure, the diligence in pursuing the underlying reason, and how success in pursuing the underlying reason would ultimately affect the pending removal proceeding.

The Department also declines to incorporate the commenter's suggestion to clarify that any reasons for requesting administrative closure should be considered in cases where a noncitizen is not pursuing outside relief. The Department believes that the regulatory text is sufficiently clear that pursuing relief outside of EOIR proceedings is not a prerequisite for the administrative

closure of a case and that the totality-of-the-circumstances analysis appropriately encompasses consideration of factors relevant to a determination of whether to administratively close a case, including the reason administrative closure is sought. *See* 8 CFR 1003.1(l)(3) (explaining the totality-of-the-circumstances analysis and stating that “[a]lthough administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings[,] . . . such a pending petition, application, or other action is not required for a case to be administratively closed”), 1003.18(c)(3) (same); *see also id.* §§ 1003.1(l)(3)(i)(A) (identifying “[t]he reason administrative closure is sought” as a relevant factor for consideration as the circumstances of the case warrant), 1003.18(c)(3)(i)(A) (same).

iii. Weighing Opposition to Motions for Administrative Closure

Comment: Many commenters supported making a noncitizen's opposition to administrative closure at least a primary consideration, stating that a noncitizen's desire to proceed with their case before EOIR should be a persuasive reason not to administratively close their case. Some commenters recommended going further, proposing that adjudicators should not be able to administratively close proceedings over a noncitizen's objection, particularly if the noncitizen desires to move forward with their removal proceedings in order to pursue available relief before EOIR. Commenters explained that administratively closing proceedings in such circumstances could foreclose relief that is only available in removal proceedings, remove the noncitizen's eligibility for work authorization that is premised on a pending application before EOIR, as well as discourage legal service providers from providing representation before EOIR. Relatedly, one commenter recommended providing noncitizens with 60 days to submit an opposition brief to a DHS motion for administrative closure.

One commenter stated that they would be opposed to the final rule implementing a provision that would provide that if one party opposed administrative closure, the primary consideration for an adjudicator would be whether that party provided a persuasive reason for the case to proceed. Specifically, the commenter stated that such a provision would codify the holding in *Matter of W-Y-U-*, 27 I&N Dec. 17, 20 (BIA 2017), and disproportionately benefit DHS, as DHS

would be more likely to oppose administrative closure. The commenter was also concerned that including such a primary consideration requirement would, in cases involving DHS opposition, outweigh a noncitizen's otherwise approvable motion for administrative closure in the name of efficiency at the expense of a noncitizen's due process rights.

One commenter also requested general clarification as to the meaning of “a persuasive reason” that the party opposing administrative closure must provide.

Response: After further consideration, the Department has decided not to include a regulatory provision requiring the weighting of any specific administrative closure factor more than any others. The Department ultimately believes that EOIR adjudicators are in the best position to determine when administrative closure is appropriate under the totality of the circumstances, and weighting certain factors differently would unnecessarily reduce adjudicators' discretion. Accordingly, to the extent that the Board's holding in *Matter of W-Y-U-* that “the primary consideration . . . in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits,” *id.*, is inconsistent with the unweighted, “totality-of-the-circumstances” standard implemented by this rule, *Matter of W-Y-U-*, 27 I&N Dec. 17, is superseded.³

To be clear: this is not to say that a party's opposition to a motion for administrative closure is not a relevant factor for EOIR adjudicators to consider; to the contrary, it is listed in the regulatory text as such. 8 CFR 1003.1(l)(3)(i)(B), 1003.18(c)(3)(i)(B). And, practically speaking, in many cases a noncitizen's opposition to administrative closure based on a desire to pursue relief before EOIR will likely weigh heavily in favor of denying a

³ The Attorney General has the authority to overrule Board decisions, *see* 8 CFR 1003.1(g)(1) (describing Board decisions as binding “[e]xcept as Board decisions may be modified or overruled by the Board or the Attorney General”), and, in general, agencies are permitted to change their policies, provided that a reasoned explanation for the policy is given. *See generally Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X internet Servs.*, 545 U.S. 967, 981–82 (2005))). Such policy changes may be through rulemaking or through adjudication. *See SEC v. Chenery Corp.*, 332 U.S. 194, 215 (1947) (holding that agencies may promulgate a general rule of law by either regulation or adjudication).

motion to administratively close proceedings. However, requiring EOIR adjudicators to weight a party's opposition more heavily when adjudicating a motion for administrative closure or maintaining the "primary consideration" standard from *Matter of W-Y-U* unnecessarily limits adjudicator discretion to evaluate the totality of the circumstances presented by each case.

In response to commenters' suggestions to not allow administrative closure over a noncitizen's objection, the Department believes that the importance of providing EOIR adjudicators with the authority to take "necessary or appropriate" action for the disposition or alternative resolution of cases weighs in favor of providing adjudicators with the ability to administratively close proceedings over a party's objection. See 8 CFR 1003.1(d)(1)(ii), 1003.10(b). As explained in the NPRM, "there is a long history of EOIR adjudicators utilizing administrative closure as a helpful tool for managing dockets at both the immigration courts and the Board." 88 FR at 62255. The decision to administratively close proceedings "involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board." *Matter of Avetisyan*, 25 I&N Dec. at 695. As such, immigration judges and Appellate Immigration Judges are in the best position to determine how a case should proceed, which includes the use of administrative closure when necessary or appropriate.

Moreover, the rule provides, and motions practice before EOIR dictates, that an adjudicator will consider a party's objection in the totality of the circumstances, which provides the noncitizen the ability to explain why administrative closure should not be granted. Practically speaking, the Department expects that it would be rare for an adjudicator to administratively close proceedings over a noncitizen's objection if the noncitizen prefers to proceed with a relief application in removal proceedings. However, there may be cases where an immigration judge or Appellate Immigration Judge determines it is necessary or appropriate to do so. In these cases, the Department notes that the parties also retain the ability to move for recalendar as necessary.

Because the Department believes that EOIR adjudicators will provide parties with a sufficient opportunity to explain any opposition to a motion to administratively close a case pursuant to both the requirements of this rule and

existing EOIR motions practice, the Department declines to add a 60-day opposition briefing regulatory requirement specific to administrative closure motions. See generally Immigration Court Practice Manual ch. 5 (explaining standards and procedures for motions before EOIR); BIA Practice Manual ch. 5 (same).

Finally, because the Department is not adding the "persuasive reason" language to the regulatory text, the Department has determined it is unnecessary to further clarify that phrase as part of this rulemaking.

iv. Sua Sponte Administrative Closure

Comment: Some commenters stated that EOIR adjudicators should be able to sua sponte administratively close proceedings, particularly in cases involving pro se noncitizens. Commenters explained that pro se noncitizens may not know that administrative closure is available to them, particularly when they may be eligible for relief with USCIS. Commenters noted that the EOIR adjudicator should explain the possible availability of administrative closure to the noncitizen and allow the noncitizen to raise any concerns with administratively closing proceedings.

In contrast, other commenters opposed sua sponte administrative closure, stating that parties should have the opportunity to present their views on administrative closure before the adjudicator makes their decision. Alternatively, commenters noted that, if the Department decides to provide for sua sponte administrative closure authority, certain safeguards should be implemented, including: (1) preventing sua sponte administrative closure over a noncitizens' objection; and (2) requiring 60 days' notice of sua sponte administrative closure, which would allow the parties time to object. Commenters also recommended providing pro se noncitizens with simple written resources explaining administrative closure (as well as termination).

Response: After further consideration, the Department has decided not to include sua sponte administrative closure authority. The Department wants to ensure that the parties are able to provide any evidence relevant to an administrative closure determination, and sua sponte administrative closure authority would potentially allow adjudicators to exercise such authority without consideration of such evidence.

However, the Department notes that, in practice, if an adjudicator believes that administrative closure may be appropriate in a given case, the

adjudicator can raise the issue with the parties. If a party is then amenable to administrative closure, the adjudicator may inquire whether the party wishes to move for administrative closure. For those cases before the Board, the adjudicator may request supplemental briefing from the parties to ensure that the positions of the parties are considered as part of the administrative closure determination. 8 CFR 1003.3(c)(1). The requirement of a motion seeking administrative closure ensures that the parties can state their positions on administrative closure before the adjudicator decides whether administrative closure is appropriate in the totality of the circumstances.

Additionally, although the Department is not providing for sua sponte administrative closure authority, the Department appreciates commenter suggestions related to ensuring information about administrative closure and termination is available to all noncitizens before EOIR, including those who may not be represented by counsel. While the Department declines to implement suggestions like providing written information about administrative closure and termination to pro se noncitizens as regulatory requirements via this rulemaking, the Department remains committed to providing information to assist pro se respondents in EOIR proceedings and exploring ways outside of the rulemaking process to adequately do so. See generally EOIR, *Immigration Court Online Resource*, <https://icor.eoir.justice.gov> (last visited Jan. 25, 2024) (providing information about EOIR proceedings).

6. Recalendar

Comment: Commenters provided a number of suggestions for modifying the recalendar factors. First, commenters requested that the Department clarify which party bears the burden of persuasion on the second factor—the basis for any opposition to recalendar—and whether the burden of persuasion on that factor will shift during the EOIR adjudicator's consideration.

Second, commenters stated that the factor at 8 CFR 1003.1(l)(3)(ii)(D) and 1003.18(c)(3)(ii)(D), considering the length of time between administrative closure and the filing of any application, should be removed altogether, or at least carefully applied. Commenters argued that, for example, relief applications for noncitizen children may take longer to prepare, and that any such preparation should not be viewed as dilatory under this recalendar factor. Commenters recommended removal of this factor and

stated that it does not adequately take into account the underlying reasons for any delay in filing.

Third, commenters recommended amending the “likelihood of success” factor at 8 CFR 1003.1(l)(3)(ii)(F) and 1003.18(c)(3)(ii)(F) to focus on *prima facie* eligibility for outside relief, rather than ultimate success of the relief. Commenters stated that this would prevent immigration judges from making initial determinations on outside relief, and instead focus on general eligibility.

Fourth, commenters recommended modifying the factor at 8 CFR 1003.1(l)(3)(ii)(G) and 1003.18(c)(3)(ii)(G), focusing on the ultimate anticipated outcome of the case, to prevent immigration judges from assessing the merits of any relief applications filed with EOIR before the noncitizen has had a chance to present evidence. Commenters suggested focusing this provision on the anticipated outcome if such outcome is other than seeking a final adjudication before EOIR.

Fifth, one commenter recommended using a “good cause” standard for recalendaring, which the commenter stated would benefit noncitizens who did not wish for their removal proceeding to be closed.

Response: As an initial matter, the Department notes that a case will be recalendared only upon the motion of a party. *See* 8 CFR 1003.1(l)(2) (“[T]he Board may, in the exercise of discretion, recalendar the case pursuant to a party’s motion to recalendar.”), 1003.18(c)(2) (same provision for immigration judges). The rule sets forth a non-exhaustive list of factors for the EOIR adjudicator to consider when making a decision with respect to a party’s motion to recalendar a case. *Id.* §§ 1003.1(l)(3)(ii)(A) through (H), 1003.18(c)(3)(ii)(A) through (H) (listing factors). And, as discussed in section III.B.3 of this preamble and explained in further detail in section IV.A, the Department is adding an additional factor—the ICE detention status of the noncitizen—to the non-exhaustive list of factors for consideration when evaluating a motion to recalendar. *Id.* §§ 1003.1(l)(3)(ii)(H), 1003.18(c)(3)(ii)(H).

Further, as is consistent with general motions practice before EOIR, a party moving to recalendar will have the opportunity to present their argument to the EOIR adjudicator as to why they believe the case should be recalendared. In doing so, the party may identify the factors they believe are relevant in the recalendaring determination, either from the factors provided by regulation, or by indicating any other factors the

party believes to be relevant to their argument. As is customary in motions practice before EOIR, the adjudicator will then give the opposing party the opportunity to respond to the motion to recalendar. However, this is not a burden-shifting framework, as the adjudicator will ultimately be making the determination based on the totality of the circumstances—considering the arguments made by the parties in support of and in opposition to the motion—and in the exercise of the adjudicator’s discretion. *See id.* §§ 1003.1(l)(2), 1003.18(c)(2) (adjudicators may recalendar in their discretion).

Second, with regard to the factor considering the length of time between administrative closure and the filing of any application, the Department notes that EOIR adjudicators will consider any relevant evidence in the totality of the circumstances. *Id.* §§ 1003.1(l)(3), 1003.18(c)(3). Using the commenter’s example of preparing a relief application for a noncitizen child, the Department notes that the party may present evidence that any gap in time between administrative closure and the filing of a relief application was due to the complicated nature of preparing that specific relief application, which the adjudicator will consider in assessing the totality of the circumstances. The Department reiterates that in cases where a motion to recalendar is not filed jointly or affirmatively unopposed, the ultimate determination made by EOIR adjudicators will be based on the totality of the circumstances, guided by the non-exhaustive factors established by this rule. *Id.* This standard provides EOIR adjudicators the flexibility to consider all relevant evidence and circumstances, including those surrounding the length of time between the granting of administrative closure and the filing of any petition, application, or other action.

Third, the Department declines to amend the “likelihood of success” factor at 8 CFR 1003.1(l)(3)(ii)(F) and 1003.18(c)(3)(ii)(F) to adopt a “*prima facie*” standard as commenters suggested. Including a consideration of the likelihood that a noncitizen will succeed on a petition, application, or other action pending outside of EOIR as a relevant factor for reopening is not meant to establish an onerous requirement for EOIR adjudicators. Rather, this factor, derived from *Matter of Avetisyan*, 25 I&N Dec. at 696, is meant to identify circumstances where there is little to no likelihood of success on an outside petition, application, or other action, such that recalendaring may be appropriate in light of the

totality of the circumstances. As discussed in section III.B.4 of this preamble, this factor is intended to ensure that administrative closure is reserved for cases with a realistic probability of relief outside of EOIR.

Fourth, the Department does not intend that EOIR adjudicators substantively adjudicate a noncitizen’s ultimate eligibility for relief when assessing the recalendaring factor focusing on “the ultimate anticipated outcome [of] the case.” 8 CFR 1003.1(l)(3)(ii)(G), 1003.18(c)(3)(ii)(G). Rather, this factor is included for the adjudicator to consider whether recalendaring is sought to request termination of proceedings or to seek relief before EOIR, among other actions, which would ultimately conclude removal proceedings. Using the commenter’s example, if a noncitizen is moving to recalendar proceedings to seek relief for which they are newly eligible, and should the totality of the circumstances support recalendaring, then the EOIR adjudicator may decide to recalendar proceedings to allow the noncitizen to pursue that relief, which would bring finality to the removal proceedings. The EOIR adjudicator will not, as commenters suggested, determine the noncitizen’s ultimate eligibility for relief outside of the normal course of proceedings before EOIR.

Fifth, the Department is of the opinion that the factors set forth in this rulemaking provide clear guidance to adjudicators that is more workable than a generalized “good cause” standard. Accordingly, the Department declines to codify a “good cause” standard for recalendaring proceedings and will retain the recalendaring provisions as proposed in the NPRM, with the addition of one factor—the ICE detention status of the noncitizen—as explained previously. *See id.* §§ 1003.1(l)(3)(ii)(H), 1003.18(c)(3)(ii)(H).

C. Termination and Dismissal

1. Distinguishing Between Termination and Dismissal

Comment: Commenters expressed support for the rule’s distinction between termination and dismissal, stating that it provided needed clarity to allow EOIR adjudicators and parties to focus on the substantive bases for disposition of a case rather than diverting attention to semantic or formal distinctions. However, some commenters stated that DHS motions to dismiss should not be granted as a matter of course or treated as dispositive; rather, commenters

emphasized the importance of allowing noncitizens the opportunity to provide argument before the motion is adjudicated. Commenters also explained that granting DHS motions to dismiss could foreclose a noncitizen's ability to pursue relief before EOIR.

Response: The Department agrees with the need to draw a distinction between termination and dismissal and has not made any additional changes to the language proposed by the NPRM. See 88 FR at 62262 (distinguishing between termination and dismissal); 8 CFR 1239.2(b). Regarding commenter concerns that DHS motions to dismiss may be treated as dispositive or granted as a matter of course, the Department reiterates that, while this rule clarifies the distinction between termination and dismissal, it does not otherwise alter how EOIR adjudicators evaluate motions, including DHS motions to dismiss. See *Matter of G–N–C–*, 22 I&N Dec. 281, 284 (BIA 1998) (explaining that the language of 8 CFR 239.2(a) (1998) and 239.2(c) (1998) “marks a clear boundary between the time prior to commencement of proceedings, where [DHS] has decisive power to cancel proceedings, and the time following commencement, where [DHS] merely has the privilege to move for dismissal of proceedings” and that, based on the distinction, “the regulation presumably contemplates not just the automatic grant of a motion . . . , but an informed adjudication by” EOIR adjudicators “based on an evaluation of the factors underlying [DHS’s] motion”).

Further, the Department notes that nothing in the rule mandates that a DHS motion to dismiss should be granted automatically or as a matter of course. Rather, the rule distinguishes between dismissal and termination and clarifies that DHS may only seek dismissal of proceedings for reasons specified in 8 CFR 239.2(a), as cross referenced by 8 CFR 239.2(c). See 8 CFR 1239.2(b) and (c). Otherwise, a motion to dismiss that is not in accordance with 8 CFR 239.2(a) “shall be deemed a motion to terminate” and adjudicated pursuant to the standards outlined in this rule for those motions, which include consideration of a party’s opposition to a motion to terminate. 8 CFR 1239.2(b); *id.* §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).

Moreover, the Department emphasizes that in scenarios where a noncitizen opposes dismissal of their case because they would prefer to pursue relief before EOIR in removal proceedings, nothing in the rule prevents the parties from presenting relevant evidence as to whether proceedings should be dismissed for any of the reasons provided in 8 CFR 239.2(a) or prevents

a noncitizen in removal proceedings before EOIR from indicating that they wish for proceedings to go forward despite a DHS motion to dismiss. Rather, motions to dismiss follow the same general motions practice before EOIR as any other type of motion, which includes responses to motions. See generally Immigration Court Practice Manual ch. 5; BIA Practice Manual ch. 5. As with any motion, before making a determination on a DHS motion to dismiss, an EOIR adjudicator will consider the basis for the motion, any opposition to the motion, and any relevant arguments and evidence presented by the parties. See, e.g., *Matter of G–N–C–*, 22 I&N Dec. at 284–85 (concluding that “a [DHS] motion to terminate proceedings must be adjudicated . . . as would any other motion” and finding error to the extent that an immigration judge terminated proceedings “without considering arguments from both sides”).

In sum, the rule neither precludes noncitizens from making arguments regarding a DHS motion to dismiss, nor indicates that a DHS motion to dismiss should be granted as a matter of course. Therefore, the Department has retained the provision at 8 CFR 1239.2(b), as proposed in the NPRM, without further change.

2. Authority To Terminate Cases

Comment: One commenter stated that this rule would inappropriately give EOIR adjudicators the authority to terminate cases that is not supported by the INA or other law. The commenter opined that EOIR adjudicators only have the authority to terminate or dismiss a pending case if DHS cannot sustain the charges of removability, or if a noncitizen has obtained an immigration benefit or relief that gives them lawful status or U.S. citizenship, or renders the noncitizen no longer subject to removal. Citing section 240(c)(1)(A) of the Act, 8 U.S.C. 1229a(c)(1)(A), and *Matter of S–O–G– & F–D–B–*, 27 I&N Dec. 462 (A.G. 2018), the commenter asserted that EOIR adjudicators otherwise lack the authority to end removal proceedings entirely using termination or dismissal because the INA requires an immigration judge to decide whether a noncitizen is removable at the conclusion of removal proceedings. Specifically, the commenter stated that terminating cases to allow noncitizens to apply for an immigration benefit or relief from a separate agency is premature, presupposes that a noncitizen will receive a benefit or relief—despite EOIR not being the adjudicator of the relief—and conflicts with the statutory obligation to

determine whether a noncitizen is removable. The commenter also expressed concern about maintaining separation-of-function principles and stated that an immigration judge may not override or usurp DHS’s exercise of prosecutorial discretion or authority.

Response: The Department disagrees with the commenter and believes that the termination and dismissal authorities implemented by this rule are fully consistent with the INA. As the Department explained in response to similar concerns related to administrative closure authority, see section III.B.1 of this preamble, the INA provides the Attorney General with the authority to promulgate regulations that the Attorney General deems necessary for implementing the INA, which includes overseeing EOIR’s adjudication system. See INA 103(g)(1)–(2), 8 U.S.C. 1103(g)(1)–(2). Exercising this statutory authority, the Attorney General has promulgated regulations providing EOIR adjudicators with the general authority to “take any action consistent with their authorities” as “appropriate and necessary for the disposition” of cases. 8 CFR 1003.1(d)(1)(ii), 1003.10(b). The Department is now using this rulemaking to explicitly define these actions to include termination and dismissal. See *id.* (“Such actions include administrative closure, termination of proceedings, and dismissal of proceedings.”).

By adding this language, the Department is making clear that termination and dismissal authority is “consistent with . . . authorities under the Act and the regulations.” *Id.* §§ 1003.1(d)(1)(ii), 1003.10(b); see also *Gonzalez v. Garland*, 16 F.4th 131, 141 (4th Cir. 2021) (explaining that the general regulatory authority encompassing the termination of proceedings is consistent with the INA). Nothing in the INA explicitly precludes EOIR adjudicators from terminating or dismissing removal proceedings. See *Gonzalez*, 16 F.4th at 141–42 (“[W]e fail to see how the general power to terminate proceedings is ‘[in]consistent’ with the authorities bestowed by the INA [and] . . . have found no provisions stating that [EOIR adjudicators] *cannot* terminate removal proceedings”). Indeed, such authority is necessarily inherent in the statute, including, as noted by the commenter, when charges of removability cannot be sustained. See, e.g., *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) (“If the DHS meets its burden, the [i]mmigration [j]udge should issue an order of removal; if it cannot, the [i]mmigration [j]udge should terminate proceedings.”).

The Department also believes these termination and dismissal provisions are consistent with the specific INA provisions governing removal proceedings. Much like administrative closure authority, termination and dismissal authority provides methods for EOIR adjudicators to manage the cases on their dockets in furtherance of their statutory responsibility to adjudicate cases. See INA 240(a)(1), 8 U.S.C. 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen].”). For example, the discretionary termination provision raised by the commenter, which focuses on a noncitizen pursuing outside relief with USCIS, is consistent with this statutory scheme governing removal proceedings. See 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). In many cases, noncitizens in removal proceedings may be eligible for relief before USCIS that would, if granted, nullify the grounds of inadmissibility or removability in removal proceedings. Thus, authorizing, but not requiring, EOIR adjudicators to discretionarily terminate such cases, where appropriate, for noncitizens to pursue the specified relief furthers the statutory scheme by allowing USCIS to adjudicate relief that would directly affect whether the noncitizen is removable. See *Matter of Coronado Acevedo*, 28 I&N Dec. 648, 651–52 (A.G. 2022) (indicating that precluding termination of proceedings in certain common situations not accounted for in the regulations “would undermine fair and efficient adjudication” of cases in some instances, including where “termination is necessary for the respondent to be eligible to seek immigration relief before USCIS”) (cleaned up).

Similarly, the Department also agrees with the Fourth Circuit’s reasoning in *Gonzalez*, concluding that the INA’s requirement that an immigration judge shall decide whether a noncitizen is removable at the conclusion of proceedings “certainly does not forbid a termination or delay of ‘the proceeding.’” 16 F.4th at 141; INA 240(c)(1)(A), 8 U.S.C. 1229a(c)(1)(A).

Moreover, the Department, as well as DHS, have long recognized that termination is consistent with the INA by authorizing or acknowledging its use in certain circumstances, such as when it would allow noncitizens to seek specific relief or status that the INA makes available to them outside of removal proceedings. See, e.g., 8 CFR 1239.2(f) (2023) (allowing a noncitizen to seek termination to proceed on a naturalization application if certain conditions are met); see also *id.*

214.14(c)(1)(i) (recognizing that a noncitizen may seek termination before EOIR while USCIS adjudicates their petition for U nonimmigrant status); *id.* 214.11(d)(1)(i) (recognizing that a noncitizen may seek termination before EOIR while USCIS adjudicates their petition for T nonimmigrant status). However, as explained in the NPRM, the Department believes that it is important for EOIR adjudicators to have termination authority outside of these existing circumstances, which do not capture all situations where EOIR adjudicators’ exercise of that authority may be necessary or appropriate for the disposition of a case. See, e.g., 88 FR at 62263–64 (discussing reasons for requiring or permitting termination in circumstances specified by the rule).

In opposing these changes, the commenter’s reliance on *Matter of S-O-G- & F-D-B-* is misplaced. *Matter of S-O-G- & F-D-B-* held that immigration judges have no inherent authority to terminate or dismiss removal proceedings and that immigration judges may dismiss or terminate proceedings only under the circumstances expressly identified in the regulations or where DHS fails to sustain charges of removability. 27 I&N Dec. at 462. Notably, this decision did not call into question the validity of regulatory provisions expressly authorizing termination, and so does not support the proposition that termination and dismissal are not statutorily authorized. *Id.* at 463 (holding that EOIR adjudicators “may not terminate or dismiss those proceedings for reasons other than those expressly set out in the relevant regulations or where DHS has failed to sustain the charges of removability.”). *Matter of S-O-G- & F-D-B-* instead focused on whether an EOIR adjudicator’s general regulatory authority to take any necessary and appropriate actions includes termination. See *id.* at 466 (analyzing whether termination or dismissal would “exceed the authorized bases for dismissal or termination in the regulations”).

In any event, *Matter of S-O-G- & F-D-B-* has been overruled by the Attorney General and its rationale for limiting termination and dismissal to certain narrow circumstances was previously rejected by the Fourth Circuit. See *Matter of Coronado Acevedo*, 28 I&N Dec. at 651 (explaining that “*S-O-G- & F-D-B-* has imposed rigid procedural requirements that would undermine . . . fair and efficient adjudication in certain immigration cases”) (cleaned up); *Gonzalez*, 16 F.4th at 142. Furthermore, this rulemaking now clarifies the scope of an EOIR

adjudicator’s termination authority by amending the general regulatory provision discussed in *Matter of S-O-G- & F-D-B-* to explicitly include termination as an available action. See 8 CFR 1003.1(d)(1)(ii), 1003.10(b).

For similar reasons, these provisions are also consistent with the policies underlying the INA by giving EOIR adjudicators the authority to terminate cases where it would advance the fairness and efficiency goals of the immigration system. See *Stone v. INS*, 514 U.S. 386, 398 (1995) (noting that “[u]nderlying considerations of administrative . . . efficiency and fairness to the [noncitizen]” are important considerations when interpreting the INA). The Department believes that this provision of the rule will help to promote fairness by allowing discretionary termination for noncitizens to pursue an application for relief or status with USCIS that Congress has made available to them. See *Meza-Morales v. Barr*, 973 F.3d 656, 665 (7th Cir. 2020) (explaining that “cases must be disposed of fairly, and granting a noncitizen the opportunity to pursue relief to which she is entitled may be appropriate and necessary for a fair disposition”). The Department believes that discretionary termination provisions would also help promote efficiency by saving adjudicatory resources for other cases that are ready for resolution in removal proceedings and by limiting the issues to be resolved by EOIR adjudicators should DHS initiate new proceedings.

The Department also disagrees with the commenter that the termination provisions raise separation-of-function concerns or impede DHS’s prosecutorial authority in any way. The Department has fully considered the separate roles and responsibilities of DHS and EOIR in removal proceedings and has determined that codifying EOIR adjudicators’ authority to grant termination under the specific circumstances identified in the rule is consistent with EOIR’s independent adjudicatory authority and would not interfere with DHS’s prosecutorial functions. It is well-established that DHS exercises its prosecutorial authority by initiating proceedings and that EOIR adjudicators do not have the authority to review that decision. See, e.g., *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 170 (BIA 2017) (explaining that EOIR adjudicators do not have the authority to review DHS’s decision to initiate removal proceedings in a particular case). This rule in no way precludes, alters, or reduces DHS’s authority or ability to initiate

proceedings, as such a decision is exclusively within the purview of DHS.

Further, this rule implements several limitations to ensure that discretionary termination authority is not used in a manner that would otherwise conflict with DHS's prosecutorial authority. First, the rule limits the availability of termination to specific, well-defined scenarios. *See* 8 CFR 1003.1(m)(1), 1003.18(d)(1); *see also* 88 FR 62242, 62264 (explaining the bases for discretionary termination in specific discrete scenarios, including where the noncitizen is a beneficiary of TPS, deferred action, and deferred enforced departure, or where an immigrant visa is immediately available to the noncitizen and USCIS has granted a Form 601-A waiver).

Second, in cases where discretionary termination may be authorized because a noncitizen is seeking relief or lawful status that would end the need for continued removal proceedings, the rule imposes additional requirements to ensure that termination is not granted prematurely. For example, as discussed in section IV.G of this preamble, the Department has modified this provision to apply only to cases where the noncitizen has first filed their application with USCIS and has demonstrated *prima facie* eligibility for such relief, with limited exceptions. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). The Department believes that this modification will mitigate the risk that termination is granted where a noncitizen has no intention of filing the application or does not have a substantial likelihood of obtaining such relief. Additionally, the Department believes that the filing requirement will ensure a seamless transition of the noncitizen's case to USCIS and allow DHS to monitor the adjudication of that case and, if appropriate, refer the noncitizen to removal proceedings after the conclusion of any USCIS adjudications. *See* 8 CFR 239.1(a) (providing DHS immigration officers, including certain USCIS officers, with the authority to issue notices to appear to initiate removal proceedings.).

Third, the rule only allows termination upon the motion of a party, thereby precluding an EOIR adjudicator's use of sua sponte termination. *See id.* §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).

Fourth, the rule also explicitly requires EOIR adjudicators to consider the parties' arguments in support of or in opposition to discretionary termination when adjudicating the motion to terminate, to ensure that the adjudicator has the full benefit of the

parties' positions on such termination. The Department believes that this requirement will ensure that DHS's prosecutorial interests in the case are considered. If DHS believes that termination is not warranted in a particular case, the rule provides DHS with an opportunity to present its reasons for opposing termination and requires EOIR adjudicators to consider those reasons in deciding whether termination is necessary or appropriate in the case. *See id.* Additionally, the Department notes that DHS can appeal an immigration judge's decision to the Board or seek reconsideration should DHS disagree with termination. *See* 8 CFR 1003.38 (appeals); 1003.23 (reconsideration).

Fifth, the rule's catch-all discretionary termination ground explicitly provides that EOIR adjudicators may only terminate outside of the enumerated circumstances where, "[d]ue to circumstances comparable to" the enumerated provisions, "termination is similarly necessary or appropriate for the disposition or alternative resolution of the case." 8 CFR 1003.1(m)(1)(ii)(F), 8 CFR 1003.18(d)(1)(ii)(F). However, the rule specifies that the EOIR adjudicator may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion. *See* 8 CFR 1003.1(m)(1)(ii)(F), 8 CFR 1003.18(d)(1)(ii)(F).

Sixth, the Department notes that the rule does not require EOIR adjudicators to terminate proceedings with prejudice. In cases where an EOIR adjudicator terminates proceedings without prejudice, nothing in this rule precludes DHS from deciding, in the exercise of their prosecutorial authority and discretion, to reinstate removal proceedings.

Seventh, the longstanding dismissal provision at 8 CFR 1239.2(c), which the Departments have retained in the final rule, reinforces the principle that EOIR adjudicators have no authority to grant discretionary termination for reasons that would encroach on DHS's exercise of prosecutorial discretion. That provision allows for dismissal of removal proceedings in certain circumstances related to DHS's exercise of prosecutorial discretion, such as where the charging document was "improvidently issued" or continuation of the case is no longer "in the best interest of the government." *See* 8 CFR 239.2(a)(6), (7). However, an EOIR adjudicator may only grant dismissal of proceedings for these reasons where DHS has affirmatively moved to dismiss

the case on one of these grounds. The rule provides no similar basis for discretionary termination on the motion of the noncitizen. *See* 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).

Taken together, the Department believes that these limitations and additional modifications of discretionary termination authority are sufficient to address any concerns that the rule would allow EOIR adjudicators to encroach on DHS's prosecutorial authority.

3. Mandatory Termination

Comment: Commenters provided several recommendations regarding the mandatory termination grounds. Commenters recommended modifying the factor covering scenarios when no charge of deportability, inadmissibility, or excludability can be sustained, to include "alienage." Commenters explained that, if DHS fails to establish alienage, then the case must be terminated.

Response: The Department believes it is unnecessary to explicitly include DHS's failure to establish alienage under the mandatory termination ground related to a failure to sustain the charges of inadmissibility against the noncitizen, as such scenarios are already encompassed by the mandatory termination ground for a failure to sustain charges of inadmissibility. 8 CFR 1003.1(m)(1)(i)(A), 1003.18(d)(1)(i)(A) (listing "[n]o charge of deportability, inadmissibility, or excludability can be sustained" as a ground for mandatory termination). By necessity, charges of inadmissibility are not sustainable if the noncitizen's alienage is not first established where relevant. *See* 8 CFR 1240.8(c) ("In the case of a respondent charged as being in the United States without being admitted or paroled, [DHS] must first establish the alienage of the respondent."). Additionally, as "alienage is a jurisdictional fact," *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (citing *United States v. Sing Tuck*, 194 U.S. 161, 167 (1904)), if DHS fails to establish alienage, there would be no legal basis to continue proceedings, and, accordingly, proceedings must be terminated as required by law. 8 CFR 1003.1(m)(1)(i)(F); 1003.18(d)(1)(i)(F) (requiring termination where required by law); *see also* 8 CFR 1240.8.

Comment: Commenters also recommended that the standard for mandatorily granting joint or affirmatively unopposed motions to terminate should be expanded to also cover circumstances where DHS does not timely respond to the motion.

Commenters stated that this change would help avoid prolonging removal proceedings while waiting on DHS's response. Other commenters stated that joint or affirmatively unopposed motions to terminate should be granted without exception.

Response: As explained in section III.B.3 of this preamble in relation to the similar administrative closure provision, the Department does not believe that expanding the joint or affirmatively unopposed motion standard to DHS non-responses best serves the interests underlying this termination provision. *See* 88 FR at 62263 (explaining that joint and affirmatively unopposed motions should generally be granted as there is no adversarial interest). Moreover, any non-responsiveness from DHS will not substantially delay proceedings, as motions and responses are subject to EOIR adjudicator-imposed time limits. *See* 8 CFR 1003.23(a).

Comment: Commenters proposed adding an additional mandatory termination ground for noncitizens with an approved SIJ petition. Commenters stated that this would allow the noncitizen to remain in the United States pending the outcome of their SIJ adjustment of status application, which are currently subject to a backlog while awaiting a priority date.

Response: The Department declines to add a provision requiring termination for all individuals with an approved SIJ petition, as the Department does not believe that termination in every such case would be necessary or appropriate. Because an approved SIJ petition itself does not result in lawful status, the Department does not believe it should be included under the mandatory termination provision with other forms of relief that do provide lawful status. *See* 87 FR 13075 (noting that "SIJ is a 'classification'; an individual does not receive an actual 'status' until they become an LPR based on the underlying SIJ classification"). Depending on visa availability, the noncitizen may be able to apply to adjust status in concurrence with their SIJ petition or, if relevant, they may be considered for deferred action while awaiting a visa to become available. *See* USCIS, Policy Alert PA–2022–10, *Special Immigrant Juvenile Classification and Deferred Action* (Mar. 7, 2022) ("USCIS SIJ Policy Alert") ("Due to ongoing visa number unavailability, the protection that Congress intended to afford SIJs through adjustment of status is often delayed for years, leaving this especially vulnerable population in limbo."). Alternatively, a noncitizen with an approved SIJ

petition may never apply to adjust status.

By contrast, the mandatory termination provisions at 8 CFR 1003.1(m)(1)(i)(D) and 1003.18(d)(1)(i)(D) apply to situations in which "the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings." Approved SIJ petitions do not meet this definition. *See* USCIS SIJ Policy Alert ("Noncitizens without lawful status who have an approved SIJ petition remain subject to removal . . .").

This rule does not foreclose termination for noncitizens with approved SIJ petitions, but rather permits discretionary termination after the adjudicator has had the opportunity to consider whether termination may be appropriate for a given case—for example, where the noncitizen is *prima facie* eligible to adjust status or has received deferred action in connection with their SIJ classification. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B) (discretionary termination where the noncitizen has demonstrated *prima facie* eligibility for an application, such as adjustment of status, that USCIS has jurisdiction to adjudicate); 8 CFR 1003.1(m)(1)(ii)(C), 1003.18(d)(1)(ii)(C) (discretionary termination where a noncitizen is the beneficiary of deferred action). The Department believes it is appropriate to limit mandatory termination under 8 CFR 1003.1(m)(1)(i)(D) and 1003.18(d)(1)(i)(D) to situations in which lawful status has been obtained and allow for broader discretion to terminate only as appropriate, particularly when a vulnerable category of noncitizens is still pursuing relief. This provision would allow adjudicators to consider a noncitizen's SIJ classification and availability of adjustment status or deferred action in determining whether termination is appropriate but would not require termination in any such case.

Comment: With regard to the mental competency termination ground, one commenter recommended providing standards detailing what qualifies as "mentally incompetent" and what constitutes "adequate safeguards." To do so, the commenter largely recommended codifying the *Matter of M–A–M–* standards, along with related best practices. *See* 25 I&N Dec. 474 (BIA 2011). Relatedly, another commenter believed this termination ground was improper, as it would leave the noncitizen in limbo without legal status and would likely result in a drain on public resources.

Response: The Department continues to believe that it is appropriate to include a termination ground covering scenarios when a noncitizen is not mentally competent and adequate safeguards are not available. 8 CFR 1003.1(m)(1)(i)(B), 1003.18(d)(1)(i)(B). Noncitizens must be afforded a procedurally fair hearing, and if a noncitizen lacks sufficient competency to proceed with a hearing, then safeguards must be implemented "to protect the rights and privileges of the" noncitizen. *Matter of M–A–M–*, 25 I&N Dec. at 478 (quoting section 240(b)(3) of the INA, 8 U.S.C. 1229a(b)(3)); *see also id.* at 483 (providing examples of safeguards). As the Board has recognized, "even where the court and the parties undertake their best efforts to ensure appropriate safeguards," concerns over the procedural fairness of proceedings may remain, and thus, the "[i]mmigration [j]udge may pursue alternatives with the parties." *Id.* at 483. The Department is of the opinion that termination of proceedings can be an appropriate alternative to carrying out proceedings that would not be fundamentally fair due to the noncitizen's lack of competency and the lack of appropriate safeguards.⁴

That said, the Department notes that "competency is not a static condition. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Id.* at 480 (quoting *Indiana v. Edwards*, 554 U.S. 164, 175 (2008) (internal quotations omitted)). Thus, should a noncitizen's mental competency be restored, or should adequate safeguards become available,

⁴ The Department notes, however, that in many cases, legal representation is a proper and adequate safeguard. *See Matter of M–J–K–*, 26 I&N Dec. 773, 777 (BIA 2016) (noting that prior to determining that no adequate safeguards are available, the "proper course" of action is "to apply the safeguard of legal representation," as "[t]he participation of counsel increases the likelihood of finding a means to proceed fairly"). Moreover, the Board has permitted the use of administrative closure as an appropriate option to allow a noncitizen who is experiencing mental health issues impacting competency to seek treatment to mitigate competency issues so that fundamentally fair proceedings can go forward. *Matter of M–A–M–*, 25 I&N Dec. at 483. Given the wide array of safeguards available in immigration proceedings, the Department anticipates that only in rare cases will there be a lack of appropriate safeguards such that fundamentally fair proceedings are not possible. *See id.* at 481–83 (listing immigration regulations that provide guidance as to appropriate safeguards and drawing from case law to provide a non-exhaustive list of examples of safeguards that immigration judges may apply in cases where a noncitizen lacks mental competency). Ultimately, however, in cases involving issues of mental competency, an immigration judge is best positioned to determine which safeguards are appropriate under the circumstances of a particular case. *Matter of M–J–K–*, 26 I&N Dec. at 775.

nothing in this rulemaking prevents future, procedurally fair proceedings from going forward.

Additionally, the Department declines to codify broad regulatory standards related to mental competency in this rulemaking as requested by a commenter. The Department does not believe this rulemaking is the appropriate vehicle for such broad standards, as it only contains a single termination ground related to mental competency. Moreover, the Department similarly declines to define these terms solely for the purposes of this narrow termination provision, which would risk confusion with broader mental competency guidelines. Notably, however, the Board's decision in *Matter of M–A–M–*, 25 I&N Dec. 474 (BIA 2011), continues to provide applicable guidelines for assessment of competency issues in proceedings before EOIR. Accordingly, the Department does not believe that further codification of competency standards in this rulemaking is necessary at this time.

4. Discretionary Termination

Comment: Commenters recommended broadening the discretionary termination ground for an unaccompanied child (“UC”) to pursue asylum before USCIS to cover noncitizens previously determined to be UCs. Specifically, commenters stated that longstanding USCIS policy and a nationwide preliminary injunction extends USCIS's initial asylum jurisdiction not only to an individual determined to meet the UC definition at 8 CFR 1001.1(hh) during the course of EOIR proceedings, but also to individuals previously determined to be UCs, absent an affirmative act by DHS or HHS to terminate such a determination prior to the filing of the individual's asylum application. Commenters also stated that this section should explicitly defer to USCIS's determinations as to when a noncitizen is considered a UC.

Commenters also recommended treating the UC termination ground as mandatory rather than discretionary, which commenters stated would help safeguard due process for child applicants and help reduce the immigration court backlog.

In contrast, other commenters opposed this discretionary termination ground, stating that EOIR should keep UCs on their dockets until they have had their asylum application adjudicated by USCIS. Commenters raised concerns that terminating proceedings before the UC has their asylum application adjudicated by

USCIS would result in the Government losing track of the UC.

Response: After further consideration, and as detailed in section IV of this preamble, the Department is modifying the discretionary termination ground relating to UCs pursuing asylum before USCIS. See 8 CFR 1003.1(m)(1)(ii)(A), 1003.18(d)(1)(ii)(A). First, the Department is modifying this discretionary termination ground to apply to all noncitizens whose asylum applications are considered to have been filed by a UC such that USCIS may exercise initial jurisdiction pursuant to INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). The Department recognizes that there may be circumstances, such as by court order, internal USCIS policy, or by a determination of a noncitizen's unaccompanied status, where applications are considered to have been filed by UCs specifically for purposes of this statutory provision. This change ensures that discretionary termination is available when necessary to allow qualifying noncitizens to pursue asylum relief before USCIS under INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). This change is discussed in further detail in section IV.B of this preamble.

Second, the Department is modifying this UC provision to require the filing of an asylum application with USCIS before an EOIR adjudicator may grant discretionary termination. After further deliberation, the Department believes that this change will best ensure that the noncitizen does not enter a position where they do not have a relief application or removal proceeding pending. This change will therefore allow the Department and DHS to most efficiently track the noncitizen's status and take appropriate action subsequent to USCIS's adjudication of their asylum application.

However, the Department declines to make this provision mandatory rather than discretionary. The Department limited the mandatory termination provisions relating to outside relief to scenarios where such relief has already been obtained. See 8 CFR 1003.1(m)(1)(i)(C) and (D), 1003.18(d)(1)(i)(C) and (D). The Department believes it is more appropriate to make discretionary termination available when a noncitizen is still pursuing relief but does not currently have valid legal status. See, e.g., 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B) (discretionary termination available when pursuing relief with USCIS).

As the Department notes further, in section IV.C of this preamble, the final rule will require those considered to be

filing as UCs to have filed the asylum application with USCIS, rather than state an intent to file, as proposed in the NPRM, see 88 FR at 62264, because the Department believes that this change is necessary to ensure that EOIR adjudicators do not terminate cases involving such vulnerable groups without first mitigating the risk that their cases end up outside of the immigration process with no operationally feasible mechanism to ensure that such noncitizens will submit an affirmative application promptly to USCIS. The Department believes that ensuring that there will be a transition between proceedings before EOIR to proceedings before USCIS is particularly important for cases involving UCs and other similarly situated noncitizens so as to mitigate vulnerabilities of such individuals to trafficking, fraud, or abuse without actively pursuing a path for relief or protection or status. Such concerns would be exacerbated by a policy requiring mandatory termination for such individuals, and the EOIR adjudicator should have the discretion to consider whether termination might be appropriate in each case.

Additionally, the Department notes that this provision does not alter any substantive determinations regarding when, how, or by whom any UC determinations are made.

Comment: With regard to the discretionary termination ground based on prima facie eligibility for outside relief, some commenters recommended clarifying that immigration judges may determine prima facie eligibility for naturalization, rather than relying on an “affirmative communication” from USCIS. Commenters cited two Board decisions that they believed were erroneously decided and have resulted in USCIS holding an effective veto of an immigration judge's termination decision when the noncitizen is pursuing naturalization. See *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007); *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975).

Response: The Department notes that the Board, in *Matter of Acosta Hidalgo*, was interpreting the specific regulatory text of 8 CFR 1239.2(f) (2023), which is being removed and reserved in this rulemaking. See 24 I&N Dec. at 105–06. Similarly, in *Matter of Cruz*, 15 I&N Dec. at 237, the Board was interpreting the regulatory “predecessor” to 8 CFR 1239.2(f) (2023), which was “essentially identical to” 8 CFR 1239.2(f) (2023). 24 I&N Dec. at 104. Under the previous regulation, EOIR adjudicators were permitted to terminate removal proceedings only to allow a noncitizen

to proceed to a final hearing on a pending application or petition for naturalization when the noncitizen demonstrated prima facie eligibility and the matter involved exceptionally appealing or humanitarian factors. *See* 8 CFR 1239.2(f) (2023). The Board's holdings in the cases cited by the commenters do not apply to the provisions of this rule, which, while designed to include the circumstances described under former 8 CFR 1239.2(f), are broader in nature. *Compare* 8 CFR 1239.2(f) (2023) ("An immigration judge may terminate removal proceedings to permit the [noncitizen] to proceed to a final hearing on a pending application or petition for naturalization when the [noncitizen] has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings."), *with* 8 CFR 1003.1(m)(1)(ii)(B) and 8 CFR 1003.18(d)(1)(ii)(B) (authorizing termination where "[t]he noncitizen is prima facie eligible for naturalization").

Additionally, circuit courts have criticized the framework established by *Acosta Hidalgo* and former 8 CFR 1239.2(f) (2023) together, noting that it has created operational frustrations, as well as inefficiencies, inconsistencies, and confusion. In particular, *Perriello v. Napolitano*, 579 F.3d 135, 140 (2d Cir. 2009), asserted that former 8 CFR 1239.2(f) (2023) was "antiquated" in light of amendments made by the Immigration Act of 1990 ("IMMACT") to the naturalization process. Public Law 101-649, 511(a), 104 Stat. 4978, 5044. As relevant, the changes made by IMMACT, and as codified with minor changes, provide that ". . . no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding . . ." IMMACT § 407(d)(3), 104 Stat. at 5041; INA 318, 8 U.S.C. 1429. After this amendment, some courts called into question the continued viability of former 8 CFR 1239.2(f) (2023). *See Perriello*, 579 F.3d at 140 (collecting cases). In *Acosta Hidalgo*, the BIA reaffirmed that EOIR adjudicators must "require some form of affirmative communication" from DHS before terminating under former 8 CFR 1239.2(c) (2023).

This framework was confusing. *Perriello* stated, whereby former 8 CFR 1239.2(f) (2023) required an "affirmative communication" by DHS regarding prima facie eligibility for naturalization before terminating removal proceedings,

but where the statute prohibited consideration of an application while the removal proceedings were pending, which could be read to include a prohibition on assessments of prima facie eligibility. *Perriello*, 579 F.3d at 142. The court stated that "[t]he law, in effect, seems to be chasing its tail." *Id.* at 138. Recognizing these concerns, and as discussed in section IV.F of this preamble, this rule eliminates the certification requirement while continuing to recognize DHS's role in the naturalization context. This rule, which authorizes EOIR adjudicators to make a prima facie inquiry into naturalization eligibility, will provide significant efficiencies, and address operational frustrations, inconsistencies, and confusion over adopting a similar requirement to the holding in *Acosta Hidalgo* in relevant cases involving naturalization applications, as EOIR adjudicators will no longer be reliant on USCIS prima facie naturalization determinations before they may adjudicate a motion to terminate, and parties will no longer be required to obtain and produce such certifications.⁵ The Department notes that evidence of any such certification from USCIS may be considered by the EOIR adjudicator in determining whether to terminate under this provision. Additionally, this provision does not require EOIR adjudicators to terminate in any case where a noncitizen asserts they are eligible to naturalize, and to the extent that the adjudicator determines that such certification is necessary to render a decision on termination, the

⁵ As acknowledged in *Acosta Hidalgo*, the Department cannot compel DHS to produce such a certification, 24 I&N Dec at 107, and where DHS has not done so, cases have unnecessarily stalled without progress towards resolution, leaving the parties in a state of uncertainty and confusion. For example, in *Periello*, the court stated that "nothing seems to compel DHS to make such a determination [on the noncitizen's prima facie eligibility for naturalization], let alone to issue such a communication." 579 F.3d at 138. *Periello* also stated that "[i]n some cases . . . DHS has adjudicated naturalization applications while [noncitizens] have awaited termination of their removal proceedings, notwithstanding the bar in [INA 318, 8 U.S.C. 1429] . . . And in yet other cases, no determination of prima facie eligibility has been made by anybody, leaving [noncitizens] to pursue writs of mandamus in an effort to compel DHS to produce 'affirmative statement[s]' as to prima facie eligibility." *Id.* at 140–41. To illustrate the potentially confusing results, *Periello* cited an unpublished district court case where a noncitizen had petitioned for relief after DHS concluded that it lacked jurisdiction over the noncitizen's naturalization application, but nonetheless advised that the noncitizen was not prima facie eligible for naturalization. *Id.* In the same case, an immigration judge had previously ruled that the noncitizen was prima facie eligible for naturalization, but the BIA reversed, holding that Board precedent prohibited the immigration judge from making that determination. *Id.*

adjudicator may request that the parties produce such a certification.

Moreover, permitting EOIR adjudicators to make an inquiry into a noncitizen's prima facie eligibility for naturalization, despite not having jurisdiction to adjudicate naturalization applications, is consistent with agency practice in analogous contexts. For example, although USCIS has exclusive jurisdiction over U visa applications, an EOIR adjudicator is permitted to assess a noncitizen's prima facie eligibility for U nonimmigrant status. *See Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 813–14 (BIA 2012) (setting forth the inquiry into prima facie eligibility for U nonimmigrant status). Given that EOIR adjudicators lack jurisdiction over naturalization applications, EOIR adjudicators' determinations as to noncitizens' prima facie eligibility for naturalization will not be binding on USCIS.

In sum, nothing in the INA or the regulatory text requires an "affirmative communication" from USCIS as to a noncitizen's prima facie eligibility for naturalization, as this rule authorizes EOIR adjudicators to assess whether a noncitizen is prima facie eligible for naturalization when termination is sought on that basis. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). Under this rule, immigration judges would not assess prima facie eligibility for naturalization as a part of a noncitizen's naturalization application, INA 318, 8 U.S.C. 1429 ("the findings of the Attorney General in terminating removal proceedings . . . shall not be deemed binding in any way . . . with respect to the question of whether such person has established [] eligibility for naturalization as required by this subchapter"), but rather solely for the purpose of assessing whether termination would be necessary or appropriate to allow the noncitizen to have their application considered by DHS. Nevertheless, as discussed in more detail in section IV.F of this preamble, this rule continues to acknowledge both DHS's unique role as sole administrators over the process to obtain permanent (with limited exceptions) citizenship in the United States and Congress's directive that pending removal proceedings—which are initiated and prosecuted by DHS—should bar consideration of naturalization applications, by limiting termination to pursue a naturalization application to those instances where DHS does not oppose a noncitizen's motion to terminate. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

Comment: Commenters recommended adding standalone discretionary

termination grounds for noncitizens with certain pending USCIS applications, including T visas, U visas, Violence Against Women Act (“VAWA”) self-petitions, and SIJ petitions. For example, commenters noted that a standalone discretionary termination ground would be important for many noncitizens with approved SIJ petitions, but who are awaiting a visa priority date. Commenters stated that the rulemaking’s existing discretionary termination ground for noncitizens with deferred action—which would cover SIJ applicants in many circumstances—is not sufficient. Commenters explained deferred action for SIJ applicants is purely discretionary and may be removed by a future administration, thereby foreclosing future discretionary termination for SIJ applicants.

One commenter also recommended adding a discretionary termination ground for noncitizens with bona fide determinations from USCIS, but who are awaiting visa availability. The commenter explained that, in these circumstances, the noncitizen already has an otherwise approvable form of relief, and termination would be more efficient than administrative closure while simply waiting on visa availability.

Response: The Department declines to add specific discretionary termination grounds for various forms of relief proposed by commenters because the rule’s existing termination grounds already broadly cover those forms of relief. The rule includes a discretionary termination ground for a noncitizen who is prima facie eligible for naturalization, lawful status, or relief from removal that USCIS has jurisdiction to adjudicate, and the noncitizen has filed the petition, application, or other action with USCIS, though no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization. This would broadly include the types of relief noted by commenters, including T visas, U visas, VAWA self-petitions, and SIJ petitions. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). More specifically, the Department declines to add standalone discretionary termination grounds for SIJ applicants as proposed by commenters, as speculation of which status categories may receive deferred action under future administrations is outside the scope of this rule.

Further, as explained in more detail in section IV.H of this preamble, the Department is modifying this discretionary termination ground to clarify that EOIR adjudicators may not terminate cases for the express purpose of allowing a noncitizen—other than a

noncitizen who has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh)—to pursue an asylum application before USCIS. This limitation on termination requires the noncitizen to establish that they warrant termination based on a form of relief that USCIS may adjudicate, but the noncitizen may not seek termination for the purpose of pursuing an affirmative asylum application before USCIS. *Id.* This limitation would also not apply to joint or affirmatively unopposed motions to terminate for the express purpose of permitting a noncitizen to pursue asylum before USCIS where no other relief is being sought, as such motions would be covered under termination provisions designed to address joint or affirmatively unopposed motions. 8 CFR 1003.1(m)(1)(i)(G); 8 CFR 1003.18(d)(1)(i)(G).

Similarly, the Department declines to add a specific discretionary termination ground for noncitizens with bona fide determinations from USCIS. However, the Department notes that such evidence would be relevant to an EOIR adjudicator’s determination on any motion to terminate. For example, such evidence may weigh heavily in favor of the noncitizen under the factor concerning prima facie eligibility for relief with USCIS.

Comment: One commenter recommended treating the discretionary termination ground for T and U visa applicants in which the parties have filed a motion to terminate under 8 CFR 214.11(d)(1)(i) or 214.14(c)(1)(i) as a mandatory termination ground. The commenter stated that, because these grounds require a joint motion, it should be subject to the mandatory “joint or unopposed” termination ground.

Response: In response to commenter concerns, the Department has decided not to finalize the discretionary termination ground related to T and U visas as proposed in the NPRM. As relevant here, a commenter noted that in the proposed discretionary termination ground for U and T visas, the cross-referenced DHS regulatory provisions—8 CFR 214.11(d)(1)(i) and 214.14(c)(1)(i)—discuss joint motions to terminate. *See, e.g.,* 8 CFR 214.11(d)(1)(i) (“In its discretion, DHS may agree to the [noncitizen]’s request to file with the immigration judge or the Board a joint motion to . . . terminate proceedings without prejudice, . . . while an application for T nonimmigrant status is adjudicated by USCIS.”). In turn, the proposed rule referenced these T and U visa regulatory

provisions under the discretionary termination grounds. However, the Department now clarifies that any jointly filed motions to terminate, including those referenced by these provisions, should be considered under the mandatory “joint or unopposed” motion termination ground. *See* 8 CFR 1003.1(m)(1)(i)(G), 1003.18(d)(1)(i)(G). Should any motions described in the DHS regulatory provisions related to U and T visas be presented before EOIR, those motions would constitute joint motions and would be governed by 8 CFR 1003.1(m)(1)(i)(G) or 1003.18(d)(1)(i)(G). Thus, the Department has decided not to finalize the discretionary termination provision cross referencing DHS’s regulations addressing T and U visa applicants because, as proposed, it was superfluous. Instead, such motions will be controlled by the joint motions provisions finalized in this rule.

5. Specific Calls for Comments

i. Additional Constraints on Termination

Comment: Commenters recommended modifying the termination provisions to state that immigration judges and the Board may not terminate a case if the noncitizen objects to termination, unless termination is required by law. Commenters stated that this would ensure that noncitizens are not foreclosed from pursuing relief before EOIR due to their removal proceeding being terminated.

Another commenter proposed allowing adjudicators to have the discretion to terminate proceedings based on compelling humanitarian grounds in rare and exceptional circumstances. In contrast, other commenters stated that immigration judges should not be allowed to terminate cases before a noncitizen has applied for relief outside of EOIR, as such termination would be premature.

One commenter recommended creating an exhaustive list of circumstances that would authorize an EOIR adjudicator to terminate or dismiss cases, and further limiting such grounds to those where DHS cannot sustain the charges of removability or where the noncitizen has obtained lawful status or U.S. citizenship, or otherwise renders the noncitizen no longer subject to removal.

Separately, a commenter recommended that, when DHS moves for termination, the immigration judge should be required to explain the effect of termination to pro se noncitizens and to solicit their views before adjudicating the motion.

Response: First, the Department declines to remove an EOIR adjudicator's ability to terminate proceedings over a party's objection, whether that party be the noncitizen or DHS, with the exception of discretionary motions to terminate for a noncitizen to seek naturalization. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B) ("Where the basis of a noncitizen's motion for termination is that the noncitizen is prima facie eligible for naturalization, the [EOIR adjudicator] shall not grant the motion if it is opposed by DHS."). This limitation on the EOIR adjudicator's ability to terminate for a noncitizen to seek naturalization when DHS opposes is discussed in greater detail in section IV.F of this preamble.

Notwithstanding the foregoing, as explained in response to a similar request regarding administrative closure, *see supra* section III.B.5.iii of this preamble, the Department believes that the importance of providing EOIR adjudicators with the authority to take "necessary or appropriate" action for the disposition or alternative resolution of cases weighs in favor of providing adjudicators with the ability to terminate proceedings over a party's objection. *See* 8 CFR 1003.1(d)(1)(ii); 8 CFR 1003.10(b). Moreover, precluding an EOIR adjudicator from terminating proceedings over a noncitizen's objection—absent a conforming provision for a DHS objection to termination—would result in a procedural imbalance between the parties. Thus, for procedural fairness, the Department declines to add a regulatory provision precluding the EOIR adjudicator from terminating proceedings over the objection of one party.

Notably, the mandatory termination grounds cover situations in which: the individual in proceedings is not removable, is a citizen, or has obtained certain legal status; both parties have jointly requested, or one party has affirmatively non-opposed, termination; fundamentally fair proceedings are not possible due to mental incompetency; or termination is otherwise required by law. *See* 8 CFR 1003.1(m)(1)(i), 1003.18(d)(1)(i). Thus, mandatory termination is intended for scenarios where removal proceedings are no longer needed, even despite possible party objections. Thus, the Department does not anticipate that noncitizens generally would object to termination of proceedings when the foregoing termination grounds are implicated; rather, the Department believes that noncitizens more likely will be requesting termination or will be joining

or affirmatively indicating non-opposition to a DHS motion in these scenarios.

Similarly, for discretionary termination, the Department notes that the enumerated discretionary termination grounds are mainly focused on allowing parties to request termination when a noncitizen may be eligible for a lawful status outside of removal proceedings. *See, e.g.,* 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii) (discretionary termination grounds include, for example, noncitizens pursuing relief with DHS or who are the beneficiaries of certain programs). Therefore, the Department believes that, in most cases, noncitizens will be requesting or unopposed to discretionary termination under these provisions. Moreover, even if a noncitizen were to object to a DHS motion to terminate, the Department anticipates that termination over a noncitizen's objection would be rare, particularly where the noncitizen wishes to continue pursuing a relief application in removal proceedings.

However, for clarity, and as explained further in section IV of this preamble, the Department is modifying the rule's discretionary termination language to explicitly state that an EOIR adjudicator "shall consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate." 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii). The Department believes that this addition will help further clarify that arguments related to a motion for discretionary termination, and particularly any opposition to such a motion, will be considered by the EOIR adjudicator in the course of adjudicating the motion, consistent with longstanding motions practice. *See generally* Immigration Court Practice Manual, ch. 5; BIA Practice Manual, ch. 5, <https://www.justice.gov/eoir/manuals-and-memoranda>.

Further, should either party disagree with the EOIR adjudicator's decision regarding termination, then filing a motion to reconsider the decision or an appeal of the decision may be options for redress. *See generally* 8 CFR 1003.23 (motions to reconsider), 1003.38 (appeals); *see also Matter of Sanchez-Herbert*, 26 I&N Dec. 43 (considering appeal of immigration judge's decision to terminate proceedings).

Next, the Department declines to expand the termination grounds to allow EOIR adjudicators to terminate proceedings based on certain humanitarian grounds, absent DHS consent. As explained in the NPRM, the Department limited such authority to

avoid encroaching on DHS's sole authority to commence removal proceedings, or to exercise prosecutorial discretion where relevant. 88 FR at 62264–65; *see also* 8 CFR 239.1(a) (providing DHS with sole discretion to commence removal proceedings). For example, as the Board observed in *Matter of M-F-O-*, an immigration judge should not terminate proceedings based on the view that the respondent is a low enforcement priority. 28 I&N Dec. 408, 415 n.11 (BIA 2021) ("Although the respondent argues on appeal that he is a low enforcement priority and that his removal proceedings should be terminated or dismissed without prejudice on this basis, it is within [DHS]'s prerogative to exercise prosecutorial discretion in that manner." (citing *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. at 170 & n.3)).

Further, the Department declines to limit discretionary termination authority to only the specified circumstances listed in the rule, 8 CFR 1003.1(m)(1)(ii)(A) through (E); 8 CFR 1003.18(d)(1)(ii)(A) through (E), as commenters suggested. The Department included a limited catch-all ground for circumstances comparable to the enumerated discretionary termination grounds where such termination is "necessary or appropriate for the disposition or alternative resolution of the case." 8 CFR 1003.1(m)(1)(ii)(F), (m)(2)(ii), 1003.18(d)(1)(ii)(F), (d)(2)(ii). The Department believes that this provision will help ensure EOIR adjudicators have sufficient authority to terminate proceedings when necessary or appropriate, particularly in new or unique circumstances not contemplated by this rule. The Department also notes that this catch-all ground includes specific limitations to prevent unfettered termination, such as prohibiting EOIR adjudicators from terminating a case "for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion." *Id.*

In the course of this rulemaking, the Department has reevaluated the discretionary termination ground for cases in which a noncitizen is pursuing outside relief with USCIS. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). After additional consideration, the Department is concerned that the language in the proposed rule, absent any additional limitations, could be read to authorize the termination of a case for the express purpose of allowing a noncitizen to apply for asylum before USCIS, other than a noncitizen who has filed an asylum application with USCIS

pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh). The final rule precludes such a result, as consistent with the NPRM. *See* 88 FR at 62264 (explaining that “the Department does not intend this proposed ground for discretionary termination to authorize a general practice of terminating proceedings involving prima facie eligibility for asylum” and stating that “the default rule that EOIR adjudicators continue to exercise authority over asylum applications filed by noncitizens in removal proceedings would continue to apply”). These revisions are more consistent with the overall regulatory structure, as 8 CFR 1208.2(b) provides that immigration judges “have exclusive jurisdiction over asylum applications filed by [a noncitizen] . . . after the charging document has been filed with the Immigration Court.”

Accordingly, the Department has modified these provisions to clarify that an EOIR adjudicator shall not terminate a case for a noncitizen to pursue an asylum application before USCIS, except as provided for in 8 CFR 1003.1(m)(1)(ii)(A) and 1003.18(d)(1)(ii)(A), 8 CFR 1003.1(m)(1)(ii)(B) (Board), 1003.18(d)(1)(ii)(B) (immigration judges).

Relatedly, the Department has modified the discretionary termination ground focusing on petitions, applications, or other actions that a noncitizen pursues with USCIS to include language requiring that the noncitizen has filed such application, petition, or other action before termination may be granted, though no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). Thus, the Department believes that this change is responsive to commenter concerns that EOIR adjudicators “should not be allowed to terminate cases before a noncitizen has applied for relief outside of EOIR.” This change is discussed further at section IV.G of this preamble.

The Department declines to amend the rule’s termination provisions to include special rules applicable to unrepresented noncitizens, as commenters suggested. The Department is cognizant of the “disadvantages faced by uncounseled noncitizens,” *Quintero v. Garland*, 998 F.3d 612, 627 (4th Cir. 2021), and acknowledges that the immigration judge’s “duty to fully develop the record” is “especially crucial in cases involving unrepresented noncitizens,” *id.* However, the

Department declines to adopt different procedural rules based on representation status, which present administrability concerns as representation status can change throughout proceedings. Rather, the Department believes that immigration judges will adequately explain the implications of a motion to terminate to an unrepresented noncitizen, as well as solicit the noncitizen’s position on termination prior to ruling on a motion, as these actions are already part of an immigration judge’s duty to develop the record.

ii. Termination Without Prejudice to DHS

Comment: Commenters stated that terminations should not be automatically considered “without prejudice,” explaining that this would limit finality for noncitizens in removal proceedings and may violate the claim preclusion doctrine and the structure of the INA, which commenters stated should prevent DHS from reinitiating proceedings based on the same facts. Another commenter suggested that the Department codify a list of non-exhaustive scenarios in which termination with prejudice may be warranted, including circumstances involving: (1) dilatory conduct by DHS, including filing multiple Notices to Appear and failure to prosecute; (2) DHS counsel repeatedly appearing for hearings unprepared or failing to disclose evidence; (3) DHS counsel’s failure to attend any hearings; (4) subsequent judicial decisions; (5) the granting of benefits to respondent by USCIS; and (6) the violation of settlement agreements or injunctions.

Response: The Department declines to delineate via regulation whether termination of proceedings should be with or without prejudice. EOIR adjudicators have the authority to take “any action consistent with their authorities . . . as necessary or appropriate for the disposition or alternate resolution of the case,” and this authority includes termination of proceedings, as guided by the individual facts and circumstances of the case. 8 CFR 1003.1(d)(1)(ii), 1003.10(b); *see id.* §§ 1003.1(m)(2)(ii), 1003.18(d)(2)(ii). The Department is of the belief that further delineating the specific scenarios suggested by commenters where termination of proceedings would be “with prejudice” does not provide EOIR adjudicators the needed flexibility to consider the individual facts and circumstances of each case.

Relatedly, should a noncitizen’s proceedings before EOIR be terminated,

and should DHS place that same noncitizen into new proceedings before EOIR, then EOIR adjudicators have the ability and expertise to determine whether DHS’s initiation of new proceedings is impacted in any way by the prior termination order.

In declining to introduce termination prejudice standards by regulation, the Department notes that, in many circumstances, termination of removal proceedings is without prejudice. *See, e.g., B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022) (explaining that the remedy for certain regulatory violations is termination without prejudice). The Department further notes that for a “decision by an immigration judge [to have] a preclusive effect” an “issue must have been actually litigated,” and “the determination of the issue” must have been necessary to the judgement. *Islam v. Sec., Dep’t of Homeland Security*, 997 F.3d 1333, 1341 (11th Cir. 2021) (internal quotation marks omitted); *see Ali v. Barr*, 951 F.3d 275, 283 (5th Cir. 2020); *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008). Moreover, “a dismissal without prejudice is not a decision on the merits for purposes of res judicata.” *Abpikar v. Holder*, 544 F.App’x 719, 721 (9th Cir. 2013) (quoting *Oscar v. Alaska Dep’t of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008)).

In sum, the Department is confident that EOIR adjudicators are equipped to make a determination as to the appropriateness of termination of proceedings in each individual case, and therefore, the Department declines to adopt standards governing the issue of termination “with prejudice” in this rulemaking.

iii. Sua Sponte Termination

Comment: Commenters generally opposed inclusion of sua sponte termination authority. Commenters stated that, if an adjudicator believes termination is appropriate, the adjudicator should invite both parties to share their views on termination and treat such views as oral or written motions. Commenters explained that this would allow the parties to provide valuable input, particularly noncitizens who may wish to proceed with their removal proceedings to pursue relief. Other commenters stated that, if the Department includes sua sponte termination authority, parties should be provided proper notice, including a proposed 60-day notice of intent to terminate. Additionally, commenters stated that any sua sponte termination authority should not be allowed over a noncitizen’s objection.

Response: After consideration, the Department has decided not to provide for sua sponte termination authority when termination is not mandatory. Accordingly, the Department has modified the regulatory text to make clear that a motion from a party is required before an EOIR adjudicator may terminate a case in the exercise of discretion. See 8 CFR 1003.1(m)(1)(ii), (m)(2)(ii), 1003.18(d)(1)(ii), (d)(2)(ii). The Department wishes to ensure that the parties are able to provide evidence and arguments in support or opposition to discretionary termination before the EOIR adjudicator makes such a determination. As explained by commenters, there may be instances, for example, when a noncitizen may oppose discretionary termination because they wish to pursue relief before EOIR. However, the Department notes that, in practice, if the adjudicator believes that termination of proceedings may be an appropriate disposition of the case, the adjudicator can raise that issue with the parties. If a party is then interested in seeking termination, the adjudicator may inquire whether the party wishes to move for termination. For those cases before the Board, the adjudicator may request supplemental briefing from the parties to ensure that the positions of the parties are considered as part of the decision whether to terminate proceedings. 8 CFR 1003.3(c). This ensures that the parties can indicate their positions on termination for the record prior to the adjudicator ruling upon the motion to terminate.

iv. Evidence Required

Comment: Some commenters stated that noncitizens should not be required to produce evidence of a filing with USCIS as a prerequisite for termination, as such filings may take a significant amount of time to prepare. Commenters noted that such a requirement would, therefore, keep cases on the immigration judge's docket unnecessarily while such filings were being completed. Rather, commenters believed that a finding of prima facie eligibility for relief before USCIS should be sufficient to terminate proceedings. In contrast, other commenters stated that proof of filing with USCIS should be required, but that United States Postal Service ("USPS") tracking or signature confirmation, along with a copy of the application, should be sufficient.

Other commenters recommended that, for purposes of terminating based on underlying legal status, the rulemaking should explicitly state that immigration judges may accept any credible evidence of legal status. Commenters

noted that they previously encountered issues with the availability of specific evidence requested by immigration judges, which resulted in the denial of their motions to terminate.

Response: After further consideration, the Department is modifying the relevant discretionary termination ground to require proof of filing with USCIS as a prerequisite to termination. Specifically, the Department has modified the discretionary termination ground focusing on petitions, applications, or other actions that a noncitizen pursues with USCIS seeking relief from removal or lawful status, to include language requiring that the noncitizen has filed such application, petition, or other action. See 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). In making this change, the Department also included an exception to this USCIS filing requirement for prima facie-eligible adjustment of status applications, so as not to preclude USCIS from accepting adjustment applications because a noncitizen is in removal proceedings. See *id.*

The Department believes this change will help ensure that EOIR is not prematurely terminating proceedings when a relevant application has not yet been filed with USCIS. This filing requirement will also help DHS and EOIR efficiently monitor the status of noncitizens by ensuring that a noncitizen placed into removal proceedings either files an application with USCIS or remains in removal proceedings until final adjudication. Moreover, in cases in which the noncitizen is in the process of preparing their application for filing with USCIS, they may request continuances or administrative closure before EOIR, as relevant, in the interim. If their requests are granted, continuances or administrative closure could significantly reduce the active resources being devoted to the noncitizen's case while they prepare their application for filing. Thus, the Department disagrees with commenter concerns that leaving such cases on the EOIR adjudicator's calendar or docket while noncitizens prepare their applications for filing would necessarily be less efficient than terminating proceedings, even where such filings may take a significant amount of time to complete.

Additionally, there is a possibility that—despite the party's stated intent—the relevant petition, application, or action will never successfully be filed with USCIS. To avoid this scenario after proceedings have already been terminated, the Department has added a requirement that the party seeking discretionary termination under this

provision must provide proof of filing with USCIS before the EOIR adjudicator may terminate proceedings, unless the specific petition, application, or action is excepted from the filing requirement. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

Separately, the Department declines to include explicit language regarding substantive evidentiary standards for motions to terminate. The rule does not limit the types of evidence that an EOIR adjudicator may consider in making a termination decision. Rather, the rule provides EOIR adjudicators with the flexibility to determine whether any submitted evidence is sufficient to grant termination. See generally *Matter of Interiano-Rosa*, 25 I&N Dec. at 265 ("Immigration [j]udges have broad discretion . . . to admit and consider relevant and probative evidence."). Imposing an "any credible evidence" standard, as proposed by commenters, may be too lenient in some circumstances, as an EOIR adjudicator may determine that certain relevant evidence is necessary before granting termination in a specific case.

D. Sua Sponte Reopening or Reconsideration and Self-Certification

Comment: Commenters expressed support for restoring the Board's traditional authority to sua sponte reopen or reconsider a case, as well as support for restoration of the Board's self-certification authority, noting that these changes provide important procedural protections and provide noncitizens with an avenue to pursue newly available relief.

One commenter recommended providing a non-exhaustive list of circumstances that would qualify as "exceptional circumstances" for sua sponte reopening or reconsideration. Another commenter recommended renaming sua sponte reopening to "reopening in the interests of justice," in order to avoid confusion as parties are often requesting the immigration judge or the Board to exercise their sua sponte reopening authority.

In contrast, another commenter raised concerns with this sua sponte authority, stating that it raised finality concerns for noncitizens whose cases have been positively resolved. As a result, the commenter recommended providing for automatic stays if the Board sua sponte reopened proceedings or, alternatively, guidance on granting discretionary stays in such circumstances.

Separately, commenters also recommended instituting a "mailbox rule" at the Board as an additional alternative to self-certification or sua sponte authority. Commenters

explained that such a rule, which would treat a document as timely once mailed, would provide another avenue for remedying filings that arrive late.

Additionally, one commenter proposed an amendment to the regulations governing motion to reopen time and numerical limitations, which the AA96 Final Rule had modified to include additional exceptions as a safety valve when curtailing adjudicators' sua sponte reopening authority. Specifically, the commenter requested the Department add an additional exception to the motion to reopen time and numerical limitations for when DHS affirmatively non-opposes a motion to reopen. The commenter noted that there is an existing exception to the time and numerical limitations for joint motions to reopen, and requested the language be modified to use the "joint and affirmatively unopposed" standard from motions to terminate in this rulemaking.

Response: After further consideration, the Department declines to delineate specific scenarios that would qualify as "exceptional circumstances" for sua sponte purposes. As explained in the NPRM, the Department believes that the current standard is a workable standard, *see* 88 FR at 62266, and if further clarity is needed, specific scenarios can be addressed through the publication of Board decisions, as necessary, *see id.* Further, the Department believes that changing the terminology of sua sponte authority, which has been consistent in use for decades, would give rise to greater confusion than its use engenders and therefore declines to rename sua sponte authority. *See, e.g., Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998).

The Department also declines to add explicit stay-related language to cover scenarios when the Board sua sponte reopens or reconsiders proceedings. Under current regulations, orders of removal are stayed while an appeal is pending, and any case that is reopened or reconsidered would return to a pending posture. *See* 8 CFR 1003.6(a) (stating that a removal order "shall not be executed . . . while an appeal is pending . . ."). Additionally, in cases where a party files a motion for sua sponte reopening or reconsideration, the party may make a request for a discretionary stay while the motion is pending, and EOIR has published guidance on discretionary stays in its Practice Manuals. *See* Immigration Court Practice Manual, ch. 8.3; BIA Practice Manual, ch. 6.3, <https://www.justice.gov/eoir/manuals-and-memoranda>.

The Department further declines to retain an AA96 Final Rule provision

that added limited exceptions to the motion to reopen time and number bars, which the AA96 Final Rule had added only to address some of the effects of limiting sua sponte authority. *See* 85 FR at 81654 (excusing time or number bars where "a three-member panel of the Board agrees that reopening is warranted" based upon "a material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability"). The Department believes that, by recodifying longstanding sua sponte reopening and reconsideration authority, Appellate Immigration Judges are able to exercise their discretion to consider untimely or number-barred motions to reopen or reconsider cases as appropriate, including scenarios covered by those limited exceptions. As noted in the NPRM, sua sponte reopening and reconsideration is a well-established and recognized practice that has "operated under a workable scheme." 88 FR at 62266.

The Department also declines to modify the existing motion to reopen time and numerical limitation standards to include an exception for affirmatively unopposed motions. This rulemaking focused, as relevant, on whether to retain, modify, or rescind the AA96 Final Rule, which did not make any changes to the joint motion exception for motion to reopen time and number limitations. The Department notes that potential modifications to motion to reopen standards are the subject of a separate future rulemaking under consideration. *See* Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, RIN 1125-AB01, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1125-AB01>.

Further, and as explained earlier, in section III.A of this preamble, the Department declines to add a broad "mailbox rule" to this rulemaking, which is focused on the particular provisions of the AA96 Final Rule, as well as administrative closure and termination authority.

E. Board Findings of Fact—Voluntary Departure

Comment: Commenters raised concerns about the Board providing proper notice to noncitizens if allowed to grant voluntary departure in the first instance. Commenters explained that noncitizens or their attorneys of record often do not receive timely notice from the Board and noted that, if the Board granted voluntary departure in the first

instance, the potential delay in receiving the Board's voluntary departure order would create difficulties for noncitizens who need to post voluntary departure bond, which, as proposed in the NPRM, would have been required to be posted within 10 days of issuance of the Board's voluntary departure order. As a result, commenters suggested increasing the bond posting timeline to 30 days.

Response: In light of commenter concerns and in recognition of the fact that Board orders are generally served by mail and received without advance warning—unlike orders of immigration judges, which are frequently served in person on the date of the final hearing on the merits of the voluntary departure request—the Department is further amending the time period for posting the voluntary departure bond. The final rule now states that the Board shall advise the noncitizen of the duty to post the bond with the ICE Field Office Director within 30 business days of the Board's order granting voluntary departure. 8 CFR 1240.26(k)(4). The Department believes this 30-day period will allow noncitizens adequate time to post a voluntary departure bond when the Board, rather than the immigration judge, grants voluntary departure in the first instance.

F. Background Check

Comment: Commenters raised concerns that there is insufficient recourse for noncitizens whose identity checks are not completed in a timely manner by DHS. Therefore, commenters suggested adding a process in which a noncitizen may request the Board to require DHS to meet its obligations under 8 CFR 1003.47(d) or, alternatively, provide a limit as to the amount of time a case may remain pending with the Board solely to complete a background check before it is required to be remanded to the immigration court.

Another commenter recommended that the background check provision should permit the Board to remand a case to an immigration judge without a motion from DHS if the noncitizen fails to complete their background check, which the commenter believed would best allow the noncitizen an opportunity to present evidence regarding their failure to complete their background check to an immigration judge, safeguarding due process, especially for pro se noncitizens. The commenter also recommended adding language to 8 CFR 1003.1(d)(6)(iii) requiring an immigration judge to consider whether the noncitizen had good cause for failing to comply with

background check requirements in instances where the case was remanded to the immigration court.

Alternatively, one commenter stated that the rule should retain the AA96 Final Rule's background check provision, which deemed a noncitizen's failure to comply with background check requirements as an automatic abandonment of their underlying applications, absent a showing of good cause. The commenter believed this provision would best promote efficiency, while safeguarding the noncitizen's ability to explain their failure to comply with background check requirements in the event of unusual or unpredictable hardships.

Response: The Department declines to incorporate the commenters' suggested changes to the background check provisions. As explained in the NPRM, the Department is retaining some changes made by the AA96 Final Rule that were intended to reduce remands to the immigration court solely for completion of the required background checks. *See* 88 FR at 62270. The Department continues to believe that remanding cases solely for the completion of background checks is an unnecessary procedural step that creates inefficiencies in EOIR's case processing. *Id.*

The Department disagrees with commenter concerns that the rule contains insufficient protections for noncitizens whose identity checks are not completed in a timely manner. When the Board places a case on hold for completion of any necessary background checks, the rule requires DHS to "report to the Board promptly when" the required checks or investigations "have been completed or updated." 8 CFR 1003.1(d)(6)(iii). If DHS fails to report the results of those checks or investigations to the Board within 180 days of the Board's notice that the case is being placed on hold, the Board may either continue to hold the case or remand to the immigration judge for further proceedings under 8 CFR 1003.47(h). *Id.* Thus, the Board has discretion to continue to hold a case pending DHS's completion of background checks or to remand to the immigration court, depending on the circumstances of each case. Further, in exercising that discretion, the Board can request a status update from DHS as needed and determine whether a remand is necessary based on that update. For example, DHS may notify the Board that a pending background check will be imminently completed, which would weigh in favor of holding the case at the Board. As such, this provision accounts for the Department's

efficiency interests in avoiding unnecessary remands, *see* 88 FR at 62270, while still permitting remands based on individual circumstances. Further, this rule does not affect a party's ability to file a motion to remand in the event of newly available evidence or eligibility for relief. *See* BIA Practice Manual, ch. 5.8 (explaining purpose, standards of, and limitations on motions to remand and stating that "[p]arties may, in appropriate circumstances, move to remand proceedings to the immigration judge to consider newly available evidence or newly acquired eligibility for relief").

The Department also declines to adopt suggested revisions that would permit the Board to remand a case to the immigration court based on a noncitizen's failure to comply with background check requirements absent a motion from DHS. Because DHS is charged with conducting the relevant background checks, the Department continues to believe that DHS is in the best position to move for a remand where necessary as a result of noncompliance with background check requirements. Further, the Department does not believe it is necessary to impose an explicit regulatory requirement that, upon remand, immigration judges must consider whether a noncitizen demonstrated good cause for failing to comply with background check requirements. Under existing regulatory authority, when a case is remanded pursuant to 8 CFR 1003.1(d)(6), immigration judges must consider new information obtained as a result of background checks and may hold an additional hearing to consider "any legal or factual issues" if presented with new information. 8 CFR 1003.47(h). The Department believes that this provision sufficiently authorizes immigration judges to evaluate relevant information when the Board remands a case due to noncompliance with background check requirements.

Finally, as explained in the NPRM, the Department declines to retain the AA96 Final Rule's provision deeming a noncitizen's failure to comply with background check requirements at the Board as an automatic abandonment of the underlying applications for relief absent a showing of good cause. 88 FR at 62270. Rather, the Department believes that this rule, by returning to pre-AA96 Final Rule regulatory language permitting the Board to, upon a motion from DHS, remand a case to the immigration court to consider a noncitizen's noncompliance in evaluating whether the underlying relief should be denied, furthers the

Department's efficiency interests while accounting for scenarios where a remand to the immigration judge may be most appropriate. *Id.* The Department is confident that in cases where DHS moves the Board to remand and the Board does so, immigration judges will appropriately consider both the fact that a noncitizen failed to comply with background check requirements and their reasons for doing so when determining whether underlying applications for relief should be denied as a matter of law or a matter of discretion. *See* 8 CFR 1003.47(h) (stating that in cases remanded from the Board pursuant to 8 CFR 1003.1(d)(6), "the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section" and, if presented with new information, "may hold a further hearing if necessary to consider any legal or factual issues, including issues relating to credibility, if relevant").

G. Adjudication Timelines

Comment: One commenter supported removing the AA96 Final Rule's adjudication timelines, including the time frames on summary dismissals at the Board, but recommended that the Department should further limit the Board's summary dismissal authority. The commenter recommended limiting summary dismissals of appeals to those that are (1) filed on a form of relief already granted to the appealing party; (2) facially improper due to lack of jurisdiction; (3) untimely without a statement of exceptional circumstances; or (4) specifically prohibited by statute or regulation. The commenter believed this would help protect pro se noncitizens from improper summary dismissal.

Another group of commenters raised concerns about returning to the 90-day and 180-day adjudication timelines at the Board and encouraged flexibility in allowing the Board to set case adjudication deadlines.

Response: The Department declines to make any substantive changes to the grounds for summary dismissal at the Board, as removing any of the longstanding regulatory grounds under which the Board may summarily dismiss an appeal would hinder the Board's ability to resolve appeals in an efficient, timely manner. Rather, this rule only removes the enjoined procedural timelines for the adjudication of summary dismissals instituted by the AA96 Final Rule and reverts to the pre-AA96 Final Rule framework.

The Department also reinstates and declines to alter the longstanding 90-day and 180-day adjudication timelines at the Board. The Department notes that these timelines do not begin the moment the appeal is filed. Instead, the 90-day timeline for cases adjudicated by a single Appellate Immigration Judge begins upon completion of the record on appeal, and the 180-day timeline for cases adjudicated by a three-member panel begins once an appeal is assigned to the three-member panel. See 8 CFR 1003.1(e)(8)(i). The Department believes these longstanding adjudication timelines ensure that Appellate Immigration Judges have sufficient time to review and complete appeals and provide a fair procedure while balancing the need for the efficient resolution of cases and the administrative finality of decisions. See 88 FR at 62271 (explaining reasoning for calculations of 90-day and 180-day adjudication timelines). While a group of commenters indicated that the Board's adjudication timelines should be more flexible, the commenters provided no data or evidence to support the assertion that these adjudication time frames are insufficient. In the Department's experience, both the 90-day adjudication timeline for decisions issued by a single Appellate Immigration Judge and the 180-day adjudication timeline for decisions issued by a three-member panel—both of which are the operative status quo—continue to be workable for the Board's internal processing of appeals.

H. Definitional Changes and Gender Neutrality

Comment: Commenters expressed support for the proposed definitions of “noncitizen” and “unaccompanied child” at 8 CFR 1003.1(gg) and (hh), respectively. Commenters who supported these added definitions stated that they aligned with current societal and professional standards of usage. One commenter agreeing with the changes noted that the Department could also use “unaccompanied noncitizen child” or “unaccompanied migrant child” if further definitional clarity was needed.

Commenters also urged EOIR to utilize gender-neutral terms so as not to exclude persons identifying as nonbinary. Commenters offered as example use of the terms “they,” “their,” “respondent,” and “appellant.” Alternatively, commenters recommended the use of gender-neutral language where applicable, such as “he or she,” and “his or her.”

Response: After further review, the Department has not made any further

changes to the definition of “unaccompanied child” proposed by the NPRM, but has non-substantively modified the “noncitizen” definition to more clearly state that it has the same meaning as the statutory definition of “alien.” Separately, the Department has made changes to use gender-neutral language where applicable. See, e.g., 88 FR at 62283 (proposing to replace the terms “his or her” with “the noncitizen”). Further, the Department has identified additional instances of the use of the term “alien” in regulatory provisions being amended by this rulemaking and is updating those provisions to replace the term “alien” with “noncitizen.” 8 CFR 1003.2(c)(2), 1003.7, 1003.23(b)(4)(iii)(B).

I. *Matter of Thomas & Thompson*

1. General Opposition

Comment: Some commenters argued that, for a variety of reasons, *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), should be withdrawn in their entirety. In particular, commenters stated that the decision in *Matter of Thomas & Thompson*—which held that State court orders altering sentences will be given effect for immigration purposes only when the orders are based on a procedural or substantive defect in the underlying criminal proceedings—marked an abrupt shift in agency law. Commenters stated that, for decades prior, the Department had given full effect to State sentencing alterations without further questioning the basis for alteration. Commenters stated that this deference to State law was in line with 1996 amendments to the INA. Specifically, commenters stated, according to statute, immigration law depends on State courts to determine whether a conviction and sentence exist. INA 101(a)(48)(B), 8 U.S.C. 1101(a)(48)(B). In light of this statutory scheme, commenters stated, the holdings of *Matter of Thomas & Thompson* and *Matter of Pickering*—the latter of which held that State court orders vacating convictions will be given effect for immigration purposes only when the orders are based on a procedural or substantive defect in the underlying criminal proceedings, much as *Matter of Thomas & Thompson* did thereafter with respect to orders altering sentences—are contrary to statute. Commenters stated that the holdings of *Matter of Thomas & Thompson* and *Matter of Pickering* upset the Federal and State constitutional balance,

disregard State law objectives, and create additional costs and impacts on the States as they adjust to the new rules. Commenters stated that many States have been forced to pursue new legislation to accommodate the holdings of *Matter of Thomas & Thompson* and *Matter of Pickering*, specifically laws making courts available for individualized constitutional defect litigation that commenters claim might otherwise be unnecessary.

Some commenters focused on what they believed to be the negative effects of the application of *Matter of Thomas & Thompson* and *Matter of Pickering* to public programs that offer mental health and substance abuse treatment. Commenters stated that States sometimes target such programs at individuals with criminal convictions, and that they sometimes entice participation by promising to eliminate, upon successful completion of a program, the legal effects of a conviction. Commenters argued that *Matter of Thomas & Thompson* and *Matter of Pickering* undermine such programs and discourage community participation in them.

Some commenters argued that *Matter of Thomas & Thompson* and *Matter of Pickering* frustrate State efforts to resolve criminal justice matters through streamlined procedures by limiting the effectiveness of State court vacatur and sentence alterations. In this regard, one commenter highlighted Georgia State court practices specifically, stating that most post-conviction orders in Georgia modifying a sentence or vacating a conviction are drafted on an ad hoc basis with reference to the facts of the specific case, and that determining whether such orders meet the *Matter of Pickering* and *Matter of Thomas & Thompson* standard requires a case-by-case analysis. They speculated that many States likely have practices similar to Georgia, and they argued that EOIR adjudicators should not be required to adhere to *Matter of Pickering* and *Matter of Thomas & Thompson* but should rather be directed to defer to all State court post-conviction orders, without regard to the rationales behind those orders. Such an approach, they argued, would be beneficial in that immigration judges would no longer have to parse orders to ascertain the State court judge's reasoning.

Finally, some commenters focused on *Matter of Thomas & Thompson* specifically, arguing that the decision erroneously applied the *Matter of Pickering* rule, insofar as it shifted the rule from the context of conviction, according to section 101(a)(48)(A) of the INA, 8 U.S.C. 1101(a)(48)(A), to the

context of sentencing at section 101(a)(48)(B) of the INA, 8 U.S.C. 1101(a)(48)(B). In urging the “withdraw[al]” of *Matter of Thomas & Thompson*, commenters also stated that, in the case of trafficking victims, post-conviction relief may be an essential remedy in relation to convictions for crimes forced to be committed as part of the trafficking.

Response: The Department appreciates these comments but declines to respond to them as they are outside the scope of this rulemaking as identified in the NPRM. See 88 FR at 62273 (“Reconsideration of the approach of *Matter of Thomas & Thompson* or *Pickering* is beyond the scope of this rulemaking, which focuses on the application of those decisions without reaffirming or reconsidering their approach.”).

2. Retroactive Application

Comment: No commenter argued that *Matter of Thomas & Thompson* should be applied retroactively. Commenters opposed the retroactive application of *Matter of Thomas & Thompson*, providing various reference points for the retroactivity analysis. Some commenters asserted that the most reasonable retroactivity rule would be to apply *Matter of Thomas & Thompson* prospectively only to cases of criminal charges filed after the decision’s publication on October 25, 2019. Other commenters argued that EOIR should adopt a bright-line rule that *Matter of Thomas & Thompson* will only apply to convictions finalized after the date of publication. And others urged that any sentencing alteration issued on or before the date of publication should be considered under the previous standard as established in *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). Regarding that previous standard, commenters argued that this framework did not cause an identifiable harm that would justify the unusual decision of retroactively attaching new consequences to criminal sentence alterations.

On the general subject of retroactivity, commenters quoted the Supreme Court’s statement that “[r]etroactivity is not favored in the law,” and that “individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994)). Commenters stated that the Eleventh Circuit, in holding that *Matter of Thomas & Thompson* should be applied

retroactively, was incorrect in stating that “the BIA did not retroactively apply a new law” to the noncitizen in that case “but instead applied the Attorney General’s determination of what the law had *always* meant.” *Edwards v. U.S. Att’y Gen.*, 56 F.4th 951, 962 (11th Cir. 2022) (“*Edwards I*”) (quoting *Yu v. U.S. Att’y Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009)), vacated No. 19–15077, 2024 WL 950198, at *1 (11th Cir. Mar. 6, 2024) (“*Edwards II*”) (on panel rehearing the court vacated the original decision and substituted a new decision that “is in all material respects the same as [the] earlier one, except that [the court] explain[s] in more detail why [it] must apply the retroactivity rule from [Yu]”). Commenters asserted that the Board has recognized State court sentence alterations in immigration proceedings since 1982, citing the Board’s decision of *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982). Thus, commenters stated, instead of clarifying what the law “had always meant,” the Attorney General in *Matter of Thomas & Thompson* changed the established law. Commenters therefore argued that EOIR should instead follow the Seventh Circuit’s approach. The Seventh Circuit has applied the factors identified in *Retail, Wholesale & Dep’t Store Union v. NLRB* (“*Retail Union*”), 466 F.2d 380, 390 (D.C. Cir. 1972), relying on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (“*Retail Union* test” or “*Retail Union* factors”), and held that retroactively applying *Matter of Thomas & Thompson* results in a “manifest injustice” as to a noncitizen who had received a sentence modification before *Matter of Thomas & Thompson* was decided. *Zaragoza v. Garland*, 52 F.4th 1006, 1023 (7th Cir. 2022). Finally, commenters stated that making *Matter of Thomas & Thompson* retroactive would be burdensome to the Federal Government. Specifically, the Government would have to relitigate the previously settled issue that EOIR acknowledges sentence alterations for convictions entered on or before October 25, 2019, and would have to address the circuit split over the retroactivity of the *Matter of Thomas & Thompson* rule, which could be reviewed by the Supreme Court.

Response: For the reasons discussed in more detail in section IV.K.1 of this preamble, the Department agrees with commenters that *Matter of Thomas & Thompson* should not apply to noncitizens who sought an order vacating, modifying, clarifying, or otherwise altering a sentence before *Matter of Thomas & Thompson* and who ultimately obtained such an order based

on that request. Retroactive application of *Matter of Thomas & Thompson* to this category of noncitizens would be manifestly unjust because in seeking such an order they could have reasonably relied on then-existing law to their detriment, and the Department does not believe it would be appropriate or workable for immigration judges to make more specific inquiries into actual reliance for this category of noncitizens. The Department does not, however, adopt a bright-line rule prohibiting application of *Matter of Thomas & Thompson* to all those charged, convicted, or sentenced before *Matter of Thomas & Thompson*: Such a rule would likely cover many noncitizens who did not reasonably rely on the prior state of the law to their detriment. Moreover, as to such noncitizens, the Department believes immigration judges can appropriately and workably identify those noncitizens who actually relied on the pre-*Matter of Thomas & Thompson* state of the law—for whom retroactive application would be manifestly unjust—and provide relief in the circumstances set forth in 8 CFR 1003.55(a)(2).

Comment: Commenters argued that, under the five-factor *Retail Union* test, the retroactive application of *Matter of Thomas & Thompson* should be limited. Commenters stated that every U.S. Court of Appeals and the Board apply the *Retail Union* test or a variation of it, providing as an example *Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019), and that the U.S. Courts of Appeals have frequently applied a framework akin to the *Retail Union* test to limit the retroactive application of Board or Attorney General decisions, providing as examples *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), and *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). Commenters asserted that the *Retail Union* factors weighed in favor of limiting retroactive application of *Matter of Thomas & Thompson* for several reasons. The first, second, and fifth *Retail Union* factors will be discussed in this comment and response, and the third and fourth factors in subsequent comments and responses.

Regarding the first *Retail Union* factor—whether the case is one of first impression—commenters stated that considering whether to apply *Matter of Thomas & Thompson* to individuals who were not party to that case does not constitute a case of first impression. Commenters asserted that the case of first impression was *Matter of Thomas & Thompson* itself; when the Department considers whether to apply *Matter of Thomas & Thompson* to

subsequent cases, it does so as a matter of second impression. Commenters stated that *Matter of Thomas & Thompson* does not present an issue of first impression for noncitizens in general who obtained State sentence alteration orders pursuant to the prior rules established under *Matter of Cota-Vargas*, *Matter of Song*, and *Matter of Estrada*.

The second factor under *Retail Union* considers whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law. Commenters stated that the Attorney General did not merely fill a void in *Matter of Thomas & Thompson*, which overruled three published decisions, *Matter of Cota-Vargas*, *Matter of Song*, and *Matter of Estrada*, but that the Attorney General's decision was a dramatic departure from EOIR's prior well-established practice. Commenters stated that, for decades prior to *Matter of Thomas & Thompson*, the Board and U.S. Courts of Appeals honored the full effect of criminal sentencing alterations with regard to immigration consequences, and that this well-established scheme was overruled by *Matter of Thomas & Thompson*.

The fifth *Retail Union* factor considers the statutory interest in applying a new rule retroactively despite the reliance of a party on the old standard. Commenters stated that even if the statutory interest in applying the new rule leaned in favor of retroactivity due to uniformity in application, as determined in *Zaragoza*, 52 F.4th at 1024, this is not sufficient to outweigh the other four factors, which commenters assert all weigh against retroactivity. Some commenters also argued that retroactive application would not further an interest in uniformity, as retroactive application based on the date of the *Matter of Thomas & Thompson* decision would itself create non-uniformity between a new case and any case in which the agency had acted prior to *Matter of Thomas & Thompson*. Instead, those commenters reasoned that not applying *Matter of Thomas & Thompson* retroactively would support uniformity because the prior practice under the overturned Board decisions would appropriately apply to all matters occurring before *Matter of Thomas & Thompson* was issued and further suggested that immigration is an ever-changing area of law in which uniformity is difficult to achieve.

Commenters acknowledged that in *Edwards I*, 56 F.4th at 962, the Eleventh Circuit concluded that *Matter of Thomas & Thompson* should be applied

retroactively. See also *Edwards II*, 2024 WL 950198 *1, *10 (vacating *Edwards I* but coming to same conclusion).

However, commenters argued that, in *Edwards*, the Eleventh Circuit neglected to use the five-factor *Retail Union* test as required by *Chenery*, it did not explain its reasoning in disagreeing with *Zaragoza*, and its retroactive application of *Matter of Thomas & Thompson* acted as a "manifest injustice."

Response: As discussed in section IV.K.1 of this preamble, the Department agrees with commenters that it is appropriate to apply the five-factor *Retail Union* test. As further explained, the Department believes that the first factor does not favor—and, if anything, weighs against—retroactive application of *Matter of Thomas & Thompson*, and that the second factor also weighs against retroactivity. The Department believes the fifth factor weighs slightly in favor of retroactive application but that this factor does not outweigh the other factors in the circumstances set forth below in section IV.K.1 of this preamble.

Comment: Turning to the third *Retail Union* factor, which focuses on reliance interests, commenters stated that this factor generally supported refraining from retroactive application of *Matter of Thomas & Thompson*. Commenters noted that, prior to *Matter of Thomas & Thompson*, EOIR adjudicators would, under *Matter of Song*, *Matter of Martin*, and *Matter of Cota-Vargas*, generally give effect to State court orders altering a noncitizen's criminal sentence. As will be discussed in more detail later in this subsection of the preamble, commenters had differing views as to the precise point in criminal proceedings at which reliance on the Board's case law predating *Matter of Thomas & Thompson* should be assessed. But commenters agreed with one another that, prior to *Matter of Thomas & Thompson*, noncitizens had relied on the Board's case law in making decisions in their criminal cases; for example, whether to enter into a plea agreement or seek a sentence alteration. Commenters argued that such reliance was reasonable and that, in a regulation limiting the retroactive application of *Matter of Thomas & Thompson*, noncitizens should not be required to show reliance in their particular case.

In general terms, commenters stated that practitioners have, for decades, been trained on and have relied upon the prior rules. Commenters stated that, with the *Matter of Thomas & Thompson* decision in 2019, individuals who were not removable or who were eligible for relief under the prior rules suddenly faced very different immigration

consequences because of the new decision. Additionally, commenters reasoned that applying *Matter of Thomas & Thompson* retroactively to pending proceedings is insupportable under the manifest injustice test and the equitable foundation of retroactivity doctrine, set forth in *Zaragoza*, 52 F.4th at 1023, and *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

Commenters discussed that, under the prior framework in effect until 2019, a post-sentencing sentence alteration was fully recognized by the Board without the need to establish a procedural or substantive defect in the proceedings. Commenters explained that many noncitizens received sentencing alterations that were based on legal or procedural defects in the underlying proceeding, but there was no cause for the defect to be spelled out explicitly in the alteration, as doing so was not necessary for the alteration to be given effect in immigration proceedings. Noncitizens thus negotiated resolutions to criminal charges with the options and restrictions of this prior framework in place. For example, a noncitizen may have accepted a plea bargain in reliance on the expectation, based on Board case law at the time the plea bargain was entered into, that a sentence could later be altered and that the alteration would be effective for immigration purposes. Commenters stated that, regarding aggravated felonies and the attendant immigration consequences, a noncitizen prior to *Matter of Thomas & Thompson* might reasonably have been willing to negotiate a sentence of one year or more with the expectation that they could later receive a sentence alteration that would be recognized in immigration proceedings. Commenters also stated that, prior to *Matter of Thomas & Thompson*, noncitizens may reasonably have elected to obtain a relatively sparse sentence alteration order in lieu of a more substantive court order in reliance on the expectation that the alteration would be given effect in immigration proceedings.

Response: As discussed in detail in section IV.K.1 of this preamble, the Department agrees that the third *Retail Union* factor weighs against retroactive application in certain classes of cases, but declines to adopt a categorical rule that would presume reliance for anyone who pled guilty, was convicted, or was sentenced prior to *Matter of Thomas & Thompson*.

Comment: Regarding the fourth *Retail Union* factor, focusing on the burden retroactive application of an agency decision would impose on parties, commenters stated that this factor also weighed in favor of limiting retroactive

application. Specifically, commenters opined that the severe burden of removal alone satisfies the fourth factor and that, where a noncitizen agreed to a plea bargain prior to *Matter of Thomas & Thompson* with the expectation that a subsequent sentence modification would be given effect in immigration proceedings, retaining an attorney to seek other post-conviction relief may well be too expensive. Commenters also stated that applying the *Matter of Thomas & Thompson* rule to cases where criminal charges were filed prior to that decision would create insurmountable burdens regarding the revisiting of past criminal charge adjudications because these convictions often occurred many years in the past and involved privileged and detailed conversations between noncitizens and their counsel. Additionally, with respect to noncitizens who obtained sentence modifications before *Matter of Thomas & Thompson*, commenters asserted that the notion that such a noncitizen can return to court to obtain another modification to satisfy the new rule created by *Matter of Thomas & Thompson* would be unrealistic, and that the courts would likely not be amenable to such a request, especially because many States set time limits on seeking a sentence alteration or prohibit successive motions.

Commenters stated that the Supreme Court has ruled that immigration consequences may be one of the considerations a noncitizen, as well as the sentencing judge, considers in resolving a criminal case. *See Mellouli v. Lynch*, 575 U.S. 798, 806–07 (2015). However, commenters stated, under *Matter of Thomas & Thompson*, it is not enough to show that a judge made a lawful modification because some additional defect must be identified. Commenters stated that some States have streamlined procedures for remedying defects in criminal proceedings, including Constitutional defects such as ineffective assistance of counsel. But commenters stated that *Matter of Thomas & Thompson*, by requiring noncitizens to show that a defect was procedural or substantive in nature, functionally precludes them from using these streamlined procedures to remedy such defects and instead requires them to pursue onerous Constitutional-defect post-conviction claims. Commenters stated that *Matter of Thomas & Thompson* and *Matter of Pickering* undermine the full effectiveness of State criminal system reform laws that are aimed to rectify race and national origin discrimination in policing and the criminal justice

system and allow relief on a streamlined basis. According to these commenters, *Matter of Thomas & Thompson* and *Matter of Pickering* functionally preclude noncitizens from using these streamlined procedures to remedy such defects and instead require them to pursue onerous individualized relief to establish, for example, ineffective assistance of counsel.

Response: The Department appreciates commenters' views on the fourth *Retail Union* factor and, as discussed in detail in section IV.K.1 of this preamble, agrees that this factor weighs against retroactive application but has concluded that this factor does not tip the balance against retroactive application in all cases.

Comment: Commenters suggested different reference points for distinguishing between cases where application of *Matter of Thomas & Thompson* would be considered impermissibly retroactive and those where such application would not. Some commenters argued that *Matter of Thomas & Thompson* should not be applied to any criminal charge initiated prior to the decision, pointing out that criminal defendants often enter into plea negotiations soon after charges are filed. Other commenters argued that the reference point should be the pleading itself, and that *Matter of Thomas & Thompson* should not be applied where the pleading predated that decision, as the potential availability of a sentence modification could influence a noncitizen's willingness to accept a plea offer.

Other commenters focused on the conviction, arguing that *Matter of Thomas & Thompson* should not apply to convictions that predate that decision. Commenters explained that a noncitizen may have accepted a plea offer in reliance on a possible subsequent sentence modification, but that, under the *Matter of Thomas & Thompson* framework, the same noncitizen may have rejected the plea due to the low likelihood of a future sentence modification for purposes of immigration proceedings. Commenters who argued that the conviction was the appropriate reference point cited *Vartelas v. Holder*, 566 U.S. 257, 269–70 (2012), where the Supreme Court determined that the reference point for deciding whether the application of a new rule is retroactive is at the time of the conduct targeted by the rule.

Finally, other commenters suggested that the proper reference point should not be the conviction or earlier events, but rather when the noncitizen took substantial steps towards seeking a sentence modification. Thus, *Matter of*

Thomas & Thompson would not apply where the noncitizen took such substantial steps prior to the decision. In this regard, commenters argued that noncitizens were likely to rely upon the case law at the time in preparing a sentence modification request to benefit their immigration case, keeping in mind that such requests can take a considerable amount of time to prepare. Some commenters also suggested that the reference point should be when the noncitizen sought a sentence modification, so *Matter of Thomas & Thompson* would not apply where the noncitizen sought such a modification prior to the decision.

Response: The Department appreciates the information commenters provided regarding their views on the proper reference points for the retroactivity analysis. As discussed in section IV.K.1 of this preamble, the Department has determined that *Matter of Thomas & Thompson* will not apply to noncitizens who obtained sentence alterations as a result of a request for such alteration made on or before October 25, 2019—the day *Matter of Thomas & Thompson* was published. *See* 8 CFR 1003.55(a)(1)(A). Recognizing that other noncitizens likely also made decisions in reliance on the law as it existed before *Matter of Thomas & Thompson*, the rule also provides a process for noncitizens to establish that *Matter of Thomas & Thompson* should not be applied to them given their detrimental reliance on the prior law. *See* 8 CFR 1003.55(a)(1)(B).

3. Defects Under State Law

Comment: Some commenters identified specific State law provisions allowing for vacatur or sentence modifications for grounds those States viewed as defects under State law. They urged the Department to recognize State court orders under such statutes, on the ground that such vacatur and modifications are based on procedural or substantive defects recognized by State law and thus meet the standards set out in *Matter of Thomas & Thompson* or *Matter of Pickering*. In particular, two commenters addressed Cal. Penal Code § 1473.7, which was mentioned in the request for comment. Both argued that all vacatur under this statute should be recognized by the Department as based on procedural or substantive defects. In addition, two commenters discussed postconviction orders in Georgia, highlighting the ad hoc nature of many of these orders and arguing that the Department should take them at face value and, in determining whether they are based on procedural or substantive defects and thus given effect

for immigration purposes, defer to the State court's characterization of the order.

Response: As explained in detail in section IV.K.2 of this preamble, the Department has elected to address circumstances in which an original order contains a genuine ambiguity, mistake, or typographical error and the State court corrects these issues in order to give effect to the original order's intent. At this time, the Department declines to go further in clarifying how *Matter of Pickering* and *Matter of Thomas & Thompson* apply to particular types of orders under Cal. Penal Code § 1473.7 or any other specific statute. The Department has considered the arguments of commenters on these issues. But the Department continues to weigh whether clarification is warranted and, if so, what type of clarification is most appropriate. Given the importance of this rule and the interest in issuing the rule promptly, the Department has concluded that the balance of interests militates in favor of issuing the rule now rather than delaying the rule further in order to consider additional clarifications, consistent with agencies' general authority to "address a problem one step at a time." *Hercules Inc. v. U.S. E.P.A.*, 938 F.2d 276, 282 (D.C. Cir. 1991).

J. Statutory and Regulatory Requirements

1. Administrative Procedure Act

Comment: Some commenters stated that this rulemaking is arbitrary and capricious under the Administrative Procedure Act. Commenters believed that the rule did not examine the full scope of the issue and failed to address alternative solutions, such as summary judgment and contempt authority, which commenters stated would provide the immigration courts with needed efficiencies. Similarly, commenters stated that the rule violates the APA because there are additional rulemakings currently being promulgated that amend related processes, which they contend renders public notice concerning the basis of this rule insufficient. Specifically, one commenter cited to a 2022 joint DHS–DOJ rulemaking providing DHS asylum officers with the authority to adjudicate asylum applications in certain circumstances, as well as a 2023 HHS NPRM proposing to make changes regarding unaccompanied children. The commenter claimed that, without a full understanding of these other rulemakings, commenters cannot

adequately analyze the proposed changes in this rule.

Commenters also stated that the Department failed to provide a Booz Allen Hamilton study cited in the NPRM and, therefore, requested release of the report and additional time to comment.

Commenters also requested various data relating to removal proceedings, termination, and administrative closure, including (1) updated data regarding the number of inactive pending cases; (2) the average length of time a case has been administratively closed; (3) the number of terminated or dismissed cases; (4) the number of UCs by year that have been placed into removal proceedings in recent years; and (5) the grounds for administratively closing, terminating, or dismissing cases.

Response: The Department has fully complied with the APA in promulgating this rulemaking. In proposing and finalizing this rulemaking, the Department considered various procedural tools for managing cases in determining the availability and scope of administrative closure and termination authorities. *See, e.g.*, 88 FR at 62256–58 (considering the availability of continuances and motions to reopen in the context of providing for administrative closure authority). The Department ultimately determined that administrative closure and termination would help promote overall efficiency in the immigration courts. *See* 88 FR at 62256 (describing efficiencies created by administrative closure), 62263 (efficiencies created by termination).

Importantly, the Department notes that various procedural tools are not mutually exclusive, and providing standards for administrative closure or termination does not reduce or affect the availability of other procedural tools. The Department will continue to review immigration court procedures to determine whether additional regulatory changes may further promote adjudicatory efficiencies.

With regard to commenters' staggered rulemaking claim, the Department does not believe that this rule is affected by any other recent or immediately forthcoming regulatory efforts, as noted in the NPRM. *See* 88 FR at 62273 ("The Department does not anticipate that the comment period for this proposed rule will overlap or coincide with other rules, Attorney General decisions, or Board decisions that would affect the effect of the regulatory changes proposed by this NPRM."). For instance, the 2022 joint DHS–DOJ rulemaking cited by commenters, which allows for DHS asylum officers to adjudicate

certain asylum applications in the first instance, was published over a year and a half ago, and was effective on May 31, 2022. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) ("Asylum Processing IFR"). Moreover, nothing in the Asylum Processing IFR is affected by the changes proposed in this rule, which focus on administrative closure and termination standards, as well as certain procedures before the Board. Similarly, the HHS proposed rule cited by commenters, which proposes various standards for the care of UCs, is not in any way affected by this rule's singular EOIR discretionary termination ground for UCs wishing to pursue their statutory right to seek asylum before USCIS. *See* Unaccompanied Children Program Foundational Rule, 88 FR 68908 (Oct. 4, 2023). As HHS notes, their NPRM is "solely focus[ed] . . . on proposing requirements that relate specifically to the care and placement of unaccompanied children in ORR custody." *Id.* at 68977.

With regard to the Booz Allen Hamilton Report cited by commenters, the Department notes that the report was cited three times in the NPRM (88 FR at 62246, 62258), is available to the public in EOIR's FOIA Library, and has been available since before this rule's comment period began. *See* EOIR, FOIA Library (last updated Mar. 11, 2024), <https://www.justice.gov/eoir/foia-library-0> (item titled "Legal Case Study: Summary Report").

In response to a request for additional statistics, the Department notes that it posts various adjudication statistics on its website, including data on overall case adjudications and certain statistics related to cases involving UCs, for instance. *See* EOIR, Statistics and Reports (last updated Oct. 3, 2023), <https://www.justice.gov/eoir/statistics-and-reports>. For example, the Department maintains statistics on several of the requests made by the commenter. *See* Inactive But Pending Cases by FY of Administrative Closure, <https://www.justice.gov/eoir/page/file/1307016/download> (inactive pending cases); Administratively Closed Cases, <https://www.justice.gov/eoir/page/file/1061521/download> (average length of administrative closure); FY 2023 Decision Outcomes, <https://www.justice.gov/media/1174716/dl?inline> (number of terminated and dismissed cases); Pending Unaccompanied Noncitizen Child (UAC) Cases, <https://www.justice.gov/media/1174841/dl?inline> (number of UC cases by year).

The Department endeavors to keep these statistics updated at regular intervals, such as quarterly or yearly, depending on the statistic. However, the Department does not maintain underlying data relevant to certain statistics requested by commenters, such as the specific grounds for administratively closing, terminating, or dismissing cases.

2. Executive Orders 12866, 13563, 14094

Comment: One commenter stated that the Department should conduct an economic impact analysis, including the consideration of any burdens the rule would have on states, municipalities, and United States taxpayers. The commenter also stated that the Department should consider the impact on DHS, which would need to expend additional resources to track the status of noncitizens who have had their cases administratively closed or terminated while they pursue relief outside of EOIR.

Response: As explained in the NPRM, the Department considered the cost and benefits of this rule in accordance with the principles of Executive Orders 12866, 13563, and 14094.

Fundamentally, the commenter relies on an unfounded assumption that this rule will incentivize unlawful migration or otherwise needlessly delay proceedings, and thus produce costs for the cited groups. However, as the Department explained in the NPRM, the procedures contained in this rule have long existed, and the rule largely codifies the status quo. *See* 88 FR at 62274–75 (noting that “the NPRM is largely either proposing to codify prior longstanding regulatory provisions (*sua sponte* authority, Board remand authority) or longstanding case law (administrative closure)”; *see also* 62244 (noting, for example, that administrative closure has existed since at least the 1980s); *Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51, 52–53 & n.1, 55 (BIA 1968) (terminating proceedings in the case and noting that “[t]he administrative power to terminate deportation proceedings” existed prior to the promulgation of the authority in the regulations). Accordingly, the Department does not anticipate that the rule could be reasonably expected to change migration behaviors, nor did the commenter provide any evidence to the contrary. For example, the rule does not provide any new types of legal status or lawful methods of entry into the United States. Instead, the procedural tools raised by the commenter—administrative closure and termination—have long existed in

immigration proceedings, with administrative closure availability only curtailed for a brief two-month period in early 2021. *See, e.g., Garcia-DeLeon*, 999 F.3d 986, 989 (6th Cir. 2021) (“For at least three decades, immigration judges and the BIA regularly administratively closed cases.”).

Moreover, the rule addresses certain procedures in EOIR adjudications, including administrative closure and termination, only in defined circumstances. The legal standards for administrative closure and termination codified by this rulemaking do not allow EOIR adjudicators to unilaterally pause or terminate cases based on any sort of generalized backlog management concerns, but instead are focused on specific legal scenarios in which such tools may be relevant to efficiently managing proceedings. *See, e.g.,* 8 CFR 1003.1(m)(1)(ii)(F), 1003.18(d)(1)(ii)(F) (preventing adjudicators from unilaterally terminating proceedings “for purely humanitarian reasons”). For example, allowing an immigration judge to terminate proceedings where a *prima facie* approvable application is filed with USCIS can help increase efficiencies by ensuring that only one agency is adjudicating the noncitizen’s relief claim at a time. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

To the extent that the commenter raised concerns about DHS exercising its prosecutorial discretion authority to move for administrative closure or termination of proceedings, the Department notes that such authority is outside the scope of this rulemaking. EOIR adjudicators do not have the authority to second-guess DHS’s decisions to institute removal proceedings or how DHS prioritizes or pursues such proceedings. *See, e.g.,* 88 FR at 62264–65 (“The proposed rule would not change the longstanding principle that immigration judges and Appellate Immigration Judges have no authority to review or second-guess DHS’s exercise of prosecutorial discretion, including its decision whether to commence removal proceedings.”).

Further, and contrary to commenter’s claims, granting administrative closure is often more efficient than, for example, requiring an immigration judge or Appellate Immigration Judge to adjudicate the case and then later entertain a motion to reopen once the noncitizen is granted outside relief. As explained in the NPRM, administrative closure can be the most efficient procedural tool when a case is not otherwise ready for final adjudication, by conserving scarce adjudicatory resources to focus on other matters that

are ready for adjudication. *See* 88 FR at 62256–57.

3. Other Regulatory Requirements

Comment: Commenters stated that the Department must conduct the appropriate environmental review under the National Environmental Policy Act (“NEPA”) before finalizing the rule, which could include an initial environmental assessment or a full environmental impact statement. Commenters claimed that the proposed rule has the potential to increase immigration, which could result in environmental consequences, such that the rule would be subject to NEPA.

Response: The Department is adopting and applying DHS’s categorical exclusion for rulemaking actions under NEPA as discussed in section V.I of this preamble. As a result, the Department is not required to prepare an environmental assessment or environmental impact statement in conjunction with this rulemaking.

K. Outside of the Scope

Commenters raised a number of suggestions and concerns that were outside of the scope of this specific rulemaking.

Comment: One commenter raised concerns about administrative closure language contained in the AA96 Final Rule—specifically the provisions at 8 CFR 1003.1(d)(1)(ii) (2020) and 1003.10(b) (2020)—rather than any language the Department proposed in the course of this rulemaking. In referring to the AA96 Final Rule’s regulatory text at 8 CFR 1003.1(d)(1)(ii) (2020) and 1003.10(b) (2020), the commenter stated that the provisions do not clearly define what constitutes a regulation or court order that authorizes administrative closure.

Response: The referenced provisions added by the AA96 Final Rule—8 CFR 1003.1(d)(1)(ii) (2020) and 1003.10(b) (2020)—are being rescinded in this rulemaking. In lieu of such language, this rulemaking provides adjudicators with administrative closure authority subject to the governing standards provided in 8 CFR 1003.1 and 1003.18.

Comment: Commenters suggested that the rule explicitly acknowledge and preserve equitable tolling for filing motions to reopen and reconsider, as equitable tolling is an important safeguard for noncitizens who may face barriers to accessing legal counsel, evidence, or other information.

Response: Commenters’ concerns regarding the equitable tolling doctrine are outside the scope of this rulemaking, as this rulemaking does not address or otherwise modify any existing standards

for equitable tolling. *See also* 85 FR at 81629 (noting that the AA96 Final Rule also does not affect pre-existing exceptions to the time and number limitations on motions to reopen, including equitable tolling). If the Department proposes to address equitable tolling in a future rulemaking, commenters are encouraged to provide comments at that time.

Comment: One commenter proposed changes to 8 CFR 1003.23(b)(3), which currently states that motions to reopen to pursue cancellation of removal “may be granted only upon demonstration that the noncitizen was statutorily eligible for such relief prior to the service of a Notice to Appear.” The commenter recommended updating the language referencing statutory eligibility at the time of NTA service, in light of the Supreme Court decisions in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), to state that a defective NTA does not preclude statutory eligibility for cancellation of removal based on the stop-time rule.

Response: Commenters’ concerns regarding Notices to Appear and cancellation of removal are outside the scope of this rulemaking, as this rulemaking addresses neither subject. If the Department pursues future rulemakings regarding Notices to Appear or cancellation of removal, the Department encourages the commenter to provide such proposed changes at that time.

IV. Final Rule

After considering public comments on the NPRM, and given further reflection, the Department now adopts the NPRM as published with the following changes:

A. Administrative Closure and Recalendaring—ICE Detention Status as a Factor

The Department has added an additional factor to the nonexhaustive list of factors to be considered when adjudicating administrative closure and recalendaring, which specifies that EOIR adjudicators must consider the “ICE detention status of the noncitizen” when making a determination about whether to administratively close or recalendar a case. *See* 8 CFR 1003.1(l)(3)(i)(H), 1003.18(c)(3)(i)(H) (administrative closure factor); 1003.1(l)(3)(ii)(H), 1003.18(c)(3)(ii)(H) (recalendaring factor).

The Department reiterates that none of the listed factors, including a noncitizen’s detention status in ICE custody, are dispositive to the determination of whether administrative

closure or recalendaring is necessary or appropriate in a given case. 8 CFR 1003.1(l)(3) (“No single factor is dispositive.”); 8 CFR 1003.18(c)(3) (same). Rather, EOIR adjudicators must consider the totality of the circumstances in making such determinations. *Id.*

However, given the potential liberty interests implicated when a noncitizen is in ICE detention during the pendency of a case before EOIR, as well as heightened costs to the Government, a noncitizen’s detention status in ICE custody will generally weigh against administrative closure or, alternatively, in favor of recalendaring if already administratively closed. Detention heightens the need to continuously monitor whether a case is ready to proceed to minimize the risk that an individual is detained any longer than necessary. *See, e.g., Reid v. Donelan*, 17 F.4th 1, 7 (1st Cir. 2021) (recognizing the court’s view that “the Due Process Clause imposes some form of reasonableness limitation on the duration of detention” under certain provisions of the INA) (cleaned up). Therefore, in most circumstances, a detained case should be kept on, or returned to, the active docket, with continuances granted as needed.

As stated previously, however, a noncitizen’s status in ICE detention is not a dispositive factor, and it is considered by the EOIR adjudicator as part of the totality of the circumstances. There may be some circumstances where, on balance, administrative closure of a case is necessary or appropriate even when a noncitizen is in ICE detention. For example, an immigration judge may find that, in certain cases, administrative closure is the proper procedural tool to allow a detained noncitizen to pursue available relief with USCIS, such as a Form I–601A, Provisional Unlawful Presence Waiver. *See* 8 CFR 212.7(e)(4)(iii). However, due to the potential liberty interests at stake in detained cases involving potential relief before USCIS, the noncitizen’s detention status may weigh against granting administrative closure unless relief before USCIS is expected to be adjudicated expeditiously. Moreover, in many cases, the noncitizen may be detained due to underlying criminal activity, which may implicate other factors that would weigh against administrative closure. *See, e.g.,* 8 CFR 1003.1(l)(3)(i)(D), 1003.18(c)(3)(i)(D) (criminal activity may affect the likelihood of success for relief the noncitizen may wish to pursue).

Conversely, as the Board recognized in *Matter of M–A–M–*, administrative

closure may be appropriate in cases involving mental competency issues, including to allow a noncitizen to seek treatment for a condition that impacts mental competency. 25 I&N Dec. at 483. Thus, for example, even if a noncitizen is in ICE detention, it may be necessary or appropriate to administratively close a case where competency issues are implicated to allow for evaluations or medical treatment where an EOIR adjudicator determines that a noncitizen’s competency status might be restored. *See id.* at 480 (recognizing that “[m]ental competency is not a static condition”).

The Department recognizes that there also may be other particularly compelling circumstances where a noncitizen is in ICE detention but, on balance, administrative closure may be necessary or appropriate in that case given the totality of the circumstances. The Department is confident that EOIR adjudicators will appropriately exercise their independent judgment and discretion in each individual case involving a request for administrative closure or recalendaring, including in those cases where a noncitizen is in ICE detention.

When applying this factor, the Department clarifies that the relevant consideration is whether the noncitizen is in ICE detention; that is, in the custody of DHS, given the aforementioned concerns. The same concerns do not apply to noncitizens in other carceral settings, such as local, State, or Federal custody. Administrative closure may be an appropriate docket management tool in such cases because the noncitizen’s incarceration is not dependent upon the outcome of the proceedings before EOIR. Additionally, there may be a less immediate need to divert EOIR resources to expeditiously resolve the case. For example, a noncitizen may be in Federal, State, or local custody during the pendency of criminal proceedings, the resolution of which may directly impact the noncitizen’s removability or eligibility for relief or protection from removal in EOIR proceedings. Thus, it may be more efficient to administratively close such cases and then recalendar them when the collateral criminal proceedings have been resolved. In such cases, it would be comparably less efficient to carry out proceedings before EOIR when the outcome of the concurrently pending collateral criminal proceedings would materially affect the outcome of EOIR proceedings.

Additionally, if a noncitizen in Federal, State, or local custody is serving out a lengthy criminal sentence,

there may be a less immediate need to resolve that noncitizen's case before EOIR because any potential removal order would not be executed until the noncitizen had completed their sentence. Thus, in such instances, it may be more efficient to administratively close the noncitizen's case and then to recalendar it closer in time to the noncitizen's eligibility for release. Accordingly, the Department believes a noncitizen's status in ICE detention, specifically, as opposed to other carceral settings, is a unique factor relevant to the determination whether to administratively close or recalendar a case.

B. Discretionary Termination—Consideration of Arguments in Favor and in Opposition

The Department has modified the standards for discretionary termination to explicitly require that EOIR adjudicators consider the reason termination is sought and the basis for any opposition to termination when adjudicating a motion to terminate. *See* 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii). For consistency and clarity, the Department is using the same phrasing as the parallel administrative closure provisions. *See* 8 CFR 1003.1(l)(3)(i)(A) and (B), 1003.18(c)(3)(i)(A) and (B).

To be clear, the inclusion of these factors in the regulations governing termination and administrative closure is not intended to and does not alter the general motions practice, which as a matter of course requires an EOIR adjudicator to consider the reason for the motion or the basis for any opposition to the motion. *See, e.g.,* Immigration Court Practice Manual ch. 5.12 (general standards for responses to motions). Further, as previously proposed in the NPRM, the Department had no intention of altering existing EOIR motions practice relating to termination. *See* 88 FR at 62264 (noting that “the adjudicator may consider any basis for opposition to termination in making their determination”). However, after considering comments raising concerns about terminating proceedings when a party objects to such termination, the Department believes it would be particularly helpful to clearly state that EOIR adjudicators will consider such objections when adjudicating a motion to terminate. For example, the Department believes that this clarification is responsive to concerns about the use of termination where a noncitizen objects to termination based on a desire to pursue relief in proceedings before EOIR where termination would otherwise foreclose the ability to pursue such relief.

Relatedly, the rule responds to concerns that terminating proceedings would override DHS's prosecutorial discretion by requiring EOIR adjudicators to consider and weigh DHS's objection to termination. This modification to the final rule is intended to clarify that discretionary termination cannot be granted without considering and weighing all arguments for and against discretionary termination. The Department believes that this requirement will help ensure that EOIR adjudicators consider the positions of both parties, including either party's interest in having proceedings go forward, prior to ruling on a motion to terminate.

The new provision states: “The [EOIR adjudicator] shall consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate.” 8 CFR 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).

C. Discretionary Termination—UC Asylum Jurisdiction

The Department has made two modifications to the NPRM's discretionary termination ground relating to cases implicating USCIS's exercise of initial asylum jurisdiction under INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). *See* 8 CFR 1003.1(m)(1)(ii)(A), 1003.18(d)(1)(ii)(A). First, the Department modified this ground to apply not only to cases involving noncitizens determined by EOIR to be unaccompanied children, as defined by 1001.1(hh), but also to cases in which USCIS would consider their asylum application as one filed by an unaccompanied child such that USCIS may exercise its initial jurisdiction under INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) to adjudicate the asylum application. Thus, this category could include those noncitizens whom DHS previously determined to be UCs and whose asylum applications are amenable to USCIS's initial jurisdiction under INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). The Department believes that EOIR adjudicators should have discretion to terminate removal proceedings in all potential circumstances where USCIS may exercise its initial jurisdiction over an asylum application pursuant to INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), such as where USCIS considers the application as one filed by a UC through USCIS policy or by court order. *See, e.g., J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 376 (D. Md. 2019) (issuing a preliminary injunction in a class action involving USCIS policy changes regarding determinations about whether an application is considered as

one filed by a UC). Accordingly, the Department has amended 8 CFR 1003.1(m)(1)(ii)(A) and 1003.18(d)(1)(ii)(A) to provide that an EOIR adjudicator may terminate proceedings when the noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh).

Further, expanding the applicability of this discretionary termination ground to capture all potentially qualifying noncitizens will help ensure that EOIR and USCIS are not duplicating adjudicatory efforts, and that the Departments are giving full effect to Congress's intent that qualifying asylum applications should be adjudicated by USCIS. In making this change, the Department notes that it is not taking a position in this rulemaking on how, when, or by whom a UC determination is made.

Second, the Department also modified this ground to require the filing of an asylum application with USCIS before an EOIR adjudicator may grant discretionary termination, to ensure that relevant noncitizens in removal proceedings have a pending application on file with USCIS before any EOIR proceedings are terminated. *See* 8 CFR 1003.1(m)(1)(ii)(A), 1003.18(d)(1)(ii)(A). The change replaces the phrase “states an intent in writing or on the record at a hearing to seek asylum with USCIS” with “has filed an asylum application with USCIS.” *Id.* This change will ensure that the Department and DHS can most efficiently monitor the noncitizen's ongoing proceedings and relief applications in order to take any necessary actions as such proceedings or applications are completed or adjudicated.

Taken together, the new provisions now read: “The noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh).” *Id.*

D. Discretionary Termination—Cross-Reference to DHS Regulations Related to T and U Visas

The Department has decided not to finalize the discretionary termination ground that cross-references DHS provisions related to T and U visas as proposed in the NPRM. 88 FR at 62278, 62281. As relevant here, commenters noted that in the proposed discretionary termination ground that cross-referenced DHS regulations related to T and U visas, the cross-referenced DHS regulatory provisions—8 CFR

214.11(d)(1)(i) and 214.14(c)(1)(i)—discuss joint motions to terminate. *See, e.g.,* 8 CFR 214.11(d)(1)(i) (“In its discretion, DHS may agree to the [noncitizen]’s request to file with the immigration judge or the Board a joint motion to . . . terminate proceedings without prejudice, . . . while an application for T nonimmigrant status is adjudicated by USCIS.”). In turn, the proposed rule referenced these T and U visa regulatory provisions under the discretionary termination grounds. 88 FR at 62278, 62281.

However, the Department clarifies that any jointly filed motions to terminate, including those filed pursuant to the cross-referenced DHS provisions, should be considered under the mandatory “joint or unopposed” motion termination ground. *See* 8 CFR 1003.1(m)(1)(i)(G), 1003.18(d)(1)(i)(G). Thus, should any motions described in the DHS regulatory provisions related to T and U visas be presented before EOIR, those motions would constitute joint motions and would be governed by 8 CFR 1003.1(m)(1)(i)(G) or 1003.18(d)(1)(i)(G). Accordingly, the Department has decided not to finalize the discretionary termination provision for T and U visa applicants because, as proposed, it was superfluous and risked confusion over the proper standard to apply for such joint motions.

E. Discretionary Termination—Motion Required

The Department has modified the discretionary termination provisions to make clear that a motion from a party is required before an EOIR adjudicator may terminate a case in the exercise of discretion. *See* 8 CFR 1003.1(m)(1)(ii) and (m)(2)(ii), 1003.18(d)(1)(ii) and (d)(2)(ii). This change is consistent with regulatory provisions requiring a motion from a party before an EOIR adjudicator may grant administrative closure, *see* 8 CFR 1003.1(l)(1), 1003.18(c)(1), and reflects the Department’s desire to ensure that parties have an opportunity to present any relevant evidence to EOIR adjudicators before they issue a decision on requests to terminate a case.

Accordingly, in relevant part, the discretionary termination provisions read that “[i]n removal, deportation, or exclusion proceedings, the [EOIR adjudicator] may, in the exercise of discretion, terminate the case upon the motion of a party where at least one of the requirements listed in . . . this section is met.” 8 CFR 1003.1(m)(1)(ii) (Board), 1003.18(d)(1)(ii) (immigration judges). Similarly, in the interest of consistency, the provisions governing discretionary termination in other proceedings now read, in relevant part,

“[i]n proceedings other than removal, deportation, or exclusion proceedings, the [EOIR adjudicator] may, in the exercise of discretion, terminate the case upon the motion of a party where terminating the case is necessary or appropriate for the disposition or alternative resolution of the case.” 8 CFR 1003.1(m)(2)(ii) (Board), 1003.18(d)(2)(ii) (immigration judges).

F. Discretionary Termination—Naturalization Eligibility

Based on existing statutory and regulatory structures, the Department has revised the provisions on discretionary termination on the basis of prima facie eligibility to naturalize. Under INA 318, 8 U.S.C. 1429, “no person shall be naturalized against whom there is outstanding a final finding of deportability,” and “no application for naturalization shall be considered by [USCIS] if there is pending against the applicant a removal proceeding.” This provision has been interpreted to mean that “‘removal proceedings and final removal orders are to take precedence over naturalization applications.’” *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042, 1045 (9th Cir. 2004) (quoting *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 970 (9th Cir. 2003)). To better align with the statutory provision precluding consideration of a naturalization application where a removal proceeding is pending, the Department believes it is appropriate, with respect to this narrow category of motions for discretionary termination, to preclude EOIR adjudicators from granting the motion if DHS—which brings removal proceedings—assesses that the noncitizen should remain in EOIR proceedings given the circumstances of the particular case, and if DHS then communicates that assessment to the adjudicator by opposing a motion to terminate. Additionally, as stated in section III.C.4 of this preamble, the Department declines to adopt *Acosta Hidalgo*’s limitation on an EOIR adjudicator’s authority to make a prima facie determination regarding a noncitizen’s eligibility for naturalization without certification from DHS when determining whether to terminate under former 8 CFR 1239.2(f) (2023). The Department has done so for efficiency reasons, and in light of operational frustrations, as well as inconsistencies and confusion over the framework established by *Acosta Hidalgo* with respect to former 8 CFR 1239.2(f) (2023). Under this rule, where a party moves to terminate, the EOIR adjudicator can make their assessment and, absent an express DHS opposition, can terminate

without a need to wait for, or require the parties to obtain or produce, DHS’s certification in every case. However, the Department continues to recognize DHS’s unique role in adjudicating naturalization applications, and Congress’s directive that pending removal proceedings—which DHS serves as the prosecutor in initiating—should bar consideration of naturalization applications, and therefore will not terminate cases over DHS’s opposition. Where DHS does oppose, the EOIR adjudicator may proceed to assess best next steps for disposition or alternative resolution of the case without the uncertainty of when or whether DHS will ultimately provide certification as to the noncitizen’s prima facie eligibility. On balance, this creates efficiencies for the Department and the parties while also acknowledging DHS’s unique role in adjudicating naturalization.

Under this rule, immigration judges would not assess prima facie eligibility for naturalization as a part of a noncitizen’s naturalization application, INA 318, 8 U.S.C. 1429 (“the findings of the Attorney General in terminating removal proceedings . . . shall not be deemed binding in any way . . . with respect to the question of whether such person has established [] eligibility for naturalization as required by this subchapter”), but rather solely for the purpose of assessing whether termination would be necessary or appropriate to allow the noncitizen to have their application considered by DHS. Nevertheless, this rule continues to acknowledge both DHS’s unique role as sole administrators over the process to obtain permanent (with limited exceptions) citizenship in the United States and its authority to initiate and prosecute removal proceedings, by limiting termination to pursue a naturalization application to those instances where DHS does not oppose a noncitizen’s motion to terminate. 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

This provision only applies to motions for discretionary termination based on prima facie eligibility to naturalize under 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). It does not limit, for example, an EOIR adjudicator’s ability to apply the mandatory termination grounds at 8 CFR 1003.1(m)(1)(i) and 1003.18(d)(1)(i) to a noncitizen who may be prima facie eligible to naturalize, nor an EOIR adjudicator’s ability to grant immigration relief or protection to such a noncitizen.

Where a noncitizen makes a motion for discretionary termination based on eligibility to naturalize, DHS may,

depending on the circumstances of the case and in line with customary EOIR practice, indicate its opposition either by filing a timely written opposition or by announcing its opposition in court, orally and on the record. The regulation does not require DHS to state its rationale for opposing the motion. As long as DHS affirmatively opposes the motion, either orally or through a timely written submission, the EOIR adjudicator must deny the motion. However, the preclusion on granting the motion is only triggered when DHS affirmatively opposes the motion. Should DHS fail to respond to the motion in one of the two ways set out previously, the preclusion on granting the motion is not triggered, and the EOIR adjudicator is authorized to grant the motion in the exercise of their discretion.

This final rule's provisions governing discretionary termination based on prima facie eligibility to naturalize replace the current regulatory provision governing discretionary termination on this ground, previously located at former 8 CFR 1239.2(f) (2023). Under that regulatory provision, as interpreted by the Board, termination required an affirmative statement from DHS that the noncitizen is prima facie eligible to naturalize. *See Matter of Acosta Hidalgo*, 24 I&N Dec. at 107–08. Courts have found that this regulatory scheme is consistent with the Act and comports with due process. *See Shewchun v. Holder*, 658 F.3d 557, 563 (6th Cir. 2011) (rejecting a challenge to *Matter of Acosta Hidalgo* and stating that “Congress has specifically accorded priority to removal proceedings over naturalization proceedings,” and that “[a]llowing DHS to have such a high level of control over an alien’s removal proceedings is thus consistent with the current statutory framework of immigration law” (internal citations and quotations omitted)); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007) (stating that due process is not violated by the requirement that DHS “provide an affirmative statement that an alien is prima facie eligible for naturalization in order to permit termination of the removal proceedings”). Given the former provision at 8 CFR 1239.2(f), this final rule’s provisions governing discretionary termination based on prima facie eligibility to naturalize do not increase DHS’s ability to prevent an EOIR adjudicator from terminating proceedings. To the contrary, the final rule’s provisions require that, in order to prevent termination, DHS must affirmatively oppose a noncitizen’s

motion, whereas under former 1239.2(f) (2023), silence from DHS effectively precluded an EOIR adjudicator from granting a noncitizen’s motion to terminate.

Specifically, the Department has amended the regulatory text to provide that, “[w]here the basis of a noncitizen’s motion for termination is that the noncitizen is prima facie eligible for naturalization, the [adjudicator] shall not grant the motion if it is opposed by DHS.” 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). The Department has done so in light of the statutory scheme governing naturalization and, relatedly, to recognize DHS’s unique role in adjudicating naturalization applications, its authority to initiate removal proceedings, and its role as the prosecutor of removal cases.

G. Discretionary Termination—USCIS Filing Required

The Department has modified the discretionary termination ground focusing on petitions, applications, or other actions that a noncitizen pursues with USCIS seeking relief from removal or lawful status, to include language requiring that the noncitizen has filed such application, petition, or other action before termination may be granted. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

This change will help ensure that EOIR is not prematurely terminating proceedings when a relevant application has not yet been filed with USCIS. By doing so, it will allow DHS and EOIR to efficiently monitor a noncitizen’s status and ensure that a noncitizen placed into removal proceedings either files an application with USCIS or remains in removal proceedings until final adjudication. Moreover, in cases where the noncitizen is in the process of preparing their application for filing with USCIS, they may request continuances or administrative closure before EOIR, as relevant, in the interim. *See* 8 CFR 1003.1(l) and 1003.18(c) (administrative closure); 1003.29 (continuances).

There are two exceptions to this USCIS filing requirement. First, where the motion is based on prima facie eligibility for adjustment of status, the noncitizen is not required to file such an application with USCIS when termination of removal proceedings is a prerequisite to the USCIS filing. *See* 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B). Second, there is no filing requirement where the motion is based on prima facie eligibility to naturalize. *See id.* The Department does not wish to require the filing of a naturalization application with USCIS

as a prerequisite to discretionary termination based on eligibility to naturalize given that, by statute, the application cannot be “considered” if the applicant is in removal proceedings, and that such a motion for termination cannot be granted if opposed by DHS. *See* INA 318, 8 U.S.C. 1429; 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

The new provisions read: “The noncitizen is prima facie eligible for naturalization, relief from removal, or a lawful status; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the noncitizen were not in proceedings; and the noncitizen has filed the petition, application, or other action with USCIS. However, no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization.” 8 CFR 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

H. Discretionary Termination—Clarification on Granting To Pursue Asylum Before USCIS

The Department has modified the grounds for discretionary termination in removal, deportation, and exclusion proceedings to clarify that EOIR adjudicators may not terminate a case in the exercise of discretion for a noncitizen to pursue an asylum application before USCIS, unless the noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh). *See id.* The Department has also added similar clarifying regulatory text in the regulatory provisions covering termination in proceedings other than removal, deportation, and exclusion proceedings. *See* 8 CFR 1003.1(m)(2)(iii), 1003.18(d)(2)(iii).

Upon reconsideration, the Department is concerned that the discretionary termination ground based on pursuing relief or a lawful status with USCIS as drafted in the proposed rule, *see* 88 FR at 62264, could have been read to authorize the termination of a case for the express purpose of allowing a noncitizen—other than a noncitizen who has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children—to apply for asylum with USCIS. This was never the Department’s intent. *See* 88 FR at 62264 (explaining that “the Department does not intend this proposed ground for discretionary termination to authorize a general practice of terminating proceedings involving prima facie

eligibility for asylum” and stating that “the default rule that EOIR adjudicators continue to exercise authority over asylum applications filed by noncitizens in removal proceedings would continue to apply”). And as explained in the NPRM, this would be in some tension with 8 CFR 1208.2(b), which grants exclusive jurisdiction to immigration judges over any asylum applications filed “after the charging document has been filed with the Immigration Court.” See *id.* As a matter of policy, the retention of exclusive jurisdiction over asylum applications by immigration judges, once the charging document has been filed, maintains efficiency of the immigration system by preventing further delay in the overall adjudication of an application that could occur if the noncitizen attempted to terminate removal proceedings so that they could restart the process with USCIS.

Accordingly, the Department has added clarifying language to this discretionary termination ground to provide that an EOIR adjudicator “shall not terminate a case for the noncitizen to pursue an asylum application before USCIS, except as provided for” in 8 CFR 1003.1(m)(1)(ii)(A) and 1003.18(d)(1)(ii)(A), 8 CFR 1003.1(m)(1)(ii)(B) (Board), 1003.18(d)(1)(ii)(B) (immigration judges). Under this provision, EOIR adjudicators may not consider a noncitizen’s desire to pursue asylum before USCIS as a basis for discretionary termination, except when related to UC asylum applications.

However, this provision does not affect the ability of the parties to pursue joint or affirmatively non-opposed motions to terminate removal, deportation, or exclusion proceedings—regardless of the basis for such motions—which are adjudicated pursuant to the standards governing mandatory termination. 8 CFR 1003.1(m)(1)(i)(G), 1003.18(d)(1)(i)(G) (directing EOIR adjudicators to grant motions that are jointly filed or where one party affirmatively indicates its non-opposition unless articulating “unusual, clearly identified, and supported reasons for denying the motion”).

Finally, given the foregoing amendment in the provisions governing removal, deportation, and exclusion proceedings, the Department deemed it necessary to include a conforming provision in the regulatory text governing termination of proceedings other than removal, deportation, and exclusion proceedings. Thus, the Department has added regulatory text to the provisions limiting termination in proceedings other than removal,

deportation, and exclusion proceedings to make clear that neither the Board nor the immigration judge is authorized to terminate a case for the noncitizen to pursue an asylum application before USCIS, unless the noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh). See 8 CFR 1003.1(m)(2)(iii) (Board), 1003.18(d)(2)(iii) (immigration judges).

I. Voluntary Departure Bond Posting Deadline

The Department has modified 8 CFR 1240.26(k)(4) to state that the Board shall advise the noncitizen of the duty to post any voluntary departure bond with the ICE Field Office Director within 30 business days of the Board’s order granting voluntary departure. In recognition of the fact that Board orders are generally served by mail and received without advance warning, the Department believes this 30-day period will allow noncitizens adequate time to post a voluntary departure bond when the Board, rather than the immigration judge, grants voluntary departure in the first instance.

J. Additional Terminology Updates and Non-Substantive Changes

The Department is non-substantively updating the “noncitizen” definition as proposed in the NPRM to better clarify that “noncitizen” is synonymous with the statutory term “alien.” In the NPRM, the proposed “noncitizen” definition stated only that the term meant “any person not a citizen or national of the United States.” See 88 FR at 62275. In this final rule, the Department has updated the definition to state that the “term *noncitizen* means ‘alien,’ as defined in section 101(a)(3) of the Act.” See 8 CFR 1001.1(gg). This maintains the same substantive underlying definition as the NPRM, but also provides better clarity that the terms “noncitizen” and “alien” are defined to be synonymous.⁶

Relatedly, in addition to the changes the Department proposed in the NPRM regarding replacing the term “alien” with “noncitizen,” the Department has identified other instances of the use of the term “alien” in regulatory provisions the Department is amending in this rulemaking. Accordingly, the Department is also amending 8 CFR 1003.2, 1003.7, and 1003.23(b)(4)(iii)(B)

to replace the term “alien” with “noncitizen” in those provisions.

The Department is also making clarifying edits regarding the authorities of the Chief Appellate Immigration Judge and Chief Immigration Judge. The Department is amending 8 CFR 1003.1(a)(2)(i)(E) by adding a cross-reference to 8 CFR 1003.1(d)(1)(ii) and is similarly amending 8 CFR 1003.9(b)(5) to include a cross-reference to 8 CFR 1003.10(b), rather than adding an explicit reference to administrative closure authority to each provision as proposed in the NPRM. See 88 FR at 62275, 62280. These amendments clarify that the Chief Appellate Immigration Judge and Chief Immigration Judge, respectively, may exercise each of the authorities described in the cross-referenced provisions, including administrative closure authority. See 8 CFR 1003.1(a)(2)(i)(E), 1003.9(b)(5).

Additionally, the Department would like to clarify a change made in 8 CFR 1003.1(e)(7) (request for oral argument). Notably, the Department intended to remove gendered language in this provision, and in doing so, inadvertently proposed language identifying the Attorney General in place of the Deputy Attorney General. Specifically, the proposed language stated that “[o]ral argument shall be held at the offices of the Board unless the Deputy Attorney General or the Attorney General’s designee authorizes oral argument to be held elsewhere.” See 88 FR at 62277 (emphasis added). This was a drafter’s error. To preserve the meaning of the preexisting regulatory language, while removing gendered language—as was the intent in the NPRM—the Department is correcting its drafter’s error and updating this provision to replace the incorrect reference to the “Attorney General” with a correct reference to the “Deputy Attorney General.” 8 CFR 1003.1(e)(7).

Finally, the Department identified an erroneous cross-reference in 8 CFR 1003.1(l)(1) and 1003.18(c)(1) and is amending those provisions to correct the intended cross-reference, by changing the erroneous reference to 8 CFR 214.15(p)(4) to the correct reference to 8 CFR 245.15(p)(4). The Department also is amending a reference to “this chapter,” and replacing it with a reference to “this title” in those same provisions. See 8 CFR 1003.1(l)(1), 1003.18(c)(1).

K. Application of Matter of Pickering and Matter of Thomas & Thompson

In the NPRM, the Department requested comment on whether—and, if

⁶ In defining the term “noncitizen” this way, the Department intends this term to be interchangeable with the term “alien” as used throughout chapter V of title 8 of the Code of Federal Regulations.

so, to what extent—*Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), should be given retroactive effect and how that decision and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), should apply to particular types of State court orders. 88 FR at 62273. After considering the comments received, the Department has determined to adopt a provision at 8 CFR 1003.55 clarifying the application of *Matter of Thomas & Thompson* and instructing adjudicators to recognize certain types of defects. First, paragraph (a)(1) provides that *Matter of Thomas & Thompson* does not apply where: (A) a court at any time granted a request to modify, clarify, vacate, or otherwise alter the sentence and the request was filed on or before October 25, 2019; or (B) the noncitizen demonstrates that the noncitizen reasonably and detrimentally relied on the availability of an order modifying, clarifying, vacating, or otherwise altering the sentence entered in connection with a guilty plea, conviction, or sentence on or before October 25, 2019. Paragraph (a)(2) states that, for such cases, the adjudicator shall assess the relevant order under *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016), as applicable. Second, paragraph (b) instructs adjudicators to give effect to an order that corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order and that was entered to give effect to the intent of the original order. These provisions are described in detail in sections IV.K.1 and IV.K.2 of this preamble.

1. Applicability of *Matter of Thomas & Thompson*

In *Matter of Pickering*, the Board held that if a State court vacates a noncitizen's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes. 23 I&N Dec. at 624. In *Matter of Thomas & Thompson*, Attorney General Barr overruled three prior Board decisions—*Matter of Cota-Vargas*, 37 I&N Dec. 849, which held that an order modifying a sentence is given “full . . . faith and credit” for immigration purposes regardless of the reason for the modification; *Matter of Song*, 23 I&N Dec. 173, which held the same for a sentence that was vacated and revised; and *Matter of Estrada*, 26 I&N Dec. 749, which *Matter of Thomas & Thompson*

understood to establish a “highly general multifactor test[.]” I&N Dec. at 684, governing whether an order clarifying a sentence is effective for immigration purposes—and held that State court orders that modify, clarify, or otherwise alter a noncitizen's criminal sentence will similarly be given effect for immigration purposes only when they are based on a substantive or procedural defect in the underlying criminal proceeding, and not when based on reasons unrelated to the merits, such as rehabilitation or avoiding immigration consequences. 27 I&N Dec. at 675.

Recently, a circuit split has emerged on whether *Matter of Thomas & Thompson* may be applied in immigration proceedings to orders altering sentences or to criminal proceedings that predated the Attorney General's decision. Compare *Zaragoza*, 52 F.4th at 1010 (holding that applying *Matter of Thomas & Thompson* to a preexisting sentence alteration order “is an impermissibly retroactive application of a new rule”), with *Edwards II*, 2024 WL 950198, at *10 (following prior precedent to hold that *Matter of Thomas & Thompson* does not “announce[] new law” and instead “correctly states what the law always was and how it always should have been applied”).⁷ Having considered the reasoning of these decisions, precedent on the retroactive application of agency rules adopted through adjudication, and the comments received, the Department has decided to adopt a provision that limits the retroactive application of *Matter of Thomas & Thompson*.

The first and threshold question is whether applying *Matter of Thomas & Thompson* to State court orders altering sentences or to criminal proceedings predating that decision would have a retroactive effect. A new rule operates retroactively when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Vartelas*, 566 U.S. at 266 (quoting *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.)). Here, applying *Matter of Thomas & Thompson* can have such an effect in

substantial classes of cases. Under *Matter of Thomas & Thompson*, individuals who sought relief that would have been recognized under *Matter of Cota-Vargas*, and individuals who had a criminal disposition when *Matter of Cota-Vargas* was effective, lose the pathway to address immigration consequences that *Matter of Cota-Vargas* previously provided. The loss of that pathway thereby “attache[d] a new disability, in respect of” those prior applications or criminal dispositions. *Vartelas*, 566 U.S. at 266 (quoting *Wheeler*, 22 F. Cas. at 767). That remains true, moreover, even where noncitizens had not already received relief under *Matter of Cota-Vargas* and could not be sure that they would receive such relief. In *St. Cyr*, the Supreme Court found that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, 110 Stat. 3009 (1996), imposed a retroactive effect to the extent it eliminated discretionary relief from removal, even though noncitizens might or might not have received such relief. 533 U.S. at 321, 325. The same is true here.

When courts consider the retroactivity of statutes, as in *Vartelas* and *St. Cyr*, and determine that the statutes would have a retroactive effect, that determination often yields a categorical conclusion that the statute does not apply retroactively. To be sure, “[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration.” *St. Cyr*, 533 U.S. at 315 (quoting *Landgraf*, 511 U.S. at 266). Given the concerns that retroactivity can yield, however, “congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.” *Id.* (quoting *Bowen*, 488 U.S. at 208). Courts sometimes undertake that inquiry on a categorical basis and determine that a statute is not retroactive without regard to individualized circumstances. *Id.*; see *Vartelas*, 566 U.S. at 266.

But when agencies adopt new rules in adjudications, as *Matter of Thomas & Thompson* did, they may engage in “individualized consideration,” *St. Cyr*, 533 U.S. at 315, and can weigh whether a new rule should apply retroactively in particular circumstances or whether doing so would work a manifest injustice. Although the Supreme Court has long recognized that agencies may adopt new rules through adjudication, it has emphasized that the retroactive application of those rules “must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and

⁷ But see *Edwards II*, 2024 WL 950198, at *15, *19 (Jordan, J., concurring) (concurring stating that the prior precedent “incorrectly relied on precedent related to the retroactivity standard of judicial rather than agency decisionmaking” and concluding that the court should “convene *en banc* and hold that *Chenery* provides the framework for determining the retroactive effect of the Attorney General's ruling in *Thomas*”).

equitable principles.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Moreover, it is for “the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency’s governing act.” *NLRB v. Food Store Emps. Union, Loc. 347*, 417 U.S. 1, 10 n.10 (1974).

The prevailing test for analyzing that second question and determining whether a new rule adopted via adjudication should apply retroactively weighs five factors: “(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.” *Retail Union*, 466 F.2d at 390; see *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982). The Board itself has applied this test. See *Matter of Cordero-Garcia*, 27 I&N Dec. at 657 (applying the *Retail Union* factors to determine retroactivity “[i]n light of the courts’ overwhelming adoption of the test and” “the desirability of applying the immigration laws with nationwide uniformity”). So have other agencies, as well as courts.⁸ See, e.g., *Sne Enters., Inc. & United Steelworkers of Am., AFL-CIO*, 344 NLRB 673 (2005) (NLRB); *Nat’l Fuel Gas Supply Corp.*, 96 FERC ¶ 61,195, 61,852 (2001) (FERC); *Zaragoza*, 52 F.4th at 1010; *Marquez v. Garland*, 13 F.4th 108, 112 (2d Cir. 2021); *Francisco-Lopez v. Att’y Gen. U.S.*, 970 F.3d 431, 437 (3d Cir. 2020); *Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275 (9th Cir. 2015). Notably, several U.S. Courts of Appeals have applied this test to limit the retroactive application of Board and Attorney General decisions to crimes committed

before the publication of those decisions, such as *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847,⁹ and *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270.¹⁰ And in the Department’s view, this test reasonably captures the “legal and equitable” principles that the Supreme Court has directed agencies to consider. See *Chenery*, 332 U.S. at 203.¹¹

Applying this test, the Department concludes that *Matter of Thomas & Thompson* should not apply retroactively to noncitizens who took certain actions before *Matter of Thomas & Thompson* was issued. The Department accordingly adopts a rule that gives effect to that conclusion and that the Department believes best balances the competing interests.¹²

The first *Retail Union* factor asks “whether the particular case is one of

⁹ See *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019); *Obeysa v. Sessions*, 884 F.3d 442, 449 (2d Cir. 2018); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 (9th Cir. 2019); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017).

¹⁰ See *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951–52 (9th Cir. 2007).

¹¹ The Eleventh Circuit in *Edwards II* noted that it was bound by *Yu*’s holding that the Attorney General’s authority to issue “controlling” rulings on “all questions of law,” INA 103(a)(1), 8 U.S.C. 1103(a)(1), “may mean that when the Attorney General announces a new decision that is a reasonable interpretation of the INA and is entitled to deference, that decision applies retroactively because it is ‘the Attorney General’s determination of what the law ‘ha[s] always meant.’” 2024 WL 950198, at *9 (quoting *Yu*, 568 F.3d at 1333 (quoting *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313, n.12 (1994))). But whether or not the Attorney General could rely on that authority to deem a decision fully retroactive, the Department does not believe that this provision precludes it from applying the *Retail Union* test. Doing so falls within the Attorney General’s broad authority to “establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” INA 103(g)(2), 8 U.S.C. 1103(g)(2). Moreover, as explained below, *Matter of Thomas & Thompson* did not state that the statute was unambiguous, and the courts that have addressed the issue have found the statute ambiguous and deferred to the Attorney General’s interpretation of it in *Matter of Thomas & Thompson*. That further militates against regarding *Matter of Thomas & Thompson* as simply identifying what the law has always been.

¹² The Department will apply the approach set forth in this rule in all circuits, including the Eleventh Circuit. Although the Eleventh Circuit in *Edwards II* determined that it was permissible for the BIA to apply *Matter of Thomas & Thompson* retroactively, *Edwards II* did not have the benefit of a rule by the Department addressing retroactivity and did not say that the Department could not apply a different approach to retroactivity than the Eleventh Circuit adopted. See 2024 WL 950198, at *10 (“We cannot hold that it was impermissible for the BIA to apply the Attorney General’s *Matter of Thomas* decision.”). The Department therefore views *Edwards II* as not inconsistent with applying the approach set forth in this rule nationwide.

first impression.” *Retail Union*, 466 F.2d at 390. Where the case is of first impression, a court is “compelled to either apply the new rule retrospectively” to that case “or to reject it, as the prohibition against advisory opinions . . . assures that ‘every case of first impression has retroactive effect.’” *Laborers’ Int’l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 392 (3d Cir. 1994) (quoting *Chenery*, 332 U.S. at 203). Where the case is not one of first impression, the first factor may weigh against retroactivity. See *Matter of Cordero-Garcia*, 27 I&N Dec. at 658 (noting that the Ninth Circuit has recognized that this factor favors the noncitizen where the agency has “confronted the problem before, ha[s] established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted.” (quoting *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) (alterations in the original))). It is unclear how much weight this factor should receive when an agency itself assesses retroactivity: This factor relies in part on “the prohibition against advisory opinions,” which binds Article III courts but not agencies. *Laborers’ Int’l Union*, 26 F.3d at 392. In all events, the Department is not considering a case of first impression: Before *Matter of Thomas & Thompson* addressed the issue it considered, *Matter of Cota-Vargas* and other decisions had already done so. Accordingly, the first factor does not favor, and if anything weighs against, retroactive application.

The second *Retail Union* factor, which is intertwined with the third factor, asks “whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law.” *Retail Union*, 466 F.2d at 390. Where the new rule represents “an abrupt departure from well-established practice”—rather than “merely attempting to fill a void in unsettled law”—the second *Retail Union* factor will weigh against retroactive application of the rule, in part because a party’s reliance on the old rule is more likely to be reasonable. See *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 521 (9th Cir. 2012). But where the new rule merely clarifies an area of unsettled law and therefore the “party could reasonably have anticipated the change in the law,” the second factor will favor retroactivity. *Id.*

Matter of Thomas & Thompson departed from a rule set forth almost fifteen years earlier in *Matter of Cota-Vargas*, 23 I&N Dec. at 852, and that originates as far back as 1982 when in

⁸ The majority in *Edwards II* pointed to some cases following the approach set forth in *Yu* in the immigration context, see 2024 WL 950198, at *12, but one of those cases addressed an order in which the Attorney General considered the statute to be unambiguous, see *Shou Wei Jin v. Holder*, 777 F.3d 163, 170 (4th Cir. 2015); *Torres v. Holder*, 764 F.3d 152, 158 (2d Cir. 2014), and two of the relevant circuits have also issued decisions that do in fact consider the *Retail Union* factors in this context, see *Edwards II*, 2024 WL 950198, at *12 (acknowledging authority going both ways). In all events, the Department has concluded that in this context applying the *Retail Union* factors is consistent with Supreme Court precedent and identifies the relevant considerations.

Matter of Martin, 18 I&N Dec. 226, the Board terminated deportation proceedings because the noncitizen's sentence was modified to less than one year, rendering her not deportable. *Matter of Thomas & Thompson* justified the departure from *Matter of Cota-Vargas* and *Matter of Martin* as an effort to clarify the law and adopt the *Matter of Pickering* standard for sentence alterations. But even so, *Matter of Thomas & Thompson* expressly departed from the established law that formerly governed sentence alterations—*Matter of Cota-Vargas*—and was more than a mere attempt to fill a void in an unsettled area of law. Accordingly, the second factor weighs against retroactive application.

The third *Retail Union* factor looks to “the extent to which the party against whom the new rule is applied relied on the former rule.” *Retail Union*, 466 F.2d at 390. Here, *Matter of Cota-Vargas* reasonably induced reliance, across at least two classes of cases.

First, as commenters noted, noncitizens brought motions for and received State court orders before *Matter of Thomas & Thompson* that, under *Matter of Cota-Vargas*, Federal immigration law would have recognized. As commenters emphasized, these noncitizens often would have sought such sentence alteration orders via whatever avenue was most straightforward, including under rehabilitative statutes or based on motions expressly invoking the immigration consequences of their existing sentences. With those orders in hand, *Matter of Cota-Vargas* gave them “a complete defense to removal.” *Zaragoza*, 52 F.4th at 1022. And some such noncitizens would have passed up the chance to pursue relief based on a substantive or procedural defect in their original sentences. For example, it may have been easier to persuade a court to reduce a sentence from one year to 364 days based on immigration consequences than to prove that a lawyer failed to adequately advise on immigration consequences in violation of *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010), even if the latter ground would have been a meritorious basis for a sentence alteration order. And as commenters identified, many States prohibit successive motions, meaning that a noncitizen who could have obtained an order altering a sentence due to a substantive or procedural defect, but chose a simpler motion relying on *Matter of Cota-Vargas*, would be unable to bring a subsequent motion based on such a defect after *Matter of Thomas & Thompson*. See, e.g., Ala. R. Crim. P. 32.2(b) (no successive motions

except in narrow circumstances), (d) (“In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition.”); Alaska R. Crim. P. 35(b)(2) (prohibiting “second or successive motion for similar relief”); Del. R. Crim. P. Super. Ct. 35(b) (“The court will not consider repetitive requests for reduction of sentence.”); Idaho Crim. R. 35(b) (“A defendant may only file one motion seeking a reduction of sentence.”).

Second, commenters identified other ways in which noncitizens may have relied on *Matter of Cota-Vargas*, such as by relying on the advice of counsel to accept a plea deal with a sentence that would subject them to immigration consequences because courts in the jurisdiction routinely granted sentence alterations based on rehabilitation or immigration consequences, which immigration courts would have recognized under *Matter of Cota-Vargas*. Commenters submitted educational materials showing that immigration and criminal defense counsel were made aware of *Matter of Cota-Vargas*, and some organizations stated in their comments that they trained attorneys to consider that sentence alterations were categorically given effect for immigration purposes when advising noncitizens. These comments demonstrate that some criminal defendants likely detrimentally relied on the availability of such relief in making decisions during their criminal cases, including accepting pleas, declining pleas and deciding to go to trial, or litigating sentences. Had they known about the rule *Matter of Thomas & Thompson* would eventually adopt, they might reasonably have made different choices. Given the clarity of *Matter of Cota-Vargas*, the evidence that counsel advised noncitizens on the availability and effect of sentence alteration orders, and the import of the possibility of removal in decision-making by criminal defendants, such reliance would have been reasonable. See *Padilla*, 559 U.S. at 364 (“[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”). And to the extent that noncitizens had a likelihood of reasonable reliance, the Department concludes that the third factor weighs against retroactive application.

The fourth *Retail Union* factor requires consideration of “the degree of the burden which a retroactive order imposes on a party.” *Retail Union*, 466 F.2d at 390. For noncitizens who cannot

obtain a subsequent order altering their sentence, the burden here would generally be removal. Although “not, in a strict sense, a criminal sanction,” *Padilla*, 559 U.S. at 365, removal “is always ‘a particularly severe penalty.’” *Lee v. United States*, 582 U.S. 357, 370 (2017) (quoting *Padilla*, 559 U.S. at 365). The Department views that burden to be of a high degree that weighs against retroactive application. Even to the extent a noncitizen who already obtained an order altering their sentence that would have qualified under *Matter of Cota-Vargas* could return to State court and seek another order that would satisfy *Matter of Thomas & Thompson*, the need to pursue that relief would impose a substantial burden on noncitizens, many of whom are unrepresented or of limited means—particularly when that relief may ultimately prove impossible to obtain for the reasons provided previously. That burden again weighs against retroactive application.¹³

The fifth, and final, *Retail Union* factor looks at “the statutory interest in applying a new rule despite the reliance of a party on the old standard.” *Retail Union*, 466 F.2d at 390. This factor will often “point[] in favor of [retroactivity] because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established.” *Garfias-Rodriguez v. Holder*, 702 F.3d at 523. But courts also have deemed

¹³ The Department has considered additional alleged burdens commenters raised, specifically that applying *Matter of Thomas & Thompson* to noncitizens whose criminal charges were filed before the decision would create insurmountable burdens regarding the revisiting of past criminal charge adjudications because these convictions often occurred many years in the past and involved privileged and detailed conversations between noncitizens and their counsel. The approach the Department adopts mitigates the concerns regarding dated convictions, and the Department does not believe the privilege concerns militate against the approach it adopts. Specifically, noncitizens whose convictions resulted from charges filed before *Matter of Thomas & Thompson* and who sought an order modifying, clarifying, vacating, or otherwise altering their sentence on or before the day *Matter of Thomas & Thompson* issued and received such an order will benefit from pre-*Matter of Thomas & Thompson* case law. See 8 CFR 1003.55(a)(1)(A). For those who did not, the Department believes the approach adopted—that is, applying pre-*Matter of Thomas & Thompson* case law where the noncitizen demonstrates they reasonably and detrimentally relied on the availability of such an order on or before October 25, 2019, 8 CFR 1003.55(a)(1)(B)—is reasonable. The noncitizen alleging detrimental reliance is likely to have the key information required to establish such reliance, and to the extent they may need to disclose attorney-client communications, they are the holders of the attorney-client privilege and are able to waive it. See *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (discussing waiver of attorney-client privilege in the context of corporations).

decisions nonretroactive despite this factor, particularly where reliance interests are strong. *E.g.*, *Zaragoza*, 52 F.4th at 1024. And here, where there is a sufficient likelihood of reliance on *Matter of Cota-Vargas*, the Department does not believe that the fifth factor standing alone suffices to require retroactivity.

The Department recognizes that “[t]he government’s interest in applying the new rule retroactively may be heightened if the new rule follows from the ‘plain language of the statute.’” *Garfias-Rodriguez*, 702 F.3d at 523 (quoting *Great W. Bank v. Off. of Thrift Supervision*, 916 F.2d 1421, 1432 (9th Cir. 1990)). *Matter of Thomas & Thompson* did not regard the statute as unambiguous, and the courts that have addressed the issue have found the statute ambiguous and deferred to the Attorney General’s interpretation of it in *Matter of Thomas & Thompson*. See *Zaragoza*, 52 F.4th at 1019; *Edwards II*, 2024 WL 950198, *12. Regardless, the Department believes the fifth factor would not outweigh the other four factors in the context of (1) those who sought orders altering their sentence before *Matter of Thomas & Thompson* or (2) those who otherwise show detrimental reliance on *Matter of Cota-Vargas*.¹⁴

Taken together, the Department has determined that the *Retail Union* factors militate against retroactive application in certain circumstances where there is a substantial likelihood of reliance. In order to implement that determination, the Department has decided to adopt a

two-pronged approach that tailors the retroactivity of *Matter of Thomas & Thompson* based on (1) circumstances where there is the greatest likelihood of reliance and (2) the Department’s assessment of the feasibility and appropriateness of adjudicating case-specific reliance questions. The Department assesses that this approach best balances the relevant considerations.

First, the Department will recognize as effective for immigration purposes any order modifying, clarifying, vacating, or otherwise altering a criminal sentence where the request was filed on or before October 25, 2019, the day *Matter of Thomas & Thompson* issued. As stated previously, noncitizens seeking to alter their sentence before *Matter of Thomas & Thompson* reasonably could have sought any available type of sentence altering order, including under rehabilitative statutes or based on motions expressly invoking the immigration consequences of their existing sentences. And some noncitizens would have passed up the chance to pursue relief based on a substantive or procedural defect in their original sentences, which may have been more difficult and costly to establish. Furthermore, as commenters identified, many states prohibit successive sentence-altering motions, meaning that such noncitizens are now likely unable to obtain a conforming alteration order.

To be sure, not all noncitizens who received a sentence-altering order before *Matter of Thomas & Thompson* may be able to show reliance in this way. But for an adjudicator to assess whether such reliance exists in an individual case, they would likely have to consider complicated State law questions outside those they commonly consider, and which are likely to be outside their expertise. Specifically, the adjudicator would likely have to consider two questions: (1) whether the noncitizen’s original sentence suffered from a substantive or procedural defect; and (2) whether under State law the noncitizen would be unable to obtain a second sentence alteration, including whether such a request would have been timely after *Matter of Thomas & Thompson*. EOIR’s adjudicators do not have experience analyzing whether a sentence was marred by a defect that could have been addressed by a State court or whether under State law a noncitizen could seek a second sentence alteration. And requiring adjudicators to determine whether a State court erred when issuing a sentence—in some cases years or decades earlier—would involve

immigration courts in burdensome and time-consuming litigation, often involving factual materials and State court records not easily accessible to immigration courts, on matters entirely collateral to the Federal immigration proceeding. *Matter of Thomas & Thompson* itself emphasized that its rule would not require courts to engage in such an inquiry. 27 I&N Dec. at 686 (“[I]mmigration judges should not need to wade into the intricacies of state criminal law in applying this opinion’s rule.”).

For similar reasons, immigration judges and the Board need not—and should not—consider whether noncitizens who received relief that would suffice under *Matter of Cota-Vargas* could, after *Matter of Thomas & Thompson*, return to State court and seek relief that would qualify under *Matter of Thomas & Thompson*. The Department has considered the argument that, if noncitizens have an unfettered ability to return to State court, their reliance interests are weaker. But the Department does not agree that this argument supports a broader retroactivity rule. As commenters identified, many noncitizens will face barriers to seeking further relief from State courts—due to statutes of limitations, procedural bars on successive motions, or State courts’ perception that prior relief granted on other grounds moots noncitizens’ new requests. Additionally, doing so may require noncitizens to incur significant legal expense, including in cases where it is all but certain that the request will be denied. Moreover, such a requirement could substantially burden State courts.

Accounting for the interests of the immigration system as a whole, the Department assesses that it is preferable to adopt a categorical rule of nonretroactivity when a noncitizen sought a sentence alteration prior to *Matter of Thomas & Thompson*. This approach finds support in the general retroactivity principles that apply to agency adjudications. The Department’s ultimate charge from the Supreme Court is to strike a “balance” that accounts for “statutory design” and “legal and equitable principles,” *Chenery*, 332 U.S. at 203, and “best effectuate[s] the policies underlying the . . . governing act.” *Food Store*, 417 U.S. at 10 n.10. Moreover, the D.C. Circuit has recognized that the permissibility of a retroactivity decision under the *Retail Union* factors is “ultimately . . . founded upon the requirement of the [APA] that agency action not be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in

¹⁴ The Department has considered some commenters’ arguments that the fifth factor favors nonretroactivity because determining retroactive application based, in part, on the date *Matter of Thomas & Thompson* was issued would create discordance between cases that pre-date and post-date that decision. The Department believes these comments misunderstand the uniformity factor, which weighs the interest in applying the new rule—what the law is currently understood to mean—and applying that view of the law uniformly. See, e.g., *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (stressing “the strong interest in national uniformity in the administration of immigration laws”). But even assuming these commenters are right that this factor could favor nonretroactivity, that would not change the ultimate rule the Department is adopting here. For individuals who sought an order modifying, clarifying, vacating, or otherwise altering a criminal sentence where the request was filed on or before the day *Matter of Thomas & Thompson* issued, the “non-uniformity” of the variety these commenters raise would not be implicated; the Department has determined that the decision should not apply retroactively to this category of individuals. And for individuals who did not seek such an order, the Department has determined that this purported “non-uniformity” is not sufficient to warrant a categorical approach to nonretroactivity, given the ability to identify cases in which such individuals actually relied on the pre-*Matter of Thomas & Thompson* law, as discussed elsewhere in this rule.

accordance with law.” *Cassell v. FCC*, 154 F.3d 478, 483 n.4 (D.C. Cir. 1998) (quoting 5 U.S.C. 706(2)(A)); see *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986) (“Obviously, in many instances, a retroactive change in policy is perfectly appropriate; however, the law requires that an agency explain why it has decided to take this rather extraordinary step. The agency must explain how it determined that the balancing of the harms and benefits favors giving a change in policy retroactive application.”). By adopting a rule that accounts for systemic considerations in its balancing of harms and benefits, the Department does just what the Supreme Court and the D.C. Circuit have directed. *Cf. Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 670–71 (D.C. Cir. 2009) (noting that FCC’s decision to apply a new rule to existing contracts was permissible because agency’s “extensive discussion” of “the relative benefits and burdens of applying its rule to existing contracts . . . easily satisfies the Commission’s obligation under our deferential standard of review,” where FCC found retroactive application “strongly in the public interest”); *N. Carolina Utilities Comm’n v. FERC*, 741 F.3d 439, 450 (4th Cir. 2014) (holding that “FERC . . . appropriately considered doctrinal stability when determining whether to grant rehearing” to apply new policy enacted while case was pending, as “[a]gencies are certainly entitled to consider the broader regulatory implications of their decisions”).

Second, the rule instructs adjudicators to apply the pre-*Matter of Thomas & Thompson* law to those who establish actual reliance on that law. The Department recognizes that other noncitizens besides those who sought State court sentence alterations likely reasonably relied on *Matter of Cota-Vargas* to their detriment. For example, and as commenters emphasized, there are likely noncitizens who pleaded guilty to an offense without knowing the likely sentence or agreed to a higher sentence than they otherwise would have in the belief that they could easily obtain an order altering their sentence in the future that would be given effect for immigration purposes under *Matter of Cota-Vargas*.

That said, the Department does not agree with commenters that the possibility of such reliance requires declining to apply *Matter of Thomas & Thompson* on a categorical basis to all those who were charged, convicted, or sentenced before the decision was issued. Unlike for those who obtained a non-complying sentence alteration in

reliance on *Matter of Cota-Vargas* and now face obstacles to obtaining a complying order, the Department has identified an administrable way to inquire into reliance for this category of cases without requiring adjudicators to wade into complicated State law issues. Specifically, the rule requires noncitizens claiming reliance to demonstrate that the noncitizen reasonably and detrimentally relied on the availability of a sentence alteration in connection with a guilty plea, conviction, or sentence on or before October 25, 2019. 8 CFR 1003.55(a)(1)(B). Immigration judges are well positioned to evaluate the credibility of the noncitizen’s claims and the factual questions of reasonable and detrimental reliance. Given the availability of this approach, the *Retail Union* factors weigh differently: *Matter of Thomas & Thompson* will not apply retroactively where there is actual reliance (thus vindicating reliance and fairness interests) but will apply when such reliance is absent (thus vindicating the interest in applying what *Matter of Thomas & Thompson* has determined the law should provide).¹⁵

¹⁵ The Department has considered how this requirement interacts with the burdens set forth in section 240(c)(2), (3)(A), and (4)(A) of the INA, 8 U.S.C. 1229a(c)(2), (3)(A), and (4)(A). Where the noncitizen is charged as inadmissible, they bear the burden to establish that they are not, INA 240(c)(2), 8 U.S.C. 1229a(c)(2), and where a noncitizen seeks relief or protection from removal, they bear the burden of proof to establish that they are eligible and, where the form of relief is discretionary, that they merit a favorable exercise of discretion, INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A). In those circumstances, it will always be the noncitizen’s burden to prove that they have not been convicted of the crime specified in the charge, and requiring that they establish actual reliance to benefit from the pre-*Matter of Thomas & Thompson* law is consistent with that burden.

Where a noncitizen is charged as removable, ICE bears the burden of establishing by clear and convincing evidence that the noncitizen is removable as charged, INA 240(c)(3)(A), 8 U.S.C. 1229a(c)(3)(A). Courts have generally concluded that in such circumstances the burden is on the Government to establish that a vacated conviction remains valid for removability purposes. See, e.g., *Barakat v. Holder*, 621 F.3d 398, 403–05 (6th Cir. 2010) (where a noncitizen is charged as removable, “the government bears the burden of proving that a vacated conviction remains valid for immigration purposes” (quoting *Pickering*, 465 F.3d at 269 n.4)). But *Matter of Thomas & Thompson* did not answer this question for sentence modifications. See 27 I&N Dec. at 689–90 (declining to specifically address the burden for establishing the reason for a sentence modification). Nor need the Department address here the general question that *Matter of Thomas & Thompson* reserved. This rule instead addresses only a narrow situation when (1) ICE establishes that a noncitizen has been convicted; (2) the sentence ordered has been modified after *Matter of Thomas & Thompson*; and (3) the immigration judge determines that this modification was not based on a substantive or procedural defect (regardless of who bears the burden of proof on that issue). In that situation, the noncitizen’s original sentence remains valid for immigration purposes

In advocating for a rule categorically declining to apply *Matter of Thomas & Thompson* to any noncitizen who was charged, convicted, sentenced, or otherwise engaged in sentencing advocacy before that decision, commenters invoked the Seventh Circuit’s statement that “the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable.” *Zaragoza*, 52 F.4th at 1023 (quoting *Velasquez-Garcia v. Holder*, 760 F.3d 571, 582 (7th Cir. 2014) (in turn citing *Vartelas*, 566 U.S. at 273–77)). The Department agrees with these commenters that actual reliance is not essential and that “the likelihood of reliance on prior law strengthens the case for reading a new[] [rule] prospectively.” *Id.* But the Department disagrees that actual reliance is irrelevant or that the Supreme Court’s retroactivity case law requires the Department to adopt a rule that does not consider actual reliance. The statement on which these commenters rely derives from the Supreme Court’s holding that, as applied to statutes, the presumption against retroactivity does not require “actual reliance.” *Vartelas*, 566 U.S. at 273. But that issue differs from the one the Department now addresses, for the reason explained previously: When the Department decides whether to apply a rule adopted in adjudication retroactively, it can engage in individualized consideration of reliance in a manner that courts generally do not do when weighing the retroactivity of statutes. When the Department does so, actual reliance is relevant to striking the “balance” *Chenery* directs. *Chenery*, 332 U.S. at 203. And here, the Department has determined that it can more easily assess actual reliance as to the relevant category of individuals. As a result, the Department believes that considering actual reliance for this category of noncitizens as part of the *Retail Union* analysis reflects an appropriate balance among equity, administrability, and application of the rule announced in *Matter of Thomas & Thompson*.

2. Procedural or Substantive Defects

The Department also sought comment on whether it should clarify how *Matter of Thomas & Thompson* and *Matter of Pickering* apply to particular types of

under *Matter of Thomas & Thompson*’s statement of current law, and the noncitizen is arguing, based on principles of retroactivity, that the sentence should nonetheless be assessed under the pre-*Matter of Thomas & Thompson* scheme. Placing the burden on the noncitizen in that narrow situation does not conflict with the statutory burden of proof. And doing so is reasonable, because the noncitizen is the party likely to have information relevant to the question at issue.

orders. *See Matter of Sotelo*, 2019 WL 8197756, at *2 (BIA Dec. 23, 2019) (giving effect to a vacatur order issued under Cal. Penal Code § 1473.7); *Khatkarh v. Becerra*, 442 F. Supp. 3d 1277, 1285–86 (E.D. Cal. 2020) (discussing Board decision denying effect to a vacatur order issued under Cal. Penal Code § 1473.7); *Talamantes-Enriquez v. U.S. Att’y Gen.*, 12 F.4th 1340, 1354–55 (11th Cir. 2021) (denying effect to a clarification order where the original sentence was not ambiguous, but distinguishing a “sentence order [that] was ambiguous and needed clarification”). Having considered those comments, the Department has concluded that it should answer one question through this rule: whether to recognize State court alteration or other orders that correct genuine ambiguities, mistakes, and typographical errors on the face of the original order. In paragraph (b) of 8 CFR 1003.55, the Department provides guidance on that question.

Specifically, the rule clarifies that adjudicators shall give effect to an order that corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order and that was entered to give effect to the intent of the original order. 8 CFR 1003.55(b). Consistent with *Matter of Pickering* and *Matter of Thomas & Thompson*, the focus of the “procedural or substantive defect” inquiry is whether the subsequent order addresses a defect in the underlying proceedings or order. Where there is a genuine ambiguity, mistake, or typographical error on the face of the original order that a subsequent order merely corrects, the adjudicator must give effect to such corrective order. For example, if the original conviction document lists “30 years” as the sentence imposed for a first-time non-violent petty theft conviction, but a subsequent order corrects the sentence to “30 days,” as reflected in other documents in the conviction record, the subsequent order would merely have corrected a mistake or typographical error in the original order, and an adjudicator would be required to give effect to the subsequent order.

This approach is consistent with the approach of *Matter of Thomas & Thompson* and the Department’s statement that “[r]econsideration of the approach of *Matter of Thomas & Thompson* . . . is beyond the scope of this rulemaking.” 88 FR at 62273. *Matter of Thomas & Thompson* “overruled” *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016)—a case in which the Board had given effect to a State court order correcting a sentence the

Board deemed ambiguous—and stated that “[t]he test[] described in th[at] case[] will no longer govern.” 27 I&N Dec. at 690. The Department understands *Matter of Thomas & Thompson* to have disapproved of *Matter of Estrada*’s use of a “highly general multifactor test[],” *id.* at 685, based on concerns that this test would give effect to State court orders that did not correct a genuine ambiguity, mistake, or typographical error in a noncitizen’s “original sentence” and instead sought to “avoid immigration consequences,” *id.* But these concerns are absent when the original order contains a genuine ambiguity, mistake, or typographical error and the State court corrects these issues in order to give effect to the original order’s intent. The Department does not understand *Matter of Thomas & Thompson* to preclude giving effect to such orders. To the contrary, doing so is fully consistent with the approach of *Matter of Thomas & Thompson* and with the INA: That order simply identifies what the sentence always should have been and is not “based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or immigration hardship.” *Id.* at 674. For example, to the extent that the use of “[s]tandard sentencing forms” like those the Eleventh Circuit considered in *Talamantes-Enriquez v. U.S. Att’y Gen.*, 12 F.4th 1340, 1346 (11th Cir. 2021), yielded a genuine ambiguity, mistake, or typographical error that a subsequent order then corrected so as to accurately reflect the intent of the original order, adjudicators should give effect to those orders.

V. Regulatory Requirements

A. Administrative Procedure Act

This final rule is consistent with the notice-and-comment rulemaking requirements described at 5 U.S.C. 553(b) and (c). Further, this final rule is being published with a 60-day effective date, meeting the general requirements of 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate “small entities,” as that term is defined in 5 U.S.C. 601(6). Primarily, this rule reverses the amendments made by the AA96 Final Rule and restores and expands on previously existing authorities exercised by EOIR

adjudicators and processes governing appeals filed with the Board. Accordingly, this rule regulates the conduct of immigration proceedings before EOIR and therefore may have a direct impact on noncitizens in such proceedings. The rule may indirectly affect resources or business operations for legal providers representing noncitizens in proceedings before EOIR, but the rule imposes no mandates or requirements on such entities; therefore, the rule will not have a significant economic impact on a substantial number of small entities.

Moreover, the AA96 Final Rule was enjoined soon after becoming effective, and the pre-AA96 Final Rule status quo has been in effect since the injunction. As a result, it is unlikely that small entities, including legal service providers, have changed their practices since the AA96 Final Rule was enjoined, thus further minimizing this rule’s economic impact on small entities. Given that this rule generally adopts the pre-AA96 Final Rule status quo—the framework that is currently in place—with only a few alterations, the changes in this rule are unlikely to have a significant economic impact on any small entities, as it is unlikely to require any significant change in operations to accommodate the changes herein.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1532(a).

D. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

The Department certifies that this rule has been drafted in accordance with the principles of Executive Order 12866, Executive Order 13563, and Executive Order 14094. Those Executive Orders direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563

emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Further, the Office of Information and Regulatory Affairs of OMB reviewed this rule as a significant regulatory action under Executive Order 12866, as amended.

Overall, the Department expects that this rule will provide significant benefits to adjudicators, the parties, and the broader public that outweigh the potential costs.

This rule's expected benefits include providing clear guidance to adjudicators and regulated parties while maintaining adjudicator discretion and eliminating inefficiencies that likely would have resulted from the AA96 Final Rule.

For example, this rule's provisions for the exercise of administrative closure, termination, and dismissal authority strike a balance between providing sufficient guidance for adjudicators and regulated parties while, at the same time, preserving flexibility that will promote fairer, more efficient, and more uniform case processing and adjudication. Likewise, by eliminating projected inefficiencies that could have resulted from implementation of the AA96 standards, this rule codifies additional flexibility for adjudicators, which could provide significant benefits to noncitizens in certain cases with exceptional circumstances, as discussed in the NPRM. 88 FR at 62266.

Further, reinstating Board remand authority will also codify similar flexibility for adjudicators and is expected to have efficiency benefits as noted in the NPRM. 88 FR at 62268–70. The Department believes that the costs of these provisions mainly relate to any necessary familiarization with the rule, but such costs should be *de minimis*, given that the AA96 Final Rule has never been implemented and this rule is codifying the operative status quo. Further, this rule is largely codifying either prior longstanding regulatory provisions (*sua sponte* authority, Board remand authority) or longstanding case law (administrative closure). And, by codifying the operative status quo, this rule will help ensure that parties are relying on, and citing to, active regulatory provisions, rather than potentially relying on currently-enjoined language. On balance, overall, the Department believes that the fairness and efficiency benefits gained by the changes in this rule outweigh the potential *de minimis* costs.

Similarly, many of the other changes, including to briefing schedules, background check procedures, Board adjudication timelines, quality assurance certification, forwarding of

the record on appeal, and the EOIR Director's case adjudication authority are largely internal case-processing measures with no measurable costs to the public. Moreover, many of these provisions are being reverted in large part to longstanding pre-AA96 Final Rule regulatory language, with which adjudicators and the parties should already be familiar. Additionally, to the extent provisions of the AA96 Final Rule have been retained, such as the background check procedures allowing a case to be held at the Board pending a background check, rather than to be remanded to the immigration court, the Department believes that such provisions will provide efficiencies to the immigration system, which will in turn benefit adjudicators and the parties. The Department believes that more efficient case processing and adjudication will benefit the public as well by reducing strain on limited resources.

In sum, any changes made by the rule would not impact the public in a way that would render the rule in conflict with the principles of Executive Orders 12866, 13563, and 14094.

E. Executive Order 13132—Federalism

This rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not include new or revisions to existing “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

H. Congressional Review Act

This rule does not meet the criteria in 5 U.S.C. 804(2).

I. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”), codified as amended at

42 U.S.C. 4321–4347, requires all Federal agencies to assess the environmental impact of their actions. Congress enacted NEPA in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's twin aims are to ensure agencies consider the environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. *Id.* 4331. NEPA created the Council on Environmental Quality (“CEQ”), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (“CEQ regulations”).

To comply with NEPA, agencies determine the appropriate level of review of the environmental effect of their proposed actions—an environmental impact statement (“EIS”), environmental assessment (“EA”), or use of a categorical exclusion (“CE”). 42 U.S.C. 4336. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. *Id.* 4336(b)(1). If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which involves a more concise analysis and process than an EIS. *Id.* 4336(b)(2). Following the EA, the agency may conclude the process with a finding of no significant impact if the analysis shows that the action will have no significant effects. *Id.* If the analysis in the EA finds that the action is likely to have significant effects, however, then an EIS is required.

Alternatively, under NEPA and the CEQ regulations, a Federal agency also can establish CEs—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in their agency NEPA procedures. *Id.* 4336e(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a CE covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). If no extraordinary circumstances are present or if further analysis determines that the extraordinary circumstances do not involve the potential for significant environmental impacts, the agency may apply the CE to the proposed action

without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If the extraordinary circumstances have the potential to result in significant effects, the agency is required to prepare an EA or EIS. 40 CFR 1501.4(b)(2).

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to “adopt” another agency’s CEs for a category of proposed agency actions. 42 U.S.C. 4336c. To use another agency’s CEs under section 109, an agency must identify the relevant CEs listed in another agency’s (“establishing agency”) NEPA procedures that cover its category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE to a category of actions is appropriate; identify to the public the CE that the agency plans to use for its proposed actions; and document adoption of the CE. *Id.*

This notification documents the Department’s adoption under section 109 of NEPA of DHS’s CE A3 for rulemakings under section 109 of NEPA to apply to this rulemaking action. DHS established a CE in the DHS NEPA Instruction Manual that covers regulatory actions as follows:

A3 Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature:

(a) Those of a strictly administrative or procedural nature;

(b) Those that implement, without substantive change, statutory or regulatory requirements;

(c) Those that implement, without substantive change, procedures, manuals, and other guidance documents;

(d) Those that interpret or amend an existing regulation without changing its environmental effect;

(e) Technical guidance on safety and security matters; or

(f) Guidance for the preparation of security plans.¹⁶

The Department and DHS consulted on the appropriateness of the Department’s adoption of the CE for application to this rulemaking. The Department and DHS’s consultation included a review of DHS’s experience developing and applying this CE. The

Department also took into account that it has worked on joint rulemakings with DHS on immigration issues and has relied on DHS’s CE in the past. *See, e.g.,* Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries, 88 FR 18227, 18238–39 (Mar. 28, 2023) (joint DOJ–DHS rulemaking relying upon DHS’s CE); 87 FR at 18193 (same).

After review, the Department determined that this rule is very similar to the type of DHS rulemaking actions that qualify for this CE and, therefore, the impacts of this rule will be very similar to the impacts of DHS rulemakings for which this CE applies. The Department similarly found that this rule clearly fits into the categories described in the DHS CE—specifically paragraphs (a) and (d)—and is not part of a larger action. *See* DHS NEPA Instruction Manual at sec. V.B.2 (steps for determining applicability of DHS categorical exclusion).

Substantively, this rule largely codifies longstanding practices already in place before the issuance of the AA96 Final Rule and mainly represents the currently operative status quo due to the injunction of the AA96 Final Rule shortly after its effective date. Primarily, the rule affects adjudicatory docket management tools of an administrative and procedural nature, including administrative closure, termination, and dismissal of proceedings, as well as various Board processes for adjudicating appeals. The provisions regarding *Matter of Thomas & Thompson* are similarly strictly procedural as they merely instruct adjudicators which law to apply to avoid retroactivity concerns without changing any legal requirements. As such, the rule is covered by DHS’s CE as administrative and procedural in nature, as well as largely serving only to amend existing regulations without changing their environmental effect.

Additionally, the Department examined whether there were any extraordinary circumstances in which a normally excluded action could have a significant effect requiring preparation of an EA or EIS. The DHS NEPA Instruction Manual lists relevant extraordinary circumstances, including, for example, “potentially significant effect[s] on public health or safety.” *See* DHS NEPA Instruction Manual at sec. V.B.2.c.i. After review of DHS’s extraordinary circumstances, the Department has determined that no extraordinary circumstances are present that would prevent the use of DHS’s CE for this rule. As explained previously,

this rule focuses on immigration court procedural tools and Board processes, many of which are merely codifying the operative status quo. As a result, the processes being regulated in this rule do not result in any of the listed extraordinary circumstances.

Therefore, the Department applies DHS CE A3 to this final rule to comply with NEPA.

J. Severability

To the extent that any portion of this rule is stayed, enjoined, not implemented, or otherwise held invalid by a court, the Department intends for all other parts of the rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. For example, administrative closure and termination are two separate procedural tools that operate independently of each other. If one of these tools was enjoined, for instance, the other tool is fully capable of separate operation. Likewise, the rule’s Board-related procedural changes—such as to briefing schedules, background checks, sua sponte reopening and reconsideration, and adjudication timelines, among others—are distinct from the rule’s codification of standards for administrative closure and termination; therefore, the Board-related provisions would not be affected if those procedural tools were enjoined or otherwise invalidated. Similarly, the rule’s clarification of the applicability of *Matter of Thomas & Thompson* may also operate independently of the remaining provisions of the rule and would be unaffected if any other portion of the rule were enjoined or invalidated.

List of Subjects

8 CFR Part 1001 and 1003

Administrative practice and procedure, Immigration.

8 CFR Part 1239

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, the Department amends 8 CFR parts 1001, 1003, 1239, and 1240 as follows:

PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107–296, 116 Stat. 2135; Title VII of Pub. L. 110–229.

¹⁶ *See* NEPA Instruction Manual 023–01–001–01 Rev. 01, Appendix A (“Table 1—DHS List of Categorical Exclusions”) A–1—A–2 (Nov. 6, 2014) (“DHS NEPA Instruction Manual”), https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.

■ 2. Amend § 1001.1 by adding paragraphs (gg) and (hh) to read as follows:

§ 1001.1 Definitions.

* * * * *

(gg) The term *noncitizen* means “alien,” as defined in section 101(a)(3) of the Act.

(hh) The term *unaccompanied child* means “unaccompanied alien child,” as defined in 6 U.S.C. 279(g)(2).

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 4. Amend § 1003.0 by revising paragraph (b)(2)(ii) to read as follows:

§ 1003.0 Executive Office for Immigration Review.

* * * * *

(b) * * *
(2) * * *

(ii) The Director may not delegate the authority assigned to the Director in § 1292.18 of this chapter and may not delegate any other authority to adjudicate cases arising under the Act or regulations of this chapter unless expressly authorized to do so.

* * * * *

■ 5. Amend § 1003.1 by:

■ a. Revising paragraphs (a)(2)(i)(E), (c), (d)(1) introductory text, (d)(1)(ii), (d)(3)(iii) and (iv);

■ b. Removing paragraph (d)(3)(v);

■ c. Revising paragraphs (d)(6)(ii) and (iii), (d)(6)(v), (d)(7), (e) introductory text, (e)(1) through (3), (e)(4)(i) introductory text, (e)(4)(ii), (e)(7), (e)(8) introductory text, (e)(8)(i) through (iii), and (v), and (f);

■ d. Removing and reserving paragraph (k); and

■ e. Adding paragraphs (l) and (m).

The revisions and additions read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a) * * *
(2) * * *
(i) * * *

(E) Adjudicate cases as a Board member, including the authorities

described in paragraph (d)(1)(ii) of this section; and

* * * * *

(c) *Jurisdiction by certification.* The Secretary, or any other duly authorized officer of DHS, an immigration judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board for adjudication. The Board, in its discretion, may review any such case by certification without regard to the provisions of § 1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity to request oral argument and to submit a brief.

(d) * * *

(1) *Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

* * * * *

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as necessary or appropriate for the disposition or alternative resolution of the case. Such actions include administrative closure, termination of proceedings, and dismissal of proceedings. The standards for the administrative closure, dismissal, and termination of cases are set forth in paragraph (l) of this section, 8 CFR 1239.2(c), and paragraph (m) of this section, respectively.

* * * * *

(3) * * *

(iii) The Board may review de novo all questions arising in appeals from decisions issued by DHS officers.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases. A party asserting that the Board

cannot properly resolve an appeal without further factfinding must file a motion for remand. If new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to DHS.

* * * * *

(6) * * *

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations are necessary in order to adjudicate the appeal or motion, the Board will provide notice to both parties that the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board. The Board's notice will notify the noncitizen that DHS will contact the noncitizen with instructions, consistent with § 1003.47(d), to take any additional steps necessary to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary identity, law enforcement, or security investigations or examinations. The Board's notice will also advise the noncitizen of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any noncitizen in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the noncitizen fails to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, or the noncitizen's failure to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, immigration relief or

protection should be denied, either on grounds of ineligibility as a matter of law or as a matter of discretion. If DHS fails to report the results of timely completed or updated identity, law enforcement or security investigations or examinations within 180 days from the date of the Board's notice under paragraph (d)(6)(ii) of this section, the Board may continue to hold the case under paragraph (d)(6)(ii) of this section, as needed, or remand the case to the immigration judge for further proceedings under § 1003.47(h).

* * * * *

(v) The immigration relief or protection described in § 1003.47(b) and granted by the Board shall take effect as provided in § 1003.47(i).

(7) *Finality of decision.* (i) The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to DHS or an immigration judge for such further action as may be appropriate without entering a final decision on the merits of the case.

(ii) In cases involving voluntary departure, the Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the noncitizen requested voluntary departure before an immigration judge, the noncitizen's notice of appeal specified that the noncitizen is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the noncitizen is challenging, and the Board finds that the noncitizen is otherwise eligible for voluntary departure, as provided in 8 CFR 1240.26(k). In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the noncitizen merits voluntary departure as a matter of discretion. If the record does not contain sufficient factual findings regarding eligibility for voluntary departure, the Board may remand the decision to the immigration judge for further factfinding.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the

success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph (e). The provisions of this paragraph (e) shall apply to all cases before the Board, regardless of whether they were initiated by filing a Notice of Appeal, filing a motion, or receipt of a remand from Federal court or the Attorney General.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a DHS motion to remand any appeal from the decision of a DHS officer where DHS requests that the matter be remanded to DHS for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceeding and transcript, and the issuance of a briefing schedule, as appropriate. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) * * *

(i) The Board member to whom a case is assigned shall affirm the decision of the DHS officer or the immigration judge without opinion if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

* * * * *

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The

Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion issued under authority of this provision shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision but does signify the Board's conclusion that any errors in the decision of the immigration judge or DHS were harmless or nonmaterial.

* * * * *

(7) *Oral argument.* When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board en banc may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or the Deputy Attorney General's designee authorizes oral argument to be held elsewhere. DHS may be represented before the Board by an officer or counsel of DHS designated by DHS. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained noncitizens.

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days after a case is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel is unable to issue a decision within the

established time limits, as extended, the Chairman shall either self-assign the case or assign the case to a Vice Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete the member's opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, such as when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending en banc Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

* * * * *

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

* * * * *

(f) *Service of Board decisions.* The decision of the Board shall be in writing. The Board shall transmit a copy to DHS and serve a copy upon the noncitizen or the noncitizen's representative, as provided in 8 CFR part 1292.

* * * * *

(l) *Administrative closure and recalendar.* Administrative closure is the temporary suspension of a case. Administrative closure removes a case from the Board's docket until the case is recalendar. Recalendar places a case back on the Board's docket.

(1) *Administrative closure before the Board.* Board Members may, in the exercise of discretion, administratively close a case upon the motion of a party, after applying the standard set forth at paragraph (l)(3) of this section. The administrative closure authority described in this section is not limited by the authority provided in any other provisions in this title that separately authorize or require administrative closure in certain circumstances, including 8 CFR 214.15(l), 245.15(p)(4), 1214.2(a), 1214.3, 1240.62(b), 1240.70(f) through (h), 1245.13, 1245.15(p)(4)(i), and 1245.21(c).

(2) *Recalendar before the Board.* At any time after a case has been administratively closed under paragraph (l)(1) of this section, the Board may, in the exercise of discretion, recalendar the case pursuant to a party's motion to recalendar. In deciding whether to grant such a motion, the Board shall apply the standard set forth at paragraph (l)(3) of this section.

(3) *Standard for administrative closure and recalendar.* The Board shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion. In all other cases, in deciding whether to administratively close or to recalendar a case, the Board shall consider the totality of the circumstances, including as many of the factors listed under paragraphs (l)(3)(i) and (ii) of this section as are relevant to the particular case. The Board may also consider other factors where appropriate. No single factor is dispositive. The Board, having considered the totality of the circumstances, may grant a motion to administratively close or to recalendar a particular case over the objection of a party. Although administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings before the Board, such a pending petition, application, or other action is not required for a case to be administratively closed.

(i) As the circumstances of the case warrant, the factors relevant to a decision to administratively close a case include:

(A) The reason administrative closure is sought;

(B) The basis for any opposition to administrative closure;

(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;

(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the Board;

(E) The anticipated duration of the administrative closure;

(F) The responsibility of either party, if any, in contributing to any current or anticipated delay;

(G) The ultimate anticipated outcome of the case pending before the Board; and

(H) The ICE detention status of the noncitizen.

(ii) As the circumstances of the case warrant, the factors relevant to a decision to recalendar a case include:

(A) The reason recalendar is sought;

(B) The basis for any opposition to recalendar;

(C) The length of time elapsed since the case was administratively closed;

(D) If the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the Board, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action;

(E) If a petition, application, or other action that was pending outside of proceedings before the Board has been adjudicated, the result of that adjudication;

(F) If a petition, application, or other action remains pending outside of proceedings before the Board, the likelihood the noncitizen will succeed on that petition, application, or other action;

(G) The ultimate anticipated outcome if the case is recalendar; and

(H) The ICE detention status of the noncitizen.

(m) *Termination.* The Board shall have the authority to terminate cases before it as set forth in paragraphs (m)(1) and (2) of this section. A motion to dismiss a case in removal proceedings before the Board for a reason other than authorized by 8 CFR 1239.2(c) shall be deemed a motion to terminate under paragraph (m)(1) of this section.

(1) *Removal, deportation, and exclusion proceedings—(i) Mandatory termination.* In removal, deportation, and exclusion proceedings, the Board shall terminate the case where at least one of the requirements in paragraphs (m)(1)(i)(A) through (G) of this section is met.

(A) No charge of deportability, inadmissibility, or excludability can be sustained.

(B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable.

(C) The noncitizen has, since the initiation of proceedings, obtained United States citizenship.

(D) The noncitizen has, since the initiation of proceedings, obtained at least one status listed in paragraphs (m)(1)(i)(D)(1) through (4) of this section, provided that the status has not

been revoked or terminated, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings.

(1) Lawful permanent resident status.

(2) Refugee status.

(3) Asylee status.

(4) Nonimmigrant status as defined in section 101(a)(15)(S), (T), or (U) of the Act.

(E) Termination is required under 8 CFR 1245.13(l).

(F) Termination is otherwise required by law.

(G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion.

(ii) *Discretionary termination.* In removal, deportation, or exclusion proceedings, the Board may, in the exercise of discretion, terminate the case upon the motion of a party where at least one of the requirements listed in paragraphs (m)(1)(ii)(A) through (F) of this section is met. The Board shall consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate.

(A) The noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh).

(B) The noncitizen is prima facie eligible for naturalization, relief from removal, or a lawful status; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the noncitizen were not in proceedings; and the noncitizen has filed the petition, application, or other action with USCIS. However, no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization. Where the basis of a noncitizen's motion for termination is that the noncitizen is prima facie eligible for naturalization, the Board shall not grant the motion if it is opposed by DHS. The Board shall not terminate a case for the noncitizen to pursue an asylum application before USCIS, except as provided for in paragraph (m)(1)(ii)(A) of this section.

(C) The noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure.

(D) USCIS has granted the noncitizen's application for a

provisional unlawful presence waiver pursuant to 8 CFR 212.7(e).

(E) Termination is authorized by 8 CFR 1216.4(a)(6) or 1238.1(e).

(F) Due to circumstances comparable to those described in paragraphs (m)(1)(ii)(A) through (E) of this section, termination is similarly necessary or appropriate for the disposition or alternative resolution of the case. However, the Board may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(2) *Other proceedings*—(i) *Mandatory termination.* In proceedings other than removal, deportation, or exclusion proceedings, the Board shall terminate the case where the parties have jointly filed a motion to terminate, or one party has filed a motion to terminate and the other party has affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion. In addition, the Board shall terminate such a case where required by law.

(ii) *Discretionary termination.* In proceedings other than removal, deportation, or exclusion proceedings, the Board may, in the exercise of discretion, terminate the case upon the motion of a party where terminating the case is necessary or appropriate for the disposition or alternative resolution of the case. However, the Board may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(iii) *Limitation on termination.* Nothing in paragraphs (m)(2)(i) and (ii) of this section authorizes the Board to terminate a case where prohibited by another regulatory provision. Further, nothing in paragraphs (m)(2)(i) and (ii) of this section authorizes the Board to terminate a case for the noncitizen to pursue an asylum application before USCIS, unless the noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh).

■ 6. Amend § 1003.2 by:

■ a. As shown in the following table, removing the words in the left column and adding in their place the words in the right column wherever they appear:

an alien	a noncitizen.
the alien	the noncitizen.

alien's noncitizen's.

■ b. Revising paragraphs (a) and (b)(1);

■ c. Removing the words “Immigration Judge” and adding in their place “immigration judge” in paragraph (c)(2) wherever they appear;

■ d. Revising paragraphs (c)(3)(iii) and (iv);

■ e. Removing paragraphs (c)(3)(v) through (vii);

■ f. Adding paragraph (c)(4); and

■ g. Revising paragraphs (f), (g)(3), and (i).

The revisions and addition read as follows:

§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request by DHS or by the party affected by the decision to reopen or reconsider a case the Board has decided must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the moving party has made out a prima facie case for relief.

(b) * * *

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. When a motion to reconsider the decision of an immigration judge or of a DHS officer is pending at the time an appeal is filed with the Board, or when such motion is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, the motion may be deemed a motion to remand the decision for further proceedings before the immigration judge or the DHS officer from whose decision the appeal was taken. Such motion may be consolidated with and considered by the Board in connection with the appeal to the Board.

* * * * *

(c) * * *

(3) * * *

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by DHS in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with 8 CFR 1208.24.

(4) A motion to reopen a decision rendered by an immigration judge or

DHS officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the immigration judge or the DHS officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

* * * * *

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of § 1003.23(b)(4)(ii) and (b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the immigration judge, or an authorized DHS officer.

(g) * * *

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 21 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with a DHS office pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 21 days from the date of filing of the motion to file a brief in opposition to the motion directly with DHS. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

* * * * *

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the immigration court or the DHS

officer having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

■ 7. Amend § 1003.3 by revising paragraphs (c)(1) and (2) to read as follows:

§ 1003.3 Notice of appeal.

* * * * *

(c) * * *

(1) *Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In cases involving noncitizens in custody, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board and only if filed within 21 days of the deadline for the initial briefs. In cases involving noncitizens who are not in custody, the appellant shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file their brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a DHS officer.* Briefs in support of or in opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the noncitizen, the DHS officer from whose decision the appeal is taken or the Board may extend the period for

filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by a noncitizen directly with a DHS office, shall include proof of service on the opposing party.

* * * * *

■ 8. Revise § 1003.5 to read as follows:

§ 1003.5 Forwarding of record on appeal.

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be promptly forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to their duty station if the immigration judge was on leave or detailed to another location. The Chairman and the Chief Immigration Judge shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges, and shall take such steps as necessary to reduce the time required to produce transcripts of those proceedings and to ensure their quality.

(b) *Appeal from decision of a DHS officer.* If an appeal is taken from a decision of a DHS officer, the record of proceeding shall be forwarded to the Board by the DHS officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A DHS officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the benefit that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be immediately forwarded to the Board.

§ 1003.7 [Amended]

■ 9. Amend § 1003.7 by:

■ a. Removing the words “Immigration Judge” and adding in their place the words “immigration judge” wherever they appear;

- b. Removing the word “alien” and adding in its place the word “noncitizen”; and
- c. Removing the word “Service” and the words “the Service” and adding in their place the word “DHS” wherever they appear.

■ 10. Amend § 1003.9 by revising paragraph (b)(5) to read as follows:

§ 1003.9 Office of the Chief Immigration Judge.

* * * * *

(b) * * *

(5) Adjudicate cases as an immigration judge, including the authorities described in § 1003.10(b); and

* * * * *

■ 11. Amend § 1003.10 in paragraph (b) by:

- a. Revising the second sentence;
- b. Adding two sentences following the second sentence;
- c. Revising the fifth sentence; and
- d. Removing eighth and ninth sentences.

The revisions and additions read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * In deciding the individual cases before them, and subject to the applicable governing standards set forth in paragraph (d) of this section, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is necessary or appropriate for the disposition or alternative resolution of such cases. Such actions include administrative closure, termination of proceedings, and dismissal of proceedings. The standards for the administrative closure, dismissal, and termination of cases are set forth in § 1003.18(c), 8 CFR 1239.2(c), and § 1003.18(d), respectively. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine noncitizens and any witnesses. * * *

* * * * *

■ 12. Amend § 1003.18 by revising the section heading, adding paragraph headings to paragraphs (a) and (b), and adding paragraphs (c) and (d) to read as follows:

§ 1003.18 Docket management.

(a) *Scheduling.* * * *

(b) *Notice.* * * *

(c) *Administrative closure and recalendar.* Administrative closure is the temporary suspension of a case. Administrative closure removes a case

from the immigration court’s active calendar until the case is recalendared. Recalendar places a case back on the immigration court’s active calendar.

(1) *Administrative closure before immigration judges.* An immigration judge may, in the exercise of discretion, administratively close a case upon the motion of a party, after applying the standard set forth at paragraph (c)(3) of this section. The administrative closure authority described in this section is not limited by the authority provided in any other provisions in this title that separately authorize or require administrative closure in certain circumstances, including 8 CFR 214.15(l), 245.15(p)(4), 1214.2(a), 1214.3, 1240.62(b), 1240.70(f) through (h), 1245.13, 1245.15(p)(4)(i), and 1245.21(c).

(2) *Recalendar before immigration judges.* At any time after a case has been administratively closed under paragraph (c)(1) of this section, an immigration judge may, in the exercise of discretion, recalendar the case pursuant to a party’s motion to recalendar. In deciding whether to grant such a motion, the immigration judge shall apply the standard set forth at paragraph (c)(3) of this section.

(3) *Standard for administrative closure and recalendar.* An immigration judge shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion. In all other cases, in deciding whether to administratively close or to recalendar a case, an immigration judge shall consider the totality of the circumstances, including as many of the factors listed under paragraphs (c)(3)(i) and (ii) of this section as are relevant to the particular case. The immigration judge may also consider other factors where appropriate. No single factor is dispositive. The immigration judge, having considered the totality of the circumstances, may grant a motion to administratively close or to recalendar a particular case over the objection of a party. Although administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings before the immigration judge, such a pending petition, application, or other action is not required for a case to be administratively closed.

(i) As the circumstances of the case warrant, the factors relevant to a

decision to administratively close a case include:

(A) The reason administrative closure is sought;

(B) The basis for any opposition to administrative closure;

(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;

(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the immigration judge;

(E) The anticipated duration of the administrative closure;

(F) The responsibility of either party, if any, in contributing to any current or anticipated delay;

(G) The ultimate anticipated outcome of the case pending before the immigration judge; and

(H) The ICE detention status of the noncitizen.

(ii) As the circumstances of the case warrant, the factors relevant to a decision to recalendar a case include:

(A) The reason recalendar is sought;

(B) The basis for any opposition to recalendar;

(C) The length of time elapsed since the case was administratively closed;

(D) If the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the immigration judge, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action;

(E) If a petition, application, or other action that was pending outside of proceedings before the immigration judge has been adjudicated, the result of that adjudication;

(F) If a petition, application, or other action remains pending outside of proceedings before the immigration judge, the likelihood the noncitizen will succeed on that petition, application, or other action;

(G) The ultimate anticipated outcome if the case is recalendared; and

(H) The ICE detention status of the noncitizen.

(d) *Termination.* Immigration judges shall have the authority to terminate cases before them as set forth in paragraphs (d)(1) and (2) of this section. A motion to dismiss a case in removal proceedings before an immigration

judge for a reason other than authorized by 8 CFR 1239.2(c) shall be deemed a motion to terminate under paragraph (d)(1) of this section.

(1) *Removal, deportation, and exclusion proceedings*—(i) *Mandatory termination*. In removal, deportation, and exclusion proceedings, immigration judges shall terminate the case where at least one of the requirements in paragraphs (d)(1)(i)(A) through (G) of this section is met.

(A) No charge of deportability, inadmissibility, or excludability can be sustained.

(B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable.

(C) The noncitizen has, since the initiation of proceedings, obtained United States citizenship.

(D) The noncitizen has, since the initiation of proceedings, obtained at least one status listed in paragraphs (d)(1)(i)(D)(1) through (4) of this section, provided that the status has not been revoked or terminated, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings.

(1) Lawful permanent resident status.

(2) Refugee status.

(3) Asylee status.

(4) Nonimmigrant status as defined in section 101(a)(15)(S), (T), or (U) of the Act.

(E) Termination is required under 8 CFR 1245.13(l).

(F) Termination is otherwise required by law.

(G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion.

(ii) *Discretionary termination*. In removal, deportation, or exclusion proceedings, immigration judges may, in the exercise of discretion, terminate the case upon the motion of a party where at least one of the requirements listed in paragraphs (d)(1)(i)(A) through (F) of this section is met. The immigration judge shall consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate.

(A) The noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied

children, as defined in 8 CFR 1001.1(hh).

(B) The noncitizen is prima facie eligible for naturalization, relief from removal, or lawful status; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the noncitizen were not in proceedings; and the noncitizen has filed the petition, application, or other action with USCIS. However, no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization. Where the basis of a noncitizen's motion for termination is that the noncitizen is prima facie eligible for naturalization, the immigration judge shall not grant the motion if it is opposed by DHS. Immigration judges shall not terminate a case for the noncitizen to pursue an asylum application before USCIS, except as provided for in paragraph (d)(1)(ii)(A) of this section.

(C) The noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure.

(D) USCIS has granted the noncitizen's application for a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e).

(E) Termination is authorized by 8 CFR 1216.4(a)(6) or 1238.1(e).

(F) Due to circumstances comparable to those described in paragraphs (d)(1)(ii)(A) through (E) of this section, termination is similarly necessary or appropriate for the disposition or alternative resolution of the case. However, immigration judges may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(2) *Other proceedings*—(i) *Mandatory termination*. In proceedings other than removal, deportation, or exclusion proceedings, immigration judges shall terminate the case where the parties have jointly filed a motion to terminate, or one party has filed a motion to terminate and the other party has affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion. In addition, immigration judges shall terminate such a case where required by law.

(ii) *Discretionary termination*. In proceedings other than removal, deportation, or exclusion proceedings, immigration judges may, in the exercise of discretion, terminate the case upon the motion of a party where terminating the case is necessary or appropriate for the disposition or alternative resolution

of the case. However, immigration judges may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(iii) *Limitation on termination*.

Nothing in paragraphs (d)(2)(i) and (ii) of this section authorizes immigration judges to terminate a case where prohibited by another regulatory provision. Further, nothing in paragraphs (d)(2)(i) and (ii) of this section authorizes the immigration judge to terminate a case for the noncitizen to pursue an asylum application before USCIS, unless the noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh).

■ 13. Amend § 1003.23 by:

■ a. In the section heading, removing the words “Immigration Court” and add in their place the words “immigration court”;

■ b. Revising paragraph (a);

■ c. Revising the first sentence and removing the second sentence of paragraph (b)(1) introductory text;

■ d. In paragraph (b)(1), removing the words “the Service” and adding in their place the word “DHS”, wherever they appear;

■ e. Revising paragraphs (b)(1)(iii) through (v), (b)(2) and (3), and (b)(4)(i) and (ii);

■ f. In paragraph (b)(4)(iii)(B), removing the words “Immigration Judge” and adding in their place the words “immigration judge” and removing the word “alien” and adding in its place the word “noncitizen”; and

■ g. Removing paragraphs (b)(4)(v) and (vi).

The revisions read as follows:

§ 1003.23 Reopening or reconsideration before the immigration court.

(a) *Pre-decision motions*. Unless otherwise permitted by the immigration judge, motions submitted prior to the final order of an immigration judge shall be in writing and shall state, with particularity the grounds therefor, the relief sought, and the jurisdiction. The immigration judge may set and extend time limits for the making and replying to of motions and replies thereto. A motion shall be deemed unopposed unless timely response is made.

(b) * * *

(1) *In general*. An immigration judge may upon the immigration judge's own motion at any time, or upon motion of DHS or the noncitizen, reopen or

reconsider any case in which the judge has rendered a decision, unless jurisdiction is vested with the Board of Immigration Appeals. * * *

* * * * *

(iii) *Assignment to an immigration judge.* If the immigration judge is unavailable or unable to adjudicate the motion to reopen or reconsider, the Chief Immigration Judge or a delegate of the Chief Immigration Judge shall reassign such motion to another immigration judge.

(iv) *Replies to motions; decision.* The immigration judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the immigration judge.

(v) *Stays.* Except in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the immigration judge, the Board, or an authorized DHS officer.

(2) *Motion to reconsider.* A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the immigration judge's prior decision and shall be supported by pertinent authority. Such motion may not seek reconsideration of a decision denying a previous motion to reconsider.

(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the noncitizen an opportunity to apply for any form of discretionary relief will not be granted if it appears that the noncitizen's right to apply for such relief was fully explained to them by the immigration judge and an opportunity to apply therefor was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1)

of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) of the Act (cancellation of removal for certain permanent residents) or 240A(b) of the Act (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only upon demonstration that the noncitizen was statutorily eligible for such relief prior to the service of a Notice to Appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the noncitizen inadmissible or removable under sections 237(a)(2) or (a)(4) of the Act, whichever is earliest. The immigration judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) * * *

(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the noncitizen. However, the noncitizen may request a stay and, if granted by the immigration judge, the noncitizen shall not be removed pending disposition of the motion by the immigration judge. If the original asylum application was denied based upon a finding that it was frivolous, then the noncitizen is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or in removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the noncitizen demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time upon the noncitizen's demonstration of lack of

notice in accordance with section 239(a)(1) or (2) of the Act, or upon the noncitizen's demonstration of the noncitizen's Federal or State custody and the failure to appear was through no fault of the noncitizen. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the noncitizen has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph (b)(4)(ii) shall stay the removal of the noncitizen pending disposition of the motion by the immigration judge. A noncitizen may file only one motion pursuant to this paragraph (b)(4)(ii).

* * * * *

■ 14. Add subpart D, consisting of § 1003.55, to read as follows:

Subpart D—Special Provisions

§ 1003.55 Treatment of post-conviction orders.

(a) *Applicability of Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019). (1) *Matter of Thomas & Thompson* shall not apply to a criminal sentence:

(i) Where a court at any time granted a request to modify, clarify, vacate, or otherwise alter the sentence and the request was filed on or before October 25, 2019; or

(ii) Where the noncitizen demonstrates that the noncitizen reasonably and detrimentally relied on the availability of an order modifying, clarifying, vacating, or otherwise altering the sentence entered in connection with a guilty plea, conviction, or sentence on or before October 25, 2019.

(2) Where paragraph (a)(1) of this section applies, the adjudicator shall assess the relevant order under *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016), as applicable.

(b) *Post-conviction orders correcting errors.* Adjudicators shall give effect to an order that corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order and that was entered to give effect to the intent of the original order.

PART 1239—INITIATION OF REMOVAL PROCEEDINGS

■ 15. The authority citation for part 1239 continues to read as follows:

Authority: 8 U.S.C. 1103, 1221, 1229.

■ 16. Amend § 1239.2 by:

- a. Adding paragraph (b); and
- b. Removing and reserving paragraph (f).

The addition reads as follows:

§ 1239.2 Cancellation of notice to appear.

* * * * *

(b) *Ordering termination or dismissal.* After commencement of proceedings, an immigration judge or Board member shall have authority to resolve or dispose of a case through an order of dismissal or an order of termination. An immigration judge or Board member may enter an order of dismissal in cases where DHS moves for dismissal pursuant to paragraph (c) of this section. A motion to dismiss removal proceedings for a reason other than those authorized by paragraph (c) of this section shall be deemed a motion to terminate and adjudicated pursuant to 8 CFR 1003.1(m), pertaining to cases before the Board, or 8 CFR 1003.18(d), pertaining to cases before the immigration court, as applicable.

* * * * *

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF NONCITIZENS IN THE UNITED STATES

- 17. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

- 18. The heading for part 1240 is revised to read as set forth above.

- 19. Amend § 1240.26 by:

- a. As shown in the following table, removing the words in the left column and adding in their place the words in the right column wherever they appear:

An alien	A noncitizen.
an alien	a noncitizen.
the alien	the noncitizen.
alien's	noncitizen's.

- b. Removing the words “his or her” and adding in their place the words “the noncitizen’s” in paragraphs (b)(3)(i) introductory text, (b)(3)(i)(A);

- c. Removing the words “his or her” and adding in their place the words “the ICE Field Office Director’s” in paragraph (c)(4);

- d. Removing the words “his or her” and adding in their place the words “the noncitizen’s” in paragraphs (c)(4)(ii), and (i); and

- e. Revising paragraphs (k)(1), (k)(2) introductory text, (k)(3) introductory text, (k)(4), and (l).

The revisions read as follows:

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

* * * * *

(k) * * *

(1) If the Board finds that an immigration judge incorrectly denied a noncitizen’s request for voluntary departure or failed to provide appropriate advisals, the Board may consider the noncitizen’s request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases in which a noncitizen has appealed an immigration judge’s decision or in which DHS and the noncitizen have both appealed an immigration judge’s decision, the Board shall not grant voluntary departure under section 240B(a) of the Act unless:

* * * * *

(3) In cases in which DHS has appealed an immigration judge’s decision, the Board shall not grant voluntary departure under section 240B(b) of the Act unless:

* * * * *

(4) The Board may impose such conditions as it deems necessary to ensure the noncitizen’s timely departure from the United States, if supported by the record on appeal and within the scope of the Board’s authority on appeal. Unless otherwise indicated in this section, the Board shall advise the noncitizen in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b) through (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the noncitizen of the duty to post

the bond with the ICE Field Office Director within 30 business days of the Board’s order granting voluntary departure. If documentation sufficient to assure lawful entry into the country to which the noncitizen is departing is not contained in the record, but the noncitizen continues to assert a request for voluntary departure under section 240B of the Act and the Board finds that the noncitizen is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the noncitizen within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the noncitizen in writing of such conditions. The noncitizen may accept or decline the grant of voluntary departure and may manifest a declination either by written notice to the Board, by failing to timely post any required bond, or by otherwise failing to comply with the Board’s order. The grant of voluntary departure shall automatically terminate upon a filing by the noncitizen of a motion to reopen or reconsider the Board’s decision, or by filing a timely petition for review of the Board’s decision. The noncitizen may decline voluntary departure when unwilling to accept the amount of the bond or other conditions.

(l) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at \$3,000 unless the immigration judge or the Board specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge or the Board shall advise the noncitizen of the amount of this civil penalty at the time of granting voluntary departure.

Dated: May 15, 2024.

Merrick B. Garland,
Attorney General.

[FR Doc. 2024–11121 Filed 5–28–24; 8:45 am]

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Wednesday, May 29, 2024

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FEDERAL REGISTER PAGES AND DATE, MAY

34945-35684.....	1
35685-36650.....	2
36651-37058.....	3
37059-37964.....	6
37965-38836.....	7
38837-39530.....	8
39531-40358.....	9
40359-41286.....	10
41287-41880.....	13
41881-42328.....	14
42329-42766.....	15
42767-43304.....	16
43305-43732.....	17
43733-44544.....	20
44545-44900.....	21
44901-45556.....	22
45557-45748.....	23
45749-46014.....	24
46015-46308.....	28
46309-46796.....	29

CFR PARTS AFFECTED DURING MAY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

XVI.....34953

3 CFR

Proclamations:

10585.....	44907
10733.....	34945
10734.....	34949
10735.....	36651
10736.....	36655
10737.....	36657
10738.....	36659
10739.....	36661
10740.....	36663
10741.....	36665
10742.....	36667
10743.....	36669
10744.....	37059
10745.....	39531
10746.....	40361
10747.....	41287
10748.....	41289
10749.....	41291
10750.....	41293
10751.....	41295
10752.....	41297
10753.....	41881
10754.....	42329
10755.....	42333
10756.....	42335
10757.....	42339
10758.....	44545
10759.....	44901
10760.....	44903
10761.....	44905
10762.....	44907
10763.....	44909
10764.....	45749

Administrative Orders:

Memorandums:	
Memorandum of April 24, 2024.....	40359
Memorandum of May 10, 2024.....	46017
Memorandum of May 14, 2024.....	44541
Notices:	
Notice of May 8, 2024.....	40353
Notice of May 8, 2024.....	40355
Notice of May 8, 2024.....	40357
Notice of May 14, 2024.....	43765
Notice of May 20, 2024.....	44899
Orders:	
Order of May 13, 2024.....	43300
Presidential Determinations:	

No. 2024-04 of May 8,

2024.....46015

5 CFR

890.....	37061
2635.....	43686
Proposed Rules:	
532.....	36720
890.....	45782
2641.....	46036

6 CFR

Proposed Rules:

26.....37141

7 CFR

354.....	38596
958.....	45751
981.....	37965
985.....	45557
1430.....	39539
1710.....	45563
1717.....	45563
1719.....	34955, 41299
1721.....	45563
1726.....	45563
1730.....	45563
1738.....	34955
1739.....	34955
1774.....	34955
1775.....	34955
1780.....	34959
1940.....	34959
3570.....	34955
4274.....	34955
4279.....	34955
4280.....	34955
4288.....	34955

Proposed Rules:

175.....	46335
271.....	44928
273.....	44928

8 CFR

1001.....	46742
1003.....	46742
1239.....	46742
1240.....	46742

Proposed Rules:

208.....41347

9 CFR

11.....	39194
71.....	39540
77.....	39540
78.....	39540
86.....	39540

10 CFR

73.....	42767
429.....	37778, 43986
430.....	37778, 37987

431.....43986, 44052, 44464	744.....41886	903.....38224, 46020	46328
433.....35384		906.....46020	
435.....35384	16 CFR	908.....38224	Proposed Rules:
Ch. III.....37079	910.....38342	943.....38224, 46020	100.....41368, 41914
900.....35312	912.....38342	945.....38224, 46020	110.....38853, 38854
1008.....43733	17 CFR	960.....38224, 46020	117.....43797
1021.....41300, 45563	23.....34991, 45569	972.....38224, 46020	165.....35767, 38854, 38857,
Proposed Rules:	37.....34991	982.....38224, 46020	39576, 40437, 43350, 44622,
72.....41901	Proposed Rules:	983.....38224, 46020	44945, 45803, 46043
73.....41901	275.....44571	985.....38224, 46020	
430.....38762	18 CFR	1000.....38224, 46020	34 CFR
431.....43770	50.....46682	Proposed Rules:	75.....42806
11 CFR	380.....46682	91.....46618	Ch. II.....41498
4.....35685	401.....46322	92.....46618	682.....46330
12 CFR	420.....46322	570.....46618	685.....46330
229.....43737	Proposed Rules:	982.....46618	Proposed Rules:
1293.....42768	2.....37147	26 CFR	Ch. VI.....43352
1610.....37091	38.....37147	1.....37706	36 CFR
Proposed Rules:	19 CFR	26.....37116	7.....43319
Ch. VII.....45602	12.....44921	300.....42362	219.....37135
13 CFR	20 CFR	301.....37116, 37706	1225.....35007
120.....35688	655.....38838	602.....37116	Proposed Rules:
Proposed Rules:	21 CFR	Proposed Rules:	7.....44947
124.....42816	112.....37448	1.....39440, 42404, 43349	37 CFR
127.....42816	510.....42354	301.....43349	1.....36677
128.....42816	516.....42361	27 CFR	Proposed Rules:
14 CFR	520.....42354	9.....42363	1.....40439
21.....45944	522.....42354	28 CFR	38 CFR
23.....46309	524.....42354	106.....36671, 36673, 36675	2.....46331
25.....39566, 42341, 42788,	529.....42354	29 CFR	17.....45599
44911, 44913	558.....42354	1602.....46021	38.....40386
29.....37969	809.....37286	1910.....44144	51.....45599
34.....37971	886.....43743	2520.....43636	80.....41312
39.....34961, 34982, 34986,	Proposed Rules:	2550.....43636, 43675	39 CFR
34988, 35690, 35693, 35695,	73.....43349	2578.....43636	111.....35716, 42367
35698, 35701, 37109, 37111,	80.....46042	30 CFR	Proposed Rules:
41301, 41304, 42792, 44547,	201.....44944	285.....42602	3050.....44951, 46046
44914, 44917, 45564, 45754,	500.....44944	585.....42602	40 CFR
45758, 46319	501.....44944	31 CFR	9.....38950
71.....41306, 41307, 42343,	510.....44944	501.....40372	52.....36679, 37137, 41319,
42344, 42345, 42347, 42349,	514.....44944	515.....46323	41321, 42808, 42810, 42812
42351, 42352, 42795, 42797,	516.....44944	560.....43311	60.....39304, 39798, 42932
43305, 43739, 45566, 45567,	809.....37158	591.....35703	61.....45770
45760, 46019	1308.....44597	Proposed Rules:	63.....38508, 39304, 41647,
93.....43309	22 CFR	1.....41912	42932, 45770
97.....41883, 41884, 45762,	50.....41308	100.....36721	98.....42062
45764	51.....41308	1032.....44571	131.....35717
Proposed Rules:	71.....41308	32 CFR	141.....45980
25.....38004	303.....40372	45.....40378	142.....45980
29.....44928	Proposed Rules:	199.....45765	174.....43328
39.....35015, 37142, 37144,	126.....35028	310.....37127	180.....40391, 40396, 42382,
38841, 38846, 41361, 41365,	23 CFR	1665.....35004	42387
41903, 41906, 41908, 42397,	490.....37113	Proposed Rules:	228.....36681
42820, 43336, 43339, 43342,	1300.....37113	310.....42408	257.....38950
43344, 43792, 43794, 44568,	24 CFR	776.....36723	268.....35008
44930, 44933, 45610, 45612,	5.....38224, 46020	33 CFR	281.....42390
45800, 46336	8.....38224, 46020	100.....35006, 35705, 35708,	282.....42390, 43322
71.....35018, 35019, 35021,	42.....38224, 46020	37130, 40382, 41311, 43314,	302.....39124
35022, 35024, 35025, 35027,	50.....38224, 46020	43747, 46325	372.....35748, 43331
42399, 42401, 42824, 42826,	91.....38224, 46020	117.....37974, 46021	423.....40198
42828, 43347, 45615, 46038,	92.....38224, 46020	147.....35709, 37130, 41895,	702.....37028
46041, 46339	93.....38224, 46020	42799, 44550	751.....39254
129.....44935	247.....38224, 46020	165.....35712, 35714, 36671,	1500.....35442
382.....38852	290.....38224, 46020	37134, 38839, 40384, 42806,	1501.....35442
15 CFR	882.....38224, 46020	43316, 43318, 44550, 44551,	1502.....35442
326.....37972, 42354	888.....38224	44552, 44922, 45595, 45596,	1503.....35442
705.....43740	891.....38224, 46020	45598, 45767, 45768, 46326,	1504.....35442
734.....40369			1505.....35442
738.....38837, 40369			1506.....35442
740.....40369			1507.....35442
			1508.....35442

Proposed Rules:	431.....35934	10.....41558	1544.....35580
51.....36870	482.....35934	25.....46052	1546.....35580
52.....36729, 36870, 42410, 42820, 43357, 43359, 45616, 46049	485.....35934	52.....46340	1548.....35580
124.....42832	495.....35934	73.....41371	1549.....35580
180.....36737, 44954	512.....35934, 43518	76.....38007	1550.....35580
260.....42832	43 CFR	97.....46052	1552.....35580
264.....42832	1600.....40308	48 CFR	1554.....35580
265.....42832	2360.....38712	1.....41895	1570.....35580
270.....42832	2800.....35634, 41331	715.....44553	1572.....35580
271.....42832	2860.....41331	727.....37948, 40417	Proposed Rules:
281.....42413	2880.....41331	742.....37948, 40417	107.....45806
282.....42413, 43363	2920.....41331	752.....37948, 40417, 44553	385.....36742
41 CFR	6100.....40308	1602.....37061	571.....45813
300-3.....37975	45 CFR	1609.....37061	
302-6.....37975	75.....36684	Proposed Rules:	50 CFR
302-7.....37975	80.....37522	40.....36738, 42413	17.....36982, 43748, 46576
42 CFR	84.....37522, 40066	49 CFR	25.....41336
71.....41726	92.....37522	24.....36908	92.....35010
410.....41324	147.....37522	80.....45772	217.....45292
414.....41324	152.....39392	171.....39570, 41331	300.....40417
430.....41002	155.....37522, 39392	172.....39570, 41331	622.....35011, 40419, 41896, 42815, 46333
431.....40542	156.....37522	173.....39570, 41331	635.....37139, 45776, 45779
435.....39392	1324.....39488	175.....39570, 41331	648.....35755, 41899, 44924
438.....37522, 40542, 40876, 41002	1356.....40400	176.....39570, 41331	660.....35012, 44553, 46035
440.....37522	2520.....46024	178.....39570, 41331	665.....37984, 37985
441.....40542	2521.....46024	180.....39570, 41331	679.....35013, 39575, 46333
442.....40876	2522.....46024	245.....44766	Proposed Rules:
447.....40542	46 CFR	246.....44830	20.....41522
457.....37522, 39392, 41002	541.....39561, 41895, 45772	260.....45772	216.....35769
460.....37522	47 CFR	571.....39686	223.....41917, 45815
483.....40876	8.....45404	595.....39686	224.....45815
600.....39392	20.....45404	596.....39686	300.....46352
Proposed Rules:	73.....36705, 36718	1145.....38646	622.....42413
412.....35934	Proposed Rules:	1500.....35580	648.....43364, 45621
413.....35934	5.....46052	1503.....35580	665.....45623
		1515.....35580	679.....40449
		1540.....35580	
		1542.....35580	

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