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Title 3—

The President

Memorandum of November 9, 2021

Maximizing Assistance To Respond to COVID–19

Memorandum for the Secretary of Homeland Security [and] the Administrator of the Federal Emergency Management Agency

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the ''Stafford Act''), I hereby order as follows:

Section 1. *Policy.* It is the policy of my Administration to combat and respond to the coronavirus disease 2019 (COVID–19) pandemic with the full capacity and capability of the Federal Government to protect and support our families, schools, and businesses, and to assist State, local, Tribal, and territorial governments to do the same, including through emergency and disaster assistance available from the Federal Emergency Management Agency (FEMA) and through Federal support of the Governors' use of the National Guard.

Sec. 2. *Assistance for Category B COVID–19 Emergency Protective Measures.* FEMA shall provide a 100 percent Federal cost share for all work eligible for assistance under Public Assistance Category B, pursuant to sections 403 (42 U.S.C. 5170b), 502 (42 U.S.C. 5192), and 503 (42 U.S.C. 5193) of the Stafford Act, including work described in section 3(a) of the Presidential Memorandum of January 21, 2021 (Memorandum to Extend Federal Support to Governors' Use of the National Guard to Respond to COVID–19 and to Increase Reimbursement and Other Assistance Provided to States), and in section 2 of that memorandum on the Governors' use of the National Guard, performed from January 20, 2020, through April 1, 2022.

Sec. 3. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

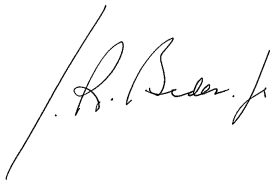
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Administrator of FEMA is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 9, 2021

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Presidential Documents

Proclamation 10306 of November 12, 2021

American Education Week, 2021

By the President of the United States of America

A Proclamation

I have always believed that our children are the kite strings that hold our national ambitions aloft—when we invest in their education, we are investing in the future of our Nation. During American Education Week, which marks its 100th anniversary this year, we celebrate the unparalleled power of education to lift our country to new heights, and we recommit ourselves to ensuring that every child in America receives a quality education.

When America made 12 years of public education standard more than a century ago, it gave us the best-educated, best-prepared workforce in the world—setting us on a path to lead the world for the better part of the 20th century. Not only is quality, equitable education the engine of innovation and the fuel of a thriving economy—it is also key to preserving our democracy and advancing American ideals. But as the First Lady so often says, any country that out-educates us will out-compete us. The truth is that we are no longer keeping pace with other countries when it comes to investing in the next generation.

While America once led the world in educational achievement, the Organization for Economic Cooperation and Development now ranks us 35th out of 37 major economies when it comes to investing in early childhood education and care. Only about half of American 3- and 4-year-olds are enrolled in early childhood education—while in Germany, France, the UK, Latvia, and other nations, that number is more than 90 percent. According to one study from the Pell Institute, we now rank 12th among advanced economies when it comes to the percentage of our young people who have attained a post-high-school degree.

Simply put—we cannot be competitive in the 21st century global economy if we do not accelerate degree attainment. It is more important than ever that we invest in education, particularly as schools and communities are still fighting to overcome the challenges of the COVID–19 pandemic. This virus has called upon the extraordinary resilience of our educators, school staff, students, and families, whose dedicated efforts over the last 19 months have helped keep millions of young people on a path to fulfillment and success. Now, we must match their determination with bold action to ensure that our children—and our Nation—are well-positioned to lead the world in the years ahead.

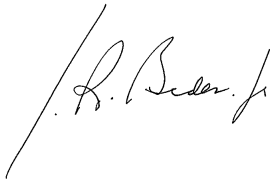
To that end, my Administration provided resources through the American Rescue Plan that are helping schools and colleges safely return to in-person instruction and meet the academic, social, emotional, and financial needs of students most affected by the pandemic. My budget proposal for fiscal year 2022 more than doubles funding for schools that serve low-income students; invests in support for students with disabilities; increases Federal funding for community schools tenfold; and works towards my Administration's goal of doubling the number of school counselors, social workers, psychologists, and nurses so that teachers can focus on teaching. Finally, my Administration's Build Back Better framework would make transformational investments in our education system—including by making 2

years of high-quality pre-school available to every child in America. We will also make significant investments in education beyond high school: We will increase Pell Grants to help students from lower-income families attend college and invest in Historically Black Colleges and Universities, Hispanic-Serving Institutions, Tribal Colleges and Universities, and other Minority-Serving Institutions to help ensure that young people from every neighborhood have a fair shot at the good-paying jobs of the future.

In celebrating the centennial anniversary of American Education Week, let us acknowledge education's power to transform lives, uplift communities, and strengthen our democratic society. Let us honor all those who nurture our students and inspire the future leaders of our great Nation.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 14 through November 20, 2021, as American Education Week. I invite all Americans to join in expressing gratitude, now and throughout the year, for the educators and staff of our Nation's schools and colleges, and I encourage the observation of this week through appropriate activities, events, and programs designed to showcase engaging, high-quality education, celebrate the joy of learning, and prepare students of every background for success.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



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Presidential Documents

Proclamation 10307 of November 12, 2021

National Apprenticeship Week, 2021

By the President of the United States of America

A Proclamation

For decades, Registered Apprenticeships have been a reliable pathway to the middle class. Apprenticeships train workers for good jobs and allow them to earn while they learn. These educational experiences are especially important for workers who did not attend college, as they provide these workers with the type of specialized training needed for the jobs of today and tomorrow. During National Apprenticeship Week, we highlight how this quality industry and worker-driven training model provides a critical talent pipeline and a means to strengthen our workforce and address our Nation's pressing challenges—from rebuilding our country's infrastructure to protecting against cybersecurity threats.

As we build our economy back better and continue to fight the COVID–19 pandemic, we have seen the especially important role apprenticeships play in providing training to workers looking to re-enter the workforce and young people who are seeking to enter the work force—in each case providing an opportunity to train and develop the skills needed for jobs of the future while earning a good income.

My Administration supports the expansion of Registered Apprenticeships and the pathways they create to good jobs and union representation. That is why I rescinded an Executive Order that undermined Registered Apprenticeship programs by promoting less rigorous industry-recognized apprenticeships. To strengthen the voice of our workers who have been central to rebuilding our economy, my Administration reinstated the longstanding National Advisory Committee on Apprenticeships. Since apprenticeships are central to supporting the investments made in the American Rescue Plan and the Build Back Better Agenda, I have proposed we invest in high-quality job training and Registered Apprenticeships in fast-growing sectors like health care, child care, advanced manufacturing, information technology, and clean energy so that every American receives the skills required by employers for good, middle-class union jobs.

My Administration also recently awarded nearly $100 million in State Apprenticeship Expansion, Equity and Innovation grants to bolster States' efforts to expand programming and inclusive recruitment strategies. These grants also aim to develop partnerships that ensure we have a workforce ready to staff new industries and non-traditional occupations, including industry sectors hit hardest by the pandemic. To facilitate the expansion of Registered Apprenticeship programs, provide technical assistance to these programs, and help small- and medium-sized firms establish Registered Apprenticeships, we also invested nearly $31 million through cooperative agreements to establish four Registered Apprenticeship Technical Assistance Centers of Excellence. The centers will also work with public and private sector partners to expand opportunities in Registered Apprenticeship programs for women, youths, people of color, rural communities, justice-involved individuals, and people with disabilities. The centers are the culmination of a longstanding commitment to expand access to apprenticeships for traditionally underrepresented groups of workers and build on existing strategies

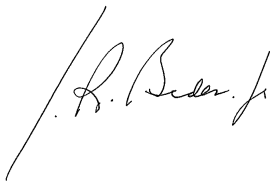
that include the Women in Apprenticeship and Non-Traditional Occupations (WANTO) grant program, now in its 27th year.

During National Apprenticeship week, we also commit to ensuring that people from populations that have been historically underserved, marginalized, and adversely affected by persistent discrimination, poverty, and inequality have an opportunity to participate in the workforce. In particular, given the historic underrepresentation of women in apprenticeship programs and the impact of the pandemic on women's labor force participation, there is even greater urgency to support women's participation in Registered Apprenticeships.

Together, and with strengthened Registered Apprenticeships, we can build an even more successful, competitive, and diverse workforce.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, do hereby proclaim November 14 through November 20, 2021, as National Apprenticeship Week. I urge the Congress, State and local governments, educational institutions, industry and labor leaders, apprentices, and all Americans to support Registered Apprenticeship programs in the United States of America and to raise awareness of their importance in building a diverse and robust workforce to strengthen our national economy.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



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Presidential Documents

Proclamation 10308 of November 12, 2021

America Recycles Day, 2021

By the President of the United States of America

A Proclamation

In recent months, I have traveled across the country to see firsthand the devastating toll of climate change. I have walked down streets in Louisiana, New Jersey, and New York where deadly storms and floods have destroyed the lives of working families, wiping homes and businesses off the map. I have sat with firefighters in Boise, Idaho, and surveyed damage from the Caldor Fire in northern California—just one large wildfire among dozens that together have burned more acres of American land this year than make up the State of New Jersey. Communities encompassing the homes of more than 100 million people—about 1 in 3 Americans—have been struck by extreme weather events in the last few months alone. Climate change is a blinking code red for our Nation.

This crisis poses an existential threat, but we also know that it is within our power to defeat it. Today, half of all global greenhouse gas emissions are created when natural resources are taken from the Earth and made into usable products. By reducing, reusing, and recycling, we can decrease waste and the greenhouse gases that fuel the climate crisis while protecting our communities and our environment. On America Recycles Day, we celebrate efforts across the country to manage our resources responsibly and creatively, and we recommit ourselves to building a brighter and more sustainable future for all people.

Although we have made significant progress since the first America Recycles Day over 2 decades ago, we still have work to do. Black, Brown, Indigenous, and low-income communities continue to be disproportionately impacted by higher pollution levels as well as detrimental health and environmental impacts from mismanaged waste. Our Nation's infrastructure has not kept pace with today's changing waste stream, and markets for recycled materials are decreasing. To improve our national recycling system and manage our precious resources equitably and sustainably, it is going to take all of us—including Federal, State, Tribal, and local governments, our partners in the private sector, and individual Americans making a difference in their communities. We must continue to work together to properly recycle and manage materials throughout their lifecycles and ensure that every American's right to a healthy environment is fulfilled and protected.

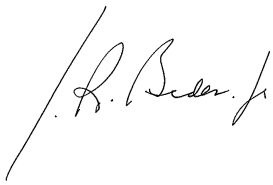
To help our Nation achieve our environmental and recycling goals, my Administration is releasing a National Recycling Strategy, which identifies objectives and actions necessary to help fight climate change and create a sustainable national recycling system. The actions this strategy recommends will help us reach our national recycling goal, and the Federal Government will lead by example across our Federal buildings, lands, and national parks. The strategy also aims to increase access to recycling so that all Americans can meaningfully participate while ensuring that our solid waste management system does not disproportionately affect communities that are already overburdened with environmental impacts. Our workplaces, communities, and Federal, State, Tribal, and local governments can all take part in reshaping our recycling system into one that puts the United States

at the forefront of environmental stewardship. You can visit www.epa.gov/recycle for more information on reducing, reusing, and recycling.

As we continue to pursue bold action to tackle climate change, we can all do our part to create a more sustainable future by making simple changes in our own lives. Today and every day, we reaffirm our commitment to preserving our precious resources and creating a healthier, cleaner, more just world for our children and future generations.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 15, 2021, as America Recycles Day. I call upon the people of the United States of America to observe this day with appropriate programs and activities, and I encourage all Americans to continue their reducing, reusing, and recycling efforts throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of November, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2021–25192
Filed 11–16–21; 8:45 am]
Billing code 3395–F2–P

Rules and Regulations

Federal Register

Vol. 86, No. 219

Wednesday, November 17, 2021

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 52

[NRC–2020–0269]

RIN 3150–AK56

Extending the Duration of the AP1000 Design Certification

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of December 6, 2021, for the direct final rule that was published in the **Federal Register** on September 22, 2021. This direct final rule amends the NRC's regulations to update the design to reflect changes provided by Westinghouse Electric Company LLC and to extend the duration of the AP1000 design certification for an additional 5 years.

DATES: *Effective date:* The effective date of December 6, 2021, for the direct final rule published September 22, 2021 (86 FR 52593), is confirmed.

ADDRESSES: Please refer to Docket ID NRC–2020–0269 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–2020–0269. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's Public Document Room (PDR), Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Doyle, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3748, email: *Daniel.Doyle@nrc.gov,* or Bruce Bavol, Office of Nuclear Reactor Regulation, telephone: 301–415–6715, email: *Bruce.Bavol@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On September 22, 2021 (86 FR 52593), the NRC published a direct final rule amending its regulations in part 52 of title 10 of the *Code of Federal Regulations* to update the design to reflect changes provided by Westinghouse Electric Company LLC and to extend the duration of the AP1000 design certification for an additional 5 years.

The NRC received and docketed three comment submissions on the companion proposed rule (86 FR 52619; September 22, 2021). Electronic copies of the comments can be obtained from the Federal rulemaking website *https://www.regulations.gov* under Docket ID NRC–2020–0269 and are also available in ADAMS under Accession Nos. ML21280A348, ML21293A316, and ML21293A315.

In the direct final rule, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on December 6, 2021. The NRC received three comment submissions. The NRC evaluated the submissions against the criteria described in the direct final rule and determined that the comments were not significant and adverse or were outside the scope of the direct final rule. Specifically, one comment submission was from an Indian Tribe, and it requested no further consultation on this project. A second comment submission agreed with this rulemaking and, thus, was not adverse. The third comment submission did not provide any comment for the NRC to consider. Therefore, the direct final rule will become effective as scheduled.

Dated: November 12, 2021.

For the Nuclear Regulatory Commission.

Angella M. Love Blair,

Acting Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2021–25074 Filed 11–16–21; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2021–1045; Special Conditions No. 25–795–SC]

Special Conditions: Airbus Defense and Space S.A., C212–CC/–CD/–CE/–CF/–DF/–DE Airplanes; Rechargeable Lithium Battery Installations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus Defense and Space S.A. (Airbus) Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes. This airplane, as modified by Airbus Defense and Space, Inc., will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. This design feature is the emergency lighting installation that contain rechargeable lithium batteries. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this

design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective November 17, 2021. Send comments on or before January 3, 2022.

ADDRESSES: Send comments identified by Docket No. FAA–2021–1045 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery 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.

Privacy: 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 *http://www.regulations.gov/,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information: 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 Notice 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 Notice, 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 the indicated comments will not be placed in the public docket of this Notice. Submissions containing CBI should be sent to Nazih Khaouly, Aircraft Systems, AIR–623, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206 231 3160; email *nazih.khaouly@faa.gov.* Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for this rulemaking.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, Aircraft Systems, AIR–623, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3160; email *nazih.khaouly@faa.gov.*

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and finds that, for the same reason, good cause exists for adopting these special conditions upon publication in the **Federal Register**.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments. The FAA may change these special conditions based on the comments received.

Background

On December 16, 2019, Airbus Defense and Space, Inc. applied for a supplemental type certificate for the installation of rechargeable lithium batteries as part of an emergency lighting installation in the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes. The Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes are twin-engine, transport category aircraft, with capacity for 28 passengers, and a maximum takeoff weight of 16,976 pounds.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Airbus Defense and Space, Inc. must show that the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes, as changed, continue to meet the applicable provisions of the regulations listed in Type Certificate No. A43EU or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*e.g.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Feature

The Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes will incorporate the following novel or unusual design feature:

An emergency lighting installation that contains rechargeable lithium batteries.

Discussion

Rechargeable lithium batteries are considered to be a novel or unusual design feature in transport category airplanes, with respect to the requirements in § 25.1353. This type of battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on transport

category airplanes. These batteries introduce higher energy levels into airplane systems through new chemical compositions in various battery-cell sizes and construction. Interconnection of these cells in battery packs introduces failure modes that require unique design considerations, such as provisions for thermal management.

Special Condition 1 requires that each individual cell within a rechargeable lithium battery be designed to maintain safe temperatures and pressures. Special Condition 2 addresses these same issues but for the entire battery. Special Condition 2 requires the battery be designed to prevent propagation of a thermal event, such as self-sustained, uncontrolled increases in temperature or pressure from one cell to adjacent cells.

Special Conditions 1 and 2 are intended to ensure that the cells and battery are designed to eliminate the potential for uncontrollable failures. However, a certain number of failures will occur due to various factors beyond the control of the designer. Therefore, other special conditions are intended to protect the airplane and its occupants if failure occurs.

Special Conditions 3, 7, and 8 are self-explanatory.

Special Condition 4 clarifies that the flammable fluid fire-protection requirements of § 25.863 apply to rechargeable lithium battery installations. Section 25.863 is applicable to areas of the airplane that could be exposed to flammable fluid leakage from airplane systems. Rechargeable lithium batteries contain electrolyte that is a flammable fluid.

Special Condition 5 requires each rechargeable lithium battery installation to not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape in such a way as to cause a major or more severe failure condition. Special Condition 6 requires each rechargeable lithium battery installation to have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells. The means of meeting special conditions 5 and 6 may be the same, but they are independent requirements addressing different hazards. Special Condition 5 addresses corrosive fluids and gases, whereas Special Condition 6 addresses heat.

Special Condition 9 requires rechargeable lithium batteries to have ''automatic'' means due to the fast acting nature of lithium battery chemical reactions. Manual intervention would not be timely or effective in mitigating the hazards associated with these batteries.

These conditions apply to all rechargeable lithium battery installations in lieu of § 25.1353(b)(1) through (4) at amendment 25–123, or § 25.1353(c)(1) through (4) at earlier amendments. These regulations will remain in effect for other battery installations on these airplanes.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes. Should Airbus Defense and Space, Inc. apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A43EU to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on the Airbus Model C212–CC/–CD/–CE/–CF/–DF/–DE airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplanes.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Defense and Space S.A. Model C212–CC/–CD/–CE/–CF/–DF/–DE, as modified by Airbus Defense and Space, Inc.

In lieu of § 25.1353(b)(1) through (4) at amendment 25–123, or § 25.1353(c)(1) through (4) at earlier amendments, each rechargeable lithium battery installation must:

1. Be designed to maintain safe cell temperatures and pressures under all foreseeable operating conditions to prevent fire and explosion.

2. Be designed to prevent the occurrence of self-sustaining, uncontrollable increases in temperature or pressure, and automatically control the charge rate of each cell to protect against adverse operating conditions, such as cell imbalance, back charging, overcharging, and overheating.

3. Not emit explosive or toxic gases, either in normal operation or as a result of its failure that may accumulate in hazardous quantities within the airplane.

4. Meet the requirements of § 25.863.

5. Not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape in such a way as to cause a major or more-severe failure condition.

6. Have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells.

7. Have a failure sensing and warning system to alert the flight crew if its failure affects safe operation of the airplane.

8. If its function is required for safe operation of the airplane, have a monitoring and warning feature that alerts the flight crew when its charge state falls below acceptable levels.

9. Have a means to automatically disconnect from its charging source in the event of an over-temperature condition, cell failure or battery failure.

Note: A battery system consists of the battery, battery charger and any protective, monitoring and alerting circuitry or hardware inside or outside of the battery. It also includes vents (where necessary) and packaging. For the purpose of these special conditions, a battery and battery system are referred to as a battery.

Issued in Kansas City, Missouri, on November 10, 2021.

Patrick R. Mullen,

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

[FR Doc. 2021–25006 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0879; Project Identifier MCAI–2020–01494–E; Amendment 39–21773; AD 2021–21–13]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Rolls-Royce Deutschland Ltd. & Co KG (RRD) Trent 1000 model turbofan engines. This AD was prompted by the manufacturer revising the engine Time Limits Manual (TLM) life limits of certain critical rotating parts and direct accumulation counting data files. This AD requires the operator to revise the airworthiness limitation section (ALS) of their existing approved aircraft maintenance program (AMP) by incorporating the revised tasks of the applicable TLM for each affected model turbofan engine, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 2, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 2, 2021.

The FAA must receive comments on this AD by January 3, 2022.

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 *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.

For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0879.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0879; 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 AD, the EASA AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; email: *kevin.m.clark@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0242, dated November 5, 2020 (EASA AD 2020–0242) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain RRD Trent 1000–A, Trent 1000–AE, Trent 1000–C, Trent 1000–CE, Trent 1000–D, Trent 1000–E, Trent 1000–G, and Trent 1000–H model turbofan engines.

This AD was prompted by the manufacturer revising the engine TLM life limits of certain critical rotating parts and updating certain maintenance tasks. The FAA is issuing this AD to address the failure of critical rotating parts.

FAA's Determination

These engines have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified about the unsafe condition described in the EASA AD referenced in this proposed AD. The FAA is issuing this AD because the agency evaluated all the relevant information provided by EASA and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2020–0242. EASA AD 2020–0242 specifies procedures for revising the approved AMP by incorporating the limitations, tasks, and associated thresholds and intervals described in the TLM.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Other Related Service Information

The FAA reviewed Chapter 05–10 of Rolls-Royce (RR) Trent 1000 TLM T–TRENT–10RRB, dated August 1, 2020. RR Trent 1000 TLM T–TRENT–10RRB, Chapter 05–10, identifies the reduced life limits of certain critical rotating parts.

The FAA also reviewed Chapter 05–20 of RR Trent 1000 TLM T–TRENT–10RRB, dated August 1, 2020. RR Trent 1000 TLM T–TRENT–10RRB, Chapter 05–20, identifies the critical rotating part inspection thresholds and intervals.

AD Requirements

This AD requires accomplishing the actions specified in EASA AD 2020–0242, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and the MCAI.''

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 since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0242 will be incorporated in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0242 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in EASA AD 2020–0242 does not mean that operators need comply only with that section. For example, where the AD

requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2020–0242. Service information required by EASA AD 2020–0242 for compliance will be available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0879.

Differences Between This AD and the MCAI

This AD does not mandate the ''Maintenance Tasks and Replacement of Critical Parts'' and ''Corrective Action(s)'' sections of EASA AD 2020–0242. Where EASA AD 2020–0242 requires compliance from its effective date, this AD requires using the effective date of this AD. Where EASA AD 2020–0242 requires revising the approved AMP within 12 months from its effective date, this AD requires revising the existing approved AMP within 90 days after the effective date of this AD. This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2020–0242.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

The FAA justifies waiving notice and comment prior to adoption of this rule because no domestic operators use this product. It is unlikely that the FAA will receive any adverse comments or useful information about this AD from any U.S. operator. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the foregoing reason, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0879; Project Identifier MCAI–2020–01494–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule 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 *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 final rule.

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 AD 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 AD, 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 AD. Submissions containing CBI should be sent to Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 0 engines installed on airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the ALS of the AMP	1 work-hour × $85 per hour = $85	$0	$85	$0

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, and

(2) Will not affect intrastate aviation in Alaska.

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 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:

2021–21–13 Rolls-Royce Deutschland Ltd & Co KG (Type Certificate previously held by Rolls-Royce plc): Amendment 39–21773; Docket No. FAA–2021–0879; Project Identifier MCAI–2020–01494–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 3, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd. & Co KG (RRD) (Type Certificate previously held by Rolls-Royce plc) Trent 1000–A, Trent 1000–AE, Trent 1000–C, Trent 1000–CE, Trent 1000–D, Trent 1000–E, Trent 1000–G, and Trent 1000–H model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine Time Limits Manual life limits of certain critical rotating parts and direct accumulation counting data files. The FAA is issuing this AD to prevent the failure of critical rotating parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, EASA AD 2020–0242, dated November 5, 2020 (EASA AD 2020–0242).

(h) Exceptions to EASA AD 2020–0242

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0242 are not required by this AD.

(2) Where EASA AD 2020–0242 requires compliance from its effective date, this AD requires using the effective date of this AD.

(3) Paragraph (3) of EASA AD 2020–0242 specifies revising the approved aircraft maintenance program (AMP) within 12 months after its effective date, but this AD requires revising the existing approved AMP within 90 days after the effective date of this AD.

(4) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2020–0242.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ECO Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *ANE-AD-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Related Information

For more information about this AD, contact Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; email: *kevin.m.clark@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) European Union Aviation Safety Agency (EASA) AD 2020–0242, dated November 5, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0242, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0879.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on October 8, 2021.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–25005 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Docket No. SSA–2021–0035]

RIN 0960–AI56

Extension of Expiration Dates for Three Body System Listings

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are extending the expiration dates of the following body systems in the Listing of Impairments (listings) in our regulations: Respiratory Disorders, Genitourinary Disorders, and Mental Disorders. We are making no other revisions to these body systems in this final rule. This extension ensures that we will continue to have the criteria we need to evaluate impairments in the affected body systems at step three of the sequential evaluation processes for initial claims and continuing disability reviews.

DATES: This final rule is effective November 17, 2021

FOR FURTHER INFORMATION CONTACT: Michael J. Goldstein, Director, Office of Medical Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–1020.

For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

We use the listings in appendix 1 to subpart P of part 404 of 20 CFR at the third step of the sequential evaluation process to evaluate claims filed by adults and children for benefits based on disability under the title II and title XVI programs.[1] 20 CFR 404.1520(d),

[1] We also use the listings in the sequential evaluation processes we use to determine whether a beneficiary's disability continues. See 20 CFR 404.1594, 416.994, and 416.994a.

416.920(d), 416.924(d). The listings are in two parts: Part A has listings criteria for adults and Part B has listings criteria for children. If you are age 18 or over, we apply the listings criteria in Part A when we assess your impairment or combination of impairments. If you are under age 18, we first use the criteria in Part B of the listings when we assess your impairment(s). If the criteria in Part B do not apply, we may use the criteria in Part A when those criteria consider the effects of your impairment(s). 20 CFR 404.1525(b), 416.925(b).

Explanation of Changes

In this final rule, we are extending the dates on which the listings for the following three body systems will no longer be effective as set out in the following chart:

Body system listings	Current expiration date	New expiration date
Respiratory Disorders 3.00 and 103.00	December 10, 2021	December 12, 2025.
Genitourinary Disorders 6.00 and 106.00	December 10, 2021	December 12, 2025.
Mental Disorders 12.00 and 112.00	January 17, 2022	December 12, 2025.

We continue to revise and update the listings on a regular basis, including those body systems not affected by this final rule.[2] We intend to update the three listings affected by this final rule as necessary based on medical advances as quickly as possible, but may not be able to publish final rules revising these listings by the current expiration date. Therefore, we are extending the expiration dates listed above.

Regulatory Procedures

Justification for Final Rule

We follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in promulgating regulations. Section 702(a)(5) of the Social Security Act, 42 U.S.C. 902(a)(5). Generally, the APA requires that an agency provides prior notice and opportunity for public comment before issuing a final regulation. The APA provides exceptions to the notice-and-comment requirements when an agency finds there is good cause for dispensing with such procedures because they are impracticable, unnecessary, or contrary to the public interest.

We determined that good cause exists for dispensing with the notice and public comment procedures. 5 U.S.C. 553(b)(B). This final rule only extends the date on which the three body system listings will no longer be effective. It makes no substantive changes to our rules. Our current regulations[3] provide that we may extend, revise, or promulgate the body system listings again. Therefore, we determined that opportunity for prior comment is unnecessary, and we are issuing this regulation as a final rule.

In addition, for the reasons cited above, we find good cause for dispensing with the 30-day delay in the effective date of this final rule. 5 U.S.C. 553(d)(3). We are not making any substantive changes to the listings in these body systems. Without an extension of the expiration date for these listings, we will not have the criteria we need to assess medical impairments in these three body systems at step three of the sequential evaluation processes. We therefore find it is in the public interest to make this final rule effective on the publication date.

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule does not meet the requirements for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB did not review it. We also determined that this final rule meets the plain language requirement of Executive Order 12866.

Regulatory Flexibility Act

We certify that this final rule does not have a significant economic impact on a substantial number of small entities because it affects only individuals. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

This final rule only extends the date for the medical listings cited above but does not create any new or affect any existing collections, or otherwise change any content of the currently published rules. Accordingly, it does not impose any burdens under the Paperwork Reduction Act and does not require further OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

The Acting Commissioner of the Social Security Administration, Kilolo Kijakazi, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

For the reasons set out in the preamble, we are amending appendix 1 to subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE

(1950–)

Subpart P—[Amended]

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a) and (h)–(j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)–(b) and (d)–(h), 416(i), 421(a) and (h)–(j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend appendix 1 to subpart P of part 404 in the introductory text by

[2] We last extended the expiration dates for Respiratory Disorders and Genitourinary Disorders on September 24, 2019 (84 FR 49950). This is the first extension of the expiration date for Mental Disorders, since we published a final rule revising the medical criteria for evaluating Mental Disorders on September 26, 2016 (81 FR 66137) and a correction to the final rule on December 2, 2016 (81 FR 86928).

[3] See the first sentence of appendix 1 to subpart P of part 404 of 20 CFR.

revising items 4, 7, and 13 to read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

4. Respiratory Disorders (3.00 and 103.00): December 12, 2025.

* * * * *

7. Genitourinary Disorders (6.00 and 106.00): December 12, 2025.

* * * * *

13. Mental Disorders (12.00 and 112.00): December 12, 2025.

* * * * *

[FR Doc. 2021–25026 Filed 11–16–21; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 11566]

RIN 1400–AE87

Visas: Ineligibility Based on Public Charge Grounds

AGENCY: State Department.

ACTION: Interim final rule; reopening of public comment period.

SUMMARY: On October 11, 2019, the Department of State (''the Department'') published an interim final rule (''IFR'') regarding visa ineligibility on public charge grounds and accepted public comments on the rule through November 12, 2019. Given the many changed circumstances since publication of the IFR, the Department is soliciting additional information from the public by reopening the public comment period for an additional 60 days.

DATES: The Department of State will accept comments until January 18, 2022.

ADDRESSES: To provide comments go to *https://www.regulations.gov,* enter Docket DOS–2021–0034 and RIN 1400–AE87. Alternatively, you may submit comments by any of the following methods:

- *Email:* You may submit comments via email to *VisaRegs@state.gov.* You must include the RIN in the subject line of your message.
- *Mail paper submissions:* You may submit comments via physical mail to Regulatory Coordinator, Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006. You must include the RIN in the Attention Line in the address.

FOR FURTHER INFORMATION CONTACT: Andrea B. Lage, Acting Regulatory Coordinator, Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006, (202) 485–7586, *VisaRegs@state.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

All interested parties are invited to respond to this Reopening of Public Comment Period by submitting written views and comments on the IFR regarding visa ineligibility on public charge grounds. Comments must be submitted in English or commenters must submit an English translation. Comments that will provide the most assistance to the Department in considering recommendations will reference a specific existing regulation, order, guidance, policy, or any other similar agency action, explain the reason for any recommended change, and include information that supports the recommended change.

II. Background

On August 14, 2019, the Department of Homeland Security (''DHS'') issued a final rule outlining its new interpretation of the public charge ground of inadmissibility. *See Inadmissibility on Public Charge Grounds,* 84 FR 41292, as amended on October 2, 2019 by *Inadmissibility on Public Charge Grounds; Correction,* 84 FR 52357 (''DHS Public Charge Final Rule''). The Department issued an IFR on October 11, 2019, amending 22 CFR 40.41 by prescribing how consular officers determine whether a noncitizen is ineligible for a visa under section 212(a)(4) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1182(a)(4), and 6 U.S.C. 236(b), because they are likely at any time to become a public charge. *See Visas: Ineligibility Based on Public Charge Grounds,* 84 FR 54996.

The Department issued its IFR in significant part to ensure that consular officers were applying standards consistent with the DHS Public Charge Final Rule. Specifically, the IFR could have helped avoid situations where a consular officer evaluates a visa applicant's circumstances and concludes that the applicant is not likely at any time to become a public charge, only for DHS to find the applicant inadmissible on public charge grounds under the same facts when they seek admission to the United States. See, *e.g.,* 84 FR at 55011 (''Coordination of Department and DHS implementation of the public charge inadmissibility ground is critical to the Department's interest in preventing inconsistent adjudication standards and different outcomes between determinations of visa eligibility and determinations of admissibility at a port of entry.'').[1]

In the time since the Department first issued the IFR, a court order vacating the DHS Public Charge Final Rule nationwide went into effect after the government moved to voluntarily dismiss an appeal of that order.[2] Due to the vacatur of the DHS Public Charge Final Rule, DHS immediately stopped applying its Public Charge Final Rule to all pending applications and petitions that would have been subject to that rule.[3] DHS is now implementing the public charge inadmissibility statute using the former-Immigration and Nationalization Service's 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (64 FR 28689, May 26, 1999) issued by the former Immigration and Naturalization Service, which was in place before the 2019 DHS Public Charge Final Rule was implemented, for immigration petitions, applications for admission and adjustment of status. On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking (''ANPRM'') and notice of virtual public listening sessions to seek broad public feedback on the public charge ground of inadmissibility that will inform its development of a future regulatory proposal.[4]

III. Change in Circumstances

With the vacatur of the 2019 DHS Public Charge Final Rule the original reason for the Department's adoption of the 2019 IFR may no longer apply. Further, with the publication of the DHS ANPRM, DHS has indicated an intention to develop a new regulatory proposal that may substantively differ from the IFR.

Additionally, just months after the Department issued its IFR, the COVID–19 pandemic swept the globe. The pandemic's ongoing effects on public health and economic conditions have been vast and have underscored the importance of ensuring that individuals are able to access public health and other programs for which they and their

[1] The IFR is currently under a preliminary injunction issued by the Southern District of New York on July 29, 2020. *See Make the Road New York* v. *Pompeo,* 475 F. Supp. 3d 232 (S.D.N.Y. 2020).

[2] *Cook County* v. *Wolf,* 498 F. Supp. 3d 999 (N.D. Ill. 2020), appeal dismissed, 2021 WL 1608766 (7th Cir. Mar. 9, 2021).

[3] *See* USCIS, ''Inadmissibility on Public Charge Grounds Final Rule: Litigation'' *https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation* (last visited Aug. 24, 2021).

[4] *Public Charge Ground of Inadmissibility,* 86 FR 47025 (Aug. 23, 2021).

family members are eligible, without undue fear or confusion. The Department welcomes comments on the potential effects of the IFR on public health measures in response to the pandemic, as well as other ways that the Department should consider the intervening circumstances of the COVID–19 pandemic in relation to the IFR.

Consequently, the Department has concluded that it should review the IFR to determine (1) if the IFR should be rescinded or revised, and (2) what final rule should be adopted, if any. If the IFR is rescinded, § 40.41 would logically revert to its prior text pending any new rulemaking; such an outcome would likely be preferable to a regulatory void, which the Department did not propose in the 2019 IFR. See 22 CFR 40.41 (2018).[5]

IV. Request for Public Comment

The Department invites comment on any issues that may be pertinent to its review of the IFR to determine (1) if the IFR should be rescinded or revised, and (2) what final rule should be adopted, if any. Reopening the comment period gives interested persons an opportunity to comment on these issues.

Kevin E. Bryant,

Deputy Director, Office of Directives Management, U.S. Department of State.

[FR Doc. 2021–25038 Filed 11–16–21; 8:45 am]

BILLING CODE 4710–06–P

[5] Prior text of § 40.41 available at *https://www.govinfo.gov/content/pkg/CFR-2018-title22-vol1/pdf/CFR-2018-title22-vol1-chapI-subchapE.pdf,* page 8.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2021–0854]

Safety Zone; Military Ocean Terminal Concord Safety Zone, Suisun Bay, Military Ocean Terminal Concord, CA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone in the navigable waters of Suisun Bay, off Concord, CA, in support of explosive off and on-loading to Military Ocean Terminal Concord (MOTCO). This safety zone is necessary to protect personnel, vessels, and the marine environment from potential explosion within the explosive arc. The safety zone is open to all persons and vessels for transitory use, but vessel operators desiring to anchor or otherwise loiter within the safety zone must obtain the permission of the Captain of the Port San Francisco or a designated representative. All persons and vessels operating within the safety zone must comply with all directions given to them by the Captain of the Port San Francisco or a designated representative.

DATES: The regulations in 33 CFR 165.1198 will be enforced from November 15, 2021, from 12:01 a.m. until November 19, 2021, at 11:59 p.m., or as announced via marine information broadcasts.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LTJG William Harris, Sector San Francisco Waterways Management, U.S. Coast Guard; telephone 415–399–7443, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.1198 for the Military Ocean Terminal Concord regulated area from November 15, 2021, from 12:01 a.m., until November 19, 2021, at 11:59 p.m. This safety zone is necessary to protect personnel, vessels, and the marine environment from potential explosion within the explosive arc. Our regulation for this safety zone, § 165.1198, specifies the location of the safety zone which encompasses the navigable waters in the area between 500 yards of MOTCO Pier 2 in position 38°03′30″ N, 122°01′14″ W and 3,000 yards of the pier. During the enforcement periods, as reflected in § 165.1198(d), if you are the operator of a vessel in the regulated area you must comply with the instructions of the COTP or the designated on-scene patrol personnel. Vessel operators desiring to anchor or otherwise loiter within the safety zone must contact Sector San Francisco Vessel Traffic Service at 415–556–2760 or VHF Channel 14 to obtain permission.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners, and marine information broadcasts.

Dated: November 10, 2021.

Taylor Q. Lam,

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

[FR Doc. 2021–25182 Filed 11–15–21; 4:15 pm]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0238; FRL–8896–02–R9]

Air Plan Approval; California; San Joaquin Valley Air Pollution Control District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the San Joaquin Valley Air Pollution Control District (SJVAPCD or ''the District'') portion of the California State Implementation Plan (SIP). This revision concerns the District's New Source Review permitting program for new and modified sources of air pollution under section 110(a)(2)(C) of the Clean Air Act (CAA); specifically our approval of Rule 2021: Experimental Research Operations. We are finalizing our proposed approval of Rule 2021 as part of the District's program to regulate the modification and construction of stationary sources within the areas covered by the SIP as necessary to assure attainment and maintenance of the National Ambient Air Quality Standards.

DATES: This rule will be effective on December 17, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R09–OAR–2020–0238. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, Air-3–1, 75 Hawthorne St., San Francisco, CA

94105, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Proposed Action
II. Public Comments
III. EPA Action
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. Proposed Action

On February 22, 2021, the EPA proposed to approve the following rule into the California SIP. 86 FR 10522. Table 1 lists the rule addressed by this final action with the dates that it was adopted by the local air agency and submitted to the EPA by the California Air Resources Board.

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Amended	Submitted on
SJVAPCD	2021	Experimental Research Operations	12/17/92	11/18/93

Our proposed action contains more information on the rule and our evaluation.

II. Public Comments

The EPA's proposed action provided a 30-day public comment period. During this period, we received one non-germane comment. Therefore, we are finalizing our action as proposed.

III. EPA Action

No comments were submitted that changed our assessment of the rule as described in our proposed action. We continue to find that SJVAPCD Rule 2021 fulfills all relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving the rule into the California SIP.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the rule listed in Table 1 of this preamble. The EPA has made, and will continue to make, this document available through *https://www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 18, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping

requirements, and Volatile organic compounds.

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

Dated: November 10, 2021.

Elizabeth Adams,

Acting Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(194)(i)(C)*(6)* to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(194) * * *

(i) * * *

(C) * * *

(6) Rule 2021, ''Experimental Research Operations,'' amended on December 17, 1992.

* * * * *

[FR Doc. 2021–25045 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0707; FRL–9059–02–R4]

Air Plan Approval; North Carolina: Mecklenburg Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a State Implementation Plan (SIP) revision to the Mecklenburg County portion of the North Carolina SIP, hereinafter referred to as the Mecklenburg Local Implementation Plan (LIP). The revision was submitted by the State of North Carolina, through the North Carolina Division Air Quality (NCDAQ), on behalf of Mecklenburg County Air Quality via a letter dated April 24, 2020, and was received by EPA on June 19, 2020. The revision updates several Mecklenburg County Air Pollution Control Ordinance (MCAPCO) ambient air quality rules incorporated into the LIP and adds one new rule for fine particulate matter ($PM_{2.5}$). EPA is approving these changes pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective December 17, 2021.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2020–0707. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Pearlene Williams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9144. Ms. Williams can also be reached via electronic mail at *williams.pearlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Mecklenburg County LIP was originally submitted to EPA on June 14, 1990, and EPA approved the plan on May 2, 1991. *See* 56 FR 20140. Mecklenburg County prepared three submittals in order to modify the LIP for, among other things, general consistency with the North Carolina SIP.[1] The three submittals were submitted to EPA as follows: NCDAQ transmitted the October 25, 2017, submittal to EPA but withdrew it from review through a letter dated February 15, 2019. On April 24, 2020, NCDAQ resubmitted the October 25, 2017, update to EPA and also submitted the January 21, 2016, and January 14, 2019, updates. Due to an inconsistency with public notice at the local level, these submittals were withdrawn from EPA through a letter dated February 15, 2019. Mecklenburg County corrected this error, and NCDAQ submitted the updates in a revision dated April 24, 2020.[2]

On September 24, 2021, EPA published a Notice of Proposed Rulemaking (NPRM) proposing to approve the April 24, 2020, SIP revision regarding updates to Mecklenburg's ambient air quality standard rules, as well as the addition of a $PM_{2.5}$ rule. The NPRM provides additional detail regarding the background and rationale for EPA's action. Comments on the NPRM were due on or before October 25, 2021. EPA received no comments on the September 24, NPRM.

III. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Mecklenburg County Pollution Control Ordinance Rules 2.0401—*Purpose;* 2.0402—*Sulfur Oxides;* 2.0404—*Carbon Monoxide;* 2.0405—*Ozone;* 2.0407—*Nitrogen Dioxide;* 2.0408—*Lead;* and 2.0410—*$PM_{2.5}$ Particulate Matter,* all which have an effective date of December 18, 2018; as well as Rule 2.0403—*Total Suspended Particulates,* with an effective date of December 15, 2015. EPA has made and will continue to make these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

[1] The Mecklenburg County, North Carolina revision that is dated April 24, 2020, and received by EPA on June 19, 2020, is comprised of three previous submittals—one dated January 21, 2016; one dated October 25, 2017; and one dated January 14, 2019.

[2] EPA notes that the April 24, 2020, submittal was received by EPA on June 19, 2020.

[3] *See* 62 FR 27968 (May 22, 1997).

IV. Final Action

EPA is finalizing regulatory text that incorporates into the LIP changes to MCAPCO Rules 2.0401—*Purpose;* 2.0402—*Sulfur Oxides;* 2.0404—*Carbon Monoxide;* 2.0405—*Ozone;* 2.0407—*Nitrogen Dioxide;* and 2.0408—*Lead,* as well as the addition of Rule 2.0410—*$PM_{2.5}$ Particulate Matter,* all which have an effective date of December 18, 2018. Additionally, EPA is approving and incorporating into the LIP Rule 2.0403—*Total Suspended Particulates* with an effective date of December 15, 2015. EPA is taking final action to approve these changes because they are consistent with the CAA.

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 18, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: November 8, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart II—North Carolina

■ 2. In § 52.1770, amend the table in paragraph (c)(3) under ''Section 2.0400 Ambient Air Quality Standards'' by:

■ a. Revising the entries for ''Section 2.0401,'' ''Section 2.0402,'' ''Section 2.0403,'' ''Section 2.0404,'' ''Section 2.0405,'' ''Section 2.0407,'' and ''Section 2.0408,'' and

■ b. Adding a new entry for ''Rule 2.0410'' in numerical order after the entry for ''Section 2.0409.''

The revisions read as follows:

§ 52.1770 Identification of plan.

* * * * *

(c) * * *

(3) EPA Approved Mecklenburg County Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
* *	*	*	* *	*
Article 2.0000 Air Pollution Control Regulations and Procedures				

(3) EPA APPROVED MECKLENBURG COUNTY REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation
* *	*	*	* *	*
Section 2.0400 Ambient Air Quality Standards				
Rule 2.0401	Purpose	12/18/2018	11/17/2021, [Insert citation of publication].	
Rule 2.0402	Sulfur Oxides	12/18/2018	11/17/2021, [Insert citation of publication].	
Rule 2.0403	Total Suspended Particulates	12/15/2015	11/17/2021, [Insert citation of publication].	
Rule 2.0404	Carbon Monoxide	12/18/2018	11/17/2021, [Insert citation of publication].	
Rule 2.0405	Ozone	12/18/2018	11/17/2021, [Insert citation of publication].	
Rule 2.0407	Nitrogen Dioxide	12/18/2018	11/17/2021, [Insert citation of publication].	
Rule 2.0408	Lead	12/18/2018	11/17/2021, [Insert citation of publication].	
* *	*	*	* *	*
Rule 2.0410	$PM_{2.5}$ Particulate Matter	12/18/2018	11/17/2021, [Insert citation of publication].	
* *	*	*	* *	*

* * * * *

[FR Doc. 2021–24942 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

[Docket No. CDC–2021–0119]

RIN 0920–AA79

Possession, Use, and Transfer of Select Agents and Toxins—Addition of SARS–CoV/SARS–CoV–2 Chimeric Viruses Resulting From Any Deliberate Manipulation of SARS–CoV–2 To Incorporate Nucleic Acids Coding for SARS–CoV Virulence Factors to the HHS List of Select Agents and Toxins

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Interim final rule.

SUMMARY: The Centers for Disease Control and Prevention (CDC) located within the Department of Health and Human Services (HHS) is amending its select agents and toxins regulations to add SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors to the list of HHS select agents and toxins. HHS/CDC intends to regulate this agent and to require the regulated entity to obtain prior approval from CDC to conduct deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors because these chimeric viruses have the potential to pose a severe threat to public health and safety.

DATES: *Effective date:* The interim final rule is effective on November 17, 2021.

Comments due date: Written comments must be submitted on or before January 18, 2022.

Applicability dates: By December 17, 2021, all entities that possess SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors must provide notice to the Federal Select Agent Program regarding their possession of this agent. By February 15, 2022, all entities that possess, use, or transfer this agent must register (or amend an existing registration) and obtain a certificate of registration (or an amended certificate of registration) that includes this agent, in accordance with 42 CFR 73.7 and 73.7(i), respectively, and must meet all of the requirements of select agent regulations.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2021–0119 or Regulation Identifier Number (RIN) 0920–AA79, by either of the methods listed below. Do not submit comments by email. CDC does not accept comments by email.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–7, Atlanta, Georgia 30329, ATTN: RIN 0920–AA79.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All relevant comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Samuel S. Edwin, Ph.D., Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–7, Atlanta, Georgia 30329. Telephone: (404) 718–2000. Email: *lrsat@cdc.gov.*

SUPPLEMENTARY INFORMATION: The interim final rule is organized as follows:

I. Public Participation
II. Background
  A. Legal Authority
  B. Historical Background to This Rulemaking
III. Rationale for an Interim Final Rule
IV. Required Regulatory Analyses
  A. Executive Orders 12866 and 13563
  B. The Regulatory Flexibility Act
  C. Paperwork Reduction Act of 1995
  D. E.O. 12988: Civil Justice Reform
  E. E.O. 13132: Federalism
  F. Plain Language Act of 2010

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons or organizations are invited to participate in this rulemaking by submitting written views, recommendations, and data. Using the criteria enumerated below, HHS/CDC invites comments specifically, based on the following criteria, as to whether SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors should be regulated as a select agent:

(1) The effect on human health of exposure to the agent;

(2) The degree of contagiousness of the agent and the methods by which the agent is transferred to humans;

(3) The availability and effectiveness of pharmacotherapies and immunizations to treat and prevent any illness resulting from infection by the agent; and

(4) Any other criteria, including the needs of children and other vulnerable populations that the commenter considers appropriate.

In addition, HHS/CDC invites comments specifically on any virulence factors found in SARS–CoV that would increase virulence in SARS–CoV–2.

Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. HHS/CDC will carefully consider all comments submitted in preparation of a final rule.

II. Background

A. Legal Authority

HHS/CDC is promulgating this rule under the authority of sections 201–204 and 221 of Title II of Public Law 107–188(42 U.S.C. 262a).

Title II, Subtitle A, of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, (42 U.S.C. 262a), requires HHS to regulate the possession, use, and transfer of biological agents or toxins that have the potential to pose a severe threat to public health and safety (select agents and toxins). Accordingly, HHS has promulgated regulations requiring individuals or entities that possess, use, or transfer select agents and toxins to register with CDC. See 42 CFR part 73.

B. Background

Coronavirus disease 2019 is a highly contagious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS–CoV–2). As of October 18, 2021, SARS–CoV–2 has infected approximately 44,857,861 individuals and resulted in at least 723,205 deaths in the United States. It should be noted that SARS–CoV–2 is not currently a select agent. However, SARS coronavirus (SARS–CoV), a related virus, is a select agent.

HHS/CDC is regulating, as a non-Tier 1 select agent SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors. SARS–CoV virulence factors include but are not limited to those involved in inflammasome activation during infection, which could be introduced into SARS–CoV–2 and create a chimeric virus with increased virulence. HHS/CDC is also requiring prior approval from the HHS Secretary to conduct this type of work because these viruses have the potential to pose a severe threat to public health and safety. HHS/CDC believes that regulatory oversight of these experiments and the resulting chimeric viruses is essential to protecting the public from the potential consequences of a release of these viruses. The SARS–CoV/SARS–CoV–2 chimeric viruses that result from deliberate manipulation of SARS–CoV–2 to incorporate SARS–CoV virulence factors will be designated as a select agent and subject to strict regulatory controls on the possession, use, and transfer of these viruses.

HHS/CDC has determined that SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors are being listed as an HHS select agent because:

- Virulence factors from SARS–CoV including, but not limited to, those involved in inflammasome activation during infection, could be introduced into SARS–CoV–2 and create a chimeric virus with increased virulence.
- There is significant potential risk of merging a select agent virus and pandemic virus and creating a chimeric virus with the transmissibility of SARS–CoV–2 and the pathogenicity of SARS–CoV.

III. Rationale for an Interim Final Rule

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (42 U.S.C. 262a) requires the regulation of biological agents that have the potential to pose a severe threat to public health and safety. 5 U.S.C. 553 (Rulemaking) waives the requirement to publish a notice of proposed rulemaking ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest'' (5 U.S.C. 553(b)(B)). HHS/CDC believes that advance public notice and the opportunity to comment are impracticable [and contrary to the public interest] and there is good cause to issue an interim final rule with comment because there is no current regulatory oversight involving these experiments. As a result, HHS/CDC is unable to predict the potential infectiousness or virulence of the SARS–CoV/SARS–CoV–2 chimeric viruses and believes the resulting chimeric viruses have the potential to pose a severe threat to public health and safety. In addition, a release of this modification of a non-select agent with nucleic acids from a select agent would require a complicated and expensive emergency response effort. This effort could include extensive public health measures, such as quarantine, preventative treatment, and diagnostic testing for large numbers of potentially exposed persons, and extensive decontamination. Substantial costs could be incurred by hospitals and other medical facilities and institutions of government at all levels. A release, or widespread fear of one, also would create significant secondary effects. It could disrupt business, transportation, and many other aspects of normal behavior, on both a short-term and potentially a long-term basis. As a result, the regulation is needed to protect the American public from the potential consequences of a release of these viruses.

IV. Required Regulatory Analyses

A. Executive Orders 12866 and 13563

HHS/CDC has examined the impacts of the interim final rule (IFR) under Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993) and Executive Order 13563, Improving Regulation and Regulatory Review, (76 FR 3821, January 21, 2011). Both Executive Orders direct agencies to evaluate any rule prior to promulgation to determine the regulatory impact in terms of costs and benefits to United States populations and businesses. Further, together, the two Executive Orders set the following requirements: Quantify costs and benefits where the new regulation creates a change in current practice; qualitatively describe costs and benefits; choose approaches that maximize net benefits; and support regulations that protect public health

and safety. HHS/CDC has analyzed the IFR as required by these Executive Orders and has determined that it is consistent with the principles set forth in the Executive Orders and the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). We anticipate that the rule will create minimal cost impact, but that it could potentially result in benefits to the extent that it could reduce the probability of an accidental or intentional release of the SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors. Such an event is a low probability, but potentially extremely high-cost outcome. This rule has been determined to be a ''significant regulatory action'' as defined by Executive Order 12866, section 3(f). However, this rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

This regulatory impact section presents the anticipated costs and benefits that are quantified where possible. Where quantification is not possible, a qualitative discussion is provided of the costs and/or benefits that HHS/CDC anticipates from issuing this regulation.

Need for the Regulation

There is no current regulatory oversight involving SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors. Under the current regulatory baseline, the SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors would not be regulated as a select agent. As a result, existing entities that are already registered to handle select agents and toxins would not need to amend their registrations. In addition, other entities that are not currently registered to handle select agents and toxins would not need to invest in upgrading their facilities to qualify to handle select agents or toxins or to go through the process to register with HHS/CDC. However, in the absence of such activities, the risk of release of the SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors would be increased. An intentional or accidental release of this agent could impose significant costs on entities other than those directly working with the chimeric viruses. Thus, HHS/CDC is regulating this agent as a select agent because of its potential to pose a threat to public health and safety.

HHS/CDC analyzed the expected costs and benefits of this IFR by comparing the pre-IFR baseline to the provisions of this IFR.

Analysis of Costs and Benefits

Costs

In the following analysis, HHS/CDC looked at two different types of entities that may incur additional costs as a result of this rulemaking. They are described below: (1) A registered entity who wishes to amend their registration to add the agent; or (2) A new unregistered entity who will register in order to work with the agent. HHS/CDC also estimated the costs for HHS/CDC to work with entities to amend their registration or to be registered as a result of this IFR. All costs and benefits for this analysis are reported in 2020 U.S. dollars. Further, HHS/CDC assumed that all costs would be incurred within a one-year time period corresponding to the expected period of time in which experiments with these chimeric viruses would be performed.

(1) An entity is already registered and will amend the registration for the agent.

This IFR will require such an entity to amend its registration using relevant portions of APHIS/CDC Form 1 (Registration for Possession, Use, and Transfer of Select Agents and Toxins). The estimated time to amend this form is one hour for one select agent (Table 1). To account for uncertainty in the estimate, a range of 75% to 125% of this estimate is used as the lower bound and the upper bound estimates, respectively. HHS/CDC used a median hourly respondent labor rate of $49.83 for managerial staff (occupation code 11–1021 general and operations manager) as the upper bound estimate and $16.98 for clerical staff (occupation code 43–9061 office clerks, general) as the lower bound estimate. These rates were obtained from the Bureau of Labor Statistics, from the 2020 Occupational Employment Statistics Survey by Occupation (*http://www.bls.gov/oes/*). HHS/CDC assumed that the hourly burden would be evenly split between managerial staff and clerical staff as a base case. The hourly respondent labor rate for the base case was the average of these two figures ($33.41 per hour). The base salary is multiplied by an overhead multiplier of 100% to account for non-wage benefits and other overhead costs for supporting each employee. The estimated cost per already registered entity to amend their registration for this agent was $66.81 (range: $25.47 to $124.58).

The additional time for HHS/CDC's review of the amended registration for the already registered entities will also generate additional costs. HHS/CDC estimated that one staff at the GS–13 (step 5) level is required to review the amended registration application. The hourly wage of a Federal Employee at GS–13 (step 5) from the 2020 General Schedule (GS) locality pay table for Atlanta (where CDC has its headquarters), $52.20 per hour, was used to estimate the hourly base salary (Table 1). The base salary is multiplied by an overhead multiplier of 100% to account for non-wage benefits and other overhead costs for supporting each employee. HHS/CDC estimated that the review of the amendment application takes two hours (range: 1.5 hours to 2.5 hours) for HHS/CDC. The estimated HHS/CDC's cost per entity to amend their registration for the agent was $209 (range: $157 to $261).

TABLE 1—ESTIMATED COSTS PER ALREADY REGISTERED ENTITY TO AMEND THEIR REGISTRATION FOR THE AGENT

[2020 U.S. Dollars]

	Base case	Lower bound	Upper bound
Entity:			
Number of employees working on the amendment (A)	1	1	1
Hourly wage (B)	$33.41	$16.98	$49.83

TABLE 1—ESTIMATED COSTS PER ALREADY REGISTERED ENTITY TO AMEND THEIR REGISTRATION FOR THE AGENT—Continued

[2020 U.S. Dollars]

	Base case	Lower bound	Upper bound
Overhead multiplier (C)	100%	100%	100%
Time required per staff (hours) (D)	1	0.75	1.25
Estimated costs per entity (E) = (A) × (B) × ((C) + 1) × (D)	$66.81	$25.47	$124.58
HHS/CDC:			
Number of staff required for the review of the amendment application (F)	1	1	1
Hourly wage (G)	$52.20	$52.20	$52.20
Overhead multiplier (H)	100%	100%	100%
Time required for the amendment per staff (hour) (I)	2	1.5	2.5
Estimated costs per entity (J) = (F) × (G) × ((H) + 1) × (I)	$209	$157	$261

(2) A new entity will register in order to work with the select agent (The entity is NOT currently registered).

For new entities, which will register for working with the agent, HHS/CDC expects per facility costs to vary based on the entity type, laboratory size, and biosafety level (BSL). The first-year cost per facility for a medium-size BSL–2/3 research institute to register to work with the select agent is estimated at $59,600. This estimate from the Regulatory Impact Analysis for the 2005 Select Agent Regulations Final Rule [1] was adjusted to 2020 U.S. dollars value using the Consumer Price Index (CPI) Inflation Calculator.[2] This results in an adjusted value of $78,994 for each additional registered, medium-size BSL–2/3 research institute laboratory (range: $41,087 to $936,528) (Table 2). The provisions of this IFR will reduce the risk of human exposure to the chimeric viruses by ensuring that laboratory facilities employ adequate security and safety measures including:

(1) Develop and implement a written biosafety plan and measures in place that is commensurate with the risk of the select agent given its intended use,

(2) Develop and implement a written security plan and measures in place that is sufficient to safeguard the select agent against unauthorized access, theft, loss, or release,

(3) Develop and implement a written incident response plan based upon a site-specific risk assessment,

(4) Have an adequate training program for handling select agents, and

(5) Maintain an inventory of select agents.

Two HHS/CDC staff, GS–12 (step 5) would perform the initial review of the application with the final review conducted by GS–13 (step 5). HHS/CDC estimated the upper bound hourly wage for a Federal Employee at the GS–13 (step 5) from the 2020 General Schedule (GS) locality pay table for Atlanta, $52.20 per hour. The lower bound was estimated using the hourly wage for a GS–12 (step 5) employee, $43.90 per hour (Table 2). The mean of these two wage rates was used as the base case. The base salary is multiplied by an overhead multiplier of 100% to account for non-wage benefits and other overhead costs for supporting each employee. HHS/CDC estimated that the review of a new application would take two hours (range: 1.5 hours to 2.5 hours). The estimated HHS/CDC cost per entity to review a new application was $384 (range: $263 to $522).

The new registration also will require a site visit by CDC to investigate the adequacy of the laboratory to handle select agents and toxins. HHS/CDC assumed that two CDC investigators, GS–12 (step 5) or GS–13 (step 5) would travel to the laboratory and that the visit would require 3 days (1 day for outbound trip to the laboratory, 1 day for the investigation, and 1 day for the return trip) and 8 work hours per day inclusive of report writing. The estimated travel costs were $1,200 per trip for two CDC investigators. The total estimated costs associated with laboratory investigation per entity are $5,183 (range: $5,414 to $6,211). The estimated total costs for CDC per new registered entity are $6,197 (range: $5,678 to $6,733) for application review and laboratory investigation.

HHS/CDC assumed that all costs associated with the IFR will occur during the first year after the IFR is published and that the IFR will not affect costs for registered entities in following years. This may result in an over-estimate of the costs to register a new entity if that entity were to decide to continue to work with select agents and toxins in future years.

TABLE 2—ESTIMATED COSTS PER NEW ENTITY, WHICH WILL REGISTER IN ORDER TO WORK WITH THE AGENT

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Entity:			
Estimated costs for new registration per entity (A) [3]	$78,994	$41,087	$936,528
HHS/CDC:			
New application review (time) costs per entity:			
Number of staff required for the review of the new application (B)	2	2	2
Hourly wage (C)	$48.05	$43.90	$52.20
Overhead multiplier (D)	100%	100%	100%
Time required for the new application per staff (hour) (E)	2	1.5	2.5
Estimated costs associated with a new registration application review (F) = (B) × (C) × ((D) + 1) × (E)	$384	$263	$522
Lab investigation costs per entity:			
Number of staff required for the lab investigation (G)	2	2	2

[1] Regulatory Impact Analysis, 42 CFR parts 73: Possession, Use, and Transfer of Select Agents and Toxins Final Rule, Centers for Disease Control and Prevention, February 3, 2005.

[2] *https://www.bls.gov/data/inflation_calculator.htm.*

TABLE 2—ESTIMATED COSTS PER NEW ENTITY, WHICH WILL REGISTER IN ORDER TO WORK WITH THE AGENT—Continued

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Hourly wage (H)	$48.05	$43.90	$52.20
Overhead multiplier (I)	100%	100%	100%
Time required for the amendment per staff (hour) (J)	24	24	24
Estimated time costs for lab investigation per entity (K) = (F) × (G) × ((H) + 1) × (I)	$4,613	$4,214	$5,011
Number of trips required per lab investigation (L)	1	1	1
Travel associated costs per trip (M)	$1,200	$1,200	$1,200
Travel associated costs per lab investigation (N) = (L) × (M)	$1,200	$1,200	$1,200
Estimated costs associated with lab investigation (O) = (K) + (N)	$5,813	$5,414	$6,211
Estimated total costs for HHS/CDC per entity (P) = (F) + (O)	$6,197	$5,678	$6,733

HHS/CDC is only aware of one registered entity that is interested in generating this agent and would likely amend their registration to work with this agent. The base case is that only one registered entity would amend their registration for the agent and no unregistered entities would undergo the registration process in order to work with this agent. The lower bound is the same as the base case. For the upper bound, HHS/CDC assumed that two registered entities would amend their registration to work with this agent and one unregistered entity would undergo the registration process to work with this agent (Table 3).

TABLE 3—NUMBERS OF ENTITIES THAT WILL BE AFFECTED BY THE IFR

	Base case	Lower bound	Upper bound
Registered entities, which want to amend the registration for the agent	1	1	2
Unregistered entities, which want to be registered for the agent	0	0	1

The total costs associated with the IFR for the entities working with this agent are estimated at $67 (range: $25 to $936,777) (Table 4).

TABLE 4—TOTAL ESTIMATED COSTS FOR ENTITIES TO WORK WITH THE SARS–COV/SARS–COV–2 CHIMERIC VIRUSES ASSOCIATED WITH THE IFR

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Registered entities, which want to amend their registrations to work with the agent:			
Number of entities (A)	1	1	2
Estimated costs per entity (B)	$67	$25	$125
Estimated costs (C) = (A) × (B)	$67	$25	$249
Unregistered entities, which would pursue registration to work with this agent:			
Number of entities (D)	0	0	1
Estimated costs per entity (E)	$78,994	$41,087	$936,528
Estimated costs (F) = (D) × (E)	$0	$0	$936,528
Total estimated costs for entities to comply with HHS/CDC requirements to work with this agent (G) = (C) + (F)	$67	$25	$936,777

The total estimated costs for HHS/CDC to review applications to amend registrations or to register new entities to work with this agent, which are associated with the IFR are $209 (range: $156 to $7,255) (Table 5).

TABLE 5—TOTAL ESTIMATED COSTS FOR HHS/CDC TO REVIEW ENTITIES' APPLICATIONS TO AMEND THEIR REGISTRATIONS OR TO REGISTER NEW ENTITIES TO WORK WITH THE SARS–COV/SARS–COV–2 CHIMERIC VIRUSES ASSOCIATED WITH THE IFR

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Registered entities, which want to amend the registration for the agent:			
Number of entities (A)	1	1	2
Estimated costs per entity (B)	$209	$157	$261

[3] The estimates from the Regulatory Impact Analysis for the 2005 Select Agent Regulations Final Rule (Regulatory Impact Analysis, 42 CFR Parts 73: Possession, Use, and Transfer of Select Agents and Toxins Final Rule, Centers for Disease Control and Prevention, February 3, 2005) was adjusted to 2020 US dollars value using the Consumer Price Index (CPI) Inflation Calculator (*https://www.bls.gov/data/inflation_calculator.htm*).

TABLE 5—TOTAL ESTIMATED COSTS FOR HHS/CDC TO REVIEW ENTITIES' APPLICATIONS TO AMEND THEIR REGISTRATIONS OR TO REGISTER NEW ENTITIES TO WORK WITH THE SARS–COV/SARS–COV–2 CHIMERIC VIRUSES ASSOCIATED WITH THE IFR—Continued

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Estimated costs (C) = (A) × (B)	$209	$157	$522
Unregistered entities, which want to be registered for the agent:			
Number of entities (D)	0	0	1
Estimated costs per entity (E)	$6,197	$5,678	$6,733
Estimated costs (F) = (D) × (E)	$0	$0	$6,733
Total estimated costs for HHS/CDC (G) = (C) + (F)	$209	$156	$7,255

Summary of Costs

In summary, the total estimated costs associated with the IFR are $276 (range: $182 to $944,032) (Table 6). All costs are one-time costs, and the follow-up costs are assumed to be minimal. The upper bound cost estimate includes the cost to register a new entity to work with select agents and toxins, which may not be pursued. Even this upper bound estimate is less than $1 million.

TABLE 6—SUMMARY OF TOTAL ESTIMATED COSTS ASSOCIATED WITH THE IFR TO ADD THE SARS–COV/SARS–COV–2 CHIMERIC VIRUSES RESULTING FROM ANY DELIBERATE MANIPULATION OF SARS–COV–2 TO INCORPORATE NUCLEIC ACIDS CODING FOR SARS–COV VIRULENCE FACTORS TO HHS/CDC'S LIST OF SELECT AGENTS AND TOXINS

[2020 U.S. dollars]

	Base case	Lower bound	Upper bound
Total estimated costs to entities working with the agent (A)	$67	$25	$936,777
Total estimated costs to HHS/CDC (B)	209	157	7,255
Total estimated costs (C) = (A) + (B)	276	182	944,032

Benefits

The agents and toxins placed on the HHS/CDC select list have the potential to pose severe threats to public health and safety. The benefits of the HHS/CDC interim final rule derive from the strengthened prevention against the accidental or intentional release of SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors. The provisions of this IFR will reduce the risk of human exposure to the chimeric viruses by ensuring that laboratory facilities employ adequate security and safety measures including:

(1) Develop and implement a written biosafety plan and measures in place that is commensurate with the risk of the select agent given its intended use,

(2) Develop and implement a written security plan and measures in place that is sufficient to safeguard the select agent against unauthorized access, theft, loss, or release,

(3) Develop and implement a written incident response plan based upon a site-specific risk assessment,

(4) Have an adequate training program for handling select agents, and

(5) Maintain an inventory of select agents.

The benefits to public health and safety from the implementation of the rule result from the strengthened prevention that the rules provide against the either accidental or intentional release of the modification of a non-select agent with nucleic acids from a select agent but are difficult to quantify. The cost of such an event in morbidity and mortality could be very high. In addition, a release of this modification of a non-select agent with nucleic acids from a select agent would require a complicated and expensive emergency response effort. This effort could include extensive public health measures, such as quarantine, preventative treatment, and diagnostic testing for large numbers of potentially exposed persons, and extensive decontamination. Substantial costs could be incurred by hospitals and other medical facilities and institutions of government at all levels. A release, or widespread fear of one, also would create significant secondary effects. It could disrupt business, transportation, and many other aspects of normal behavior, on both a short-term and potentially a long-term basis.

HHS/CDC is unable to predict the potential infectiousness or virulence of the SARS–CoV/SARS–CoV–2 chimeric viruses that are regulated according to the provisions of this IFR. However, implementation of the IFR will provide a means of determining where the modification of a non-select agent with nucleic acids from a select agent is located; ensure that transfer, storage, and use of the agent can be tracked; provide for the screening of personnel with access to such agent; and require that entities in possession of such agent develop and implement effective means of biosafety and physical security. The benefit of these provisions is a reduced likelihood of either an accidental or intentional release of the select agent and the consequent avoidance of costs associated with such a release.

This IFR addresses a risk associated with substantial economic consequences. The likelihood of these negative outcomes under a baseline scenario of no further regulatory action are low, but also highly uncertain and difficult to characterize. Based on this analysis, HHS/CDC believes the expected benefits of this IFR are likely to exceed the estimated costs associated with this IFR.

B. The Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)

We have examined the impacts of the interim final rule under the Regulatory Flexibility Act (5 U.S.C. 601–612). The Regulatory Flexibility Act (RFA), as

amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires agencies to analyze regulatory options that would minimize any significant economic impact of a rule on small entities. Based on our current knowledge of who may possess this agent, we certify that this interim final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

This regulatory action is not a major rule as defined by Sec. 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

C. Paperwork Reduction Act of 1995

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in the current regulations are approved by the Office of Management and Budget (OMB) under OMB control number 0920–0576, expiration date 1/31/2024. This rulemaking includes a request for a nonmaterial/non-substantive change to account for small, potential increases in burden for a limited number of entities to submit amendments to their registrations.

We expect that the entities who will register for possession, use, or transfer of the select agent will already be registered with the Federal Select Agent Program because the entity would be registered to possess, use, or transfer SARS–CoV. This rulemaking will require such an entity to amend its registration with the Federal Select Agent Program using relevant portions of APHIS/CDC Form 1 (Registration for Possessing, Use, and Transfer of Select Agents and Toxins). Estimated time to amend this form is one hour for one select agent. Additionally, any registered entity that wishes to transfer the select agent will be required to submit information using APHIS/CDC Form 2 (Request to Transfer of Select Agent and Toxins). Estimated average time to complete this form is one hour. Based upon the limited publications on this agent at this time, we estimate that only one to five registered entities may add the select agent to their registration or transfer the select agent to another registered entity. Therefore, we calculate that there is no increase in the number of respondents that need to submit an application for registration, we estimate the total number of responses for entities to submit an amendment to their registration may increase by five, and the total burden hours may increase to five hours. This represents a nonmaterial/non-substantive change in burden for respondents to this approved information collection. The burden is outlined in the table below.

Section	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Section 7	Application for Registration	3	1	5	15
Section 7	Amendment to a Certificate of Registration	254	5	1	1,270

D. E.O. 12988: Civil Justice Reform

This rule has been reviewed under E.O. 12988, Civil Justice Reform. Once the interim final rule is in effect, HHS/CDC notes that: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) No retroactive effect will be given to this rule; and (3) Administrative proceedings will not be required before parties may file suit in court challenging this rule.

E. E.O. 13132: Federalism

HHS/CDC has reviewed this interim final rule in accordance with Executive Order 13132 regarding Federalism and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

F. Plain Language Act of 2010

Under the Plain Language Act of 2010 (Pub. L. 111–274, October 13, 2010), executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal Government administers or enforces. HHS/CDC has attempted to use plain language in announcing this rule consistent with the Federal Plain Writing Act guidelines.

List of Subjects in 42 CFR Part 73

Biologics, Incorporation by reference, Packaging and containers, Penalties, Reporting and Recordkeeping requirements, Transportation.

For the reasons stated in the preamble, we are amending 42 CFR part 73 as follows:

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 42 U.S.C. 262a; sections 201–204, 221 and 231 of Title II of Public Law 107–188 (42 U.S.C. 262a)

■ 2. In § 73.3 amend paragraph (b) by adding in alphabetical order an entry for ''SARS–CoV/SARS–CoV–2 chimeric viruses'' to read as follows:

§ 73.3 HHS select agents and toxins.

* * * * *

(b) * * *

SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors.

* * * * *

■ 3. Amend § 73.13 by adding paragraph (a)(3) to read as follows:

§ 73.13 Restricted experiments.

* * * * *

(a) * * *

(3) Experiments that involve the creation of SARS–CoV/SARS–CoV–2 chimeric viruses resulting from any deliberate manipulation of SARS–CoV–2 to incorporate nucleic acids coding for SARS–CoV virulence factors or vice versa.

* * * * *

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–25204 Filed 11–15–21; 4:15 pm]

BILLING CODE 4163–18–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120815345–3525–02; RTID 0648–XB588]

Snapper-Grouper Fishery of the South Atlantic; 2021 Recreational Accountability Measure and Closure for the South Atlantic Other Jacks Complex

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure (AM) for the recreational sector for the other jacks complex (lesser amberjack, almaco jack, and banded rudderfish) in the South Atlantic for the 2021 fishing year through this temporary rule. NMFS has determined that recreational landings of the other jacks complex have reached its recreational annual catch limit (ACL). Therefore, NMFS closes the recreational sector for this complex on November 17, 2021, through the remainder of the 2021 fishing year in the exclusive economic zone (EEZ) of the South Atlantic. This closure is necessary to protect the lesser amberjack, almaco jack, and banded rudderfish resources.

DATES: This rule is effective 12:01 a.m., local time, November 17, 2021, until 12:01 a.m., local time, January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes lesser amberjack, almaco jack, and banded rudderfish, and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The recreational ACL for the other jacks complex is 267,799 lb (121,472 kg), round weight. Under 50 CFR 622.193(l)(2)(i), NMFS is required to close the recreational sector for the other jacks complex when the recreational ACL has been reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register, unless NMFS determines that no closure is necessary based on the best scientific information available. The NMFS Southeast Fisheries Science Center has determined that the recreational sector for this complex has reached its ACL. Therefore, this temporary rule implements an AM to close the recreational sector for the other jacks complex in the South Atlantic EEZ, effective 12:01 a.m., local time, November 17, 2021, until January 1, 2022, the start of the next fishing year.

During the recreational closure, the bag and possession limits for the fish in the other jacks complex in or from the South Atlantic EEZ are zero.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 50 CFR 622.193(l)(2)(i), which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), the NMFS Assistant Administrator (AA) finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule that established the recreational ACL and AMs for the other jacks complex has already been subject to notice and comment, and all that remains is to notify the public of the closure. Such procedures are contrary to the public interest because of the need to immediately implement this action to protect the South Atlantic other jacks complex stock. The recreational ACL for the other jacks complex in the South Atlantic has been reached and prior notice and opportunity for public comment would require time, potentially resulting in a harvest well in excess of the established recreational ACL.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: November 12, 2021.

Michael Ruccio,

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

[FR Doc. 2021–25082 Filed 11–12–21; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 210505–0101; RTID 0648–XB472]

Fisheries Off West Coast States; Modification of the West Coast Salmon Fisheries; Inseason Actions #31 Through #32

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

ACTION: Inseason modification of 2021 management measures.

SUMMARY: NMFS announces two inseason actions in the 2021 ocean salmon fisheries. These inseason actions modified the recreational ocean salmon fishery in the area from Cape Falcon, OR to the Oregon/California border.

DATES: The effective dates for the inseason actions are set out in this document under the heading Inseason Actions and the actions remain in effect until superseded or modified.

FOR FURTHER INFORMATION CONTACT: Shannon Penna at 562–676–2148, Email: *shannon.penna@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The 2021 annual management measures for ocean salmon fisheries (86 FR 26425, May 14, 2021), announced management measures for the commercial and recreational fisheries in the area from the U.S./Canada border to the U.S./Mexico border, effective from 0001 hours Pacific Daylight Time (PDT), May 16, 2021, until the effective date of the 2022 management measures, as published in the **Federal Register**. NMFS is authorized to implement inseason management actions to modify fishing seasons and quotas as necessary to provide fishing opportunity while meeting management objectives for the affected species (50 CFR 660.409). Inseason actions in the salmon fishery may be taken directly by NMFS (50 CFR 660.409(a)—Fixed inseason management provisions) or upon consultation with the Chairman of the Pacific Fishery Management Council (Council), and the appropriate State Directors (50 CFR 660.409(b)—Flexible inseason management provisions).

Management of the salmon fisheries is divided into two geographic areas: North of Cape Falcon (NOF) (U.S./Canada border to Cape Falcon, OR), and

south of Cape Falcon (SOF) (Cape Falcon, OR, to the U.S./Mexico border). The actions described in this document affected the SOF recreational salmon fishery, as set out under the heading Inseason Action.

Consultation on these inseason actions occurred on September 14, 2021. Representatives from NMFS, Oregon Department of Fish and Wildlife (ODFW), California Department of Fish and Wildlife (CDFW), and Council staff participated in the consultations.

These inseason actions were announced on NMFS' telephone hotline and U.S. Coast Guard radio broadcast on the date of the consultations (50 CFR 660.411(a)(2)).

Inseason Action

Inseason Action #31

Description of the action: Inseason action #31 modified the SOF recreational salmon fishery from the Cape Falcon, OR to Humbug Mountain, OR. This action increased the non-mark selective coho salmon quota in the September recreational salmon fishery from 14,000 to 20,230 through an impact-neutral rollover of unused quota from the June–August mark selective coho salmon recreational fishery in the area from Cape Falcon, OR to the Oregon/California border.

Effective date: Inseason action #31 took effect on September 14, 2021 and remains in effect until superseded.

Reason and authorization for the action: Authority for this impact-neutral rollover of unutilized quota is specified in the 2021 ocean salmon regulations (86 FR 26425, May 14, 2021). The SOF June–August mark selective coho salmon recreational fishery had a quota of 120,000 marked coho salmon. Of that quota, 68,276 coho salmon were landed, leaving 51,724 coho salmon quota unutilized for the June–August period. The Council's Salmon Technical Team (STT) determined that to keep fishery impacts on Oregon Coastal natural coho salmon (OCN coho) within the level of impacts described in the preseason planning process, due to seasonal differences in impact rates to OCN coho salmon, only 6,230 coho salmon from the unutilized June–August quota could be rolled over in an impact-neutral manner. The STT calculated that an impact-neutral rollover would add 6,230 coho salmon from the June–August period to the September non-selective coho salmon fishery quota of 14,000 for an adjusted quota of 20,230 coho salmon. This action did not increase the overall 2021 coho salmon quota in the SOF recreational fishery. The West Coast Region Regional Administer (RA) considered the landings of coho salmon to date, fishery catch and effort to date, the amount of quota remaining, and the timing of the action relative to the length of the season, and determined that this inseason action was necessary to meet management goals set preseason. Inseason action to modify quotas and/or fishing seasons is authorized by 50 CFR 660.409(b)(1)(i).

Consultation date and participants: Consultation on inseason action #31 occurred on September 14, 2021. Representatives from NMFS, CDFW, ODFW, and the Council participated in this consultation.

Inseason Action #32

Description of the action: Inseason action #32 modified the recreational fishery open fishing period by increasing the days open from Cape Falcon, OR to Humbug Mountain, OR. Effective September 17, 2021 at 12:01 a.m., the recreational ocean salmon fishery from Cape Falcon, OR to Humbug Mountain, OR will be open to fishing seven days per week through the earlier of September 30, 2021, or attaining the 20,230 non-mark selective coho salmon quota.

Effective date: Inseason #32 took effect on September 17, 2021, and remains in effect until superseded.

Reason and authorization for the action: The purpose of inseason #32 was to allow greater access to available non-mark selective coho salmon quota in the recreational fishery. Prior to this action, the September recreational ocean salmon fishery in the area from Cape Falcon, OR to Humbug Mountain, OR was scheduled to be open Friday through Sunday through the earlier of September 30, or attaining a 14,000 non-mark selective coho salmon quota. Inseason action #31, above, increased the coho salmon quota in this fishery to 20,230 coho salmon. ODFW reviewed the harvest estimates from the open fishing period and recommended that adding additional days to the open fishing period would provide more fishing opportunity and was unlikely to result in early attainment of the non-mark selective coho salmon quota.

The RA considered coho salmon landings and fishery catch and effort to date in the SOF area from Cape Falcon, OR to Humbug Mountain, OR, and determined that this inseason action was necessary to meet management objectives set preseason. Inseason modification of recreational fishing days per calendar week is authorized by 50 CFR 660.409(b)(1)(i) and (iii).

Consultation date and participants: Consultation on inseason action #32 occurred on September 14, 2021. Representatives from NMFS, CDFW, ODFW, and the Council participated in this consultation.

All other restrictions and regulations remain in effect as announced for the 2021 ocean salmon fisheries (86 FR 26425, May 14, 2021), as modified by previous inseason action (86 FR 34161, June 29, 2021; 86 FR 37249, July 15, 2021; 86 FR 40182, July 28, 2021; 86 FR 43967, August 11, 2021; 86 FR 48343, August 30, 2021; 86 FR 54407, October 1, 2021).

The NMFS West Coast Region RA determined that these inseason actions were warranted based on the best available information on Pacific salmon abundance forecasts, landings to date, anticipated fishery effort and projected catch, and the other factors and considerations set forth in 50 CFR 660.409. The states manage the fisheries in state waters adjacent to the areas of the U.S. exclusive economic zone (3–200 nautical miles (5.6–370.4 kilometers) off the coasts of the states of Washington, Oregon, and California) consistent with these Federal actions. As provided by the inseason notice procedures at 50 CFR 660.411, actual notice of the described regulatory action was given, prior to the time the action was effective, by telephone hotline numbers 206–526–6667 and 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF–FM and 2182 kilohertz.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This action is authorized by 50 CFR 660.409, which was issued pursuant to section 304(b) of the MSA, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. Prior notice and opportunity for public comment on this action was impracticable because NMFS had insufficient time to provide for prior notice and the opportunity for public comment between the time coho salmon abundance, catch, and effort information were developed and fisheries impacts were calculated, and the time the fishery modifications had to be implemented in order to ensure that fisheries are managed based on the best scientific information available and that fishery participants can take advantage of the additional fishing opportunity these changes provide. As previously noted, actual notice of the

regulatory action was provided to fishers through telephone hotline and radio notification. This action complies with the requirements of the annual management measures for ocean salmon fisheries (86 FR 26425, May 14, 2021), the Fishery Management Plan (FMP), and regulations implementing the FMP under 50 CFR 660.409 and 660.411.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date, as a delay in effectiveness of this action would restrict fishing at levels inconsistent with the goals of the FMP and the current management measures.

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

Dated: November 12, 2021.

Michael Ruccio,

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

[FR Doc. 2021–25102 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 86, No. 219
Wednesday, November 17, 2021

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0877; Project Identifier AD–2020–01316–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SP, 747–400, 747–400D, and 747–400F series airplanes. This proposed AD was prompted by a determination that a certain fastener type that penetrates the fuel tank walls has insufficient bond to the structure, and energy from a lightning strike or high-powered short circuit could cause arcing to occur at the ends of fasteners in the fuel tanks. This proposed AD would require, for certain airplanes, reconfiguring the clamps of certain wire bundles, applying sealant to certain fasteners that penetrate the fuel tank walls, installing cushion clamps and polytetrafluoroethylene (TFE) sleeves, inspecting to determine if sealant was applied to certain fasteners, and applying sealant if necessary. This proposed AD would also require, for all airplanes, revising the maintenance or inspection program, as applicable, to incorporate new, more restrictive airworthiness limitations. 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 January 3, 2022.

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 *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.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020, is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0877.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0877; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Rose Len, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3604; email: *rose.len@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–2021–0877; Project Identifier AD–2020–01316–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 *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 proposed AD.

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 Rose Len, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3604; email: *rose.len@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings,

the FAA issued a final rule titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction, and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, that rule included Amendment 21–78, which established Special Federal Aviation Regulation No. 88 (''SFAR 88'') at 14 CFR part 21. Subsequently, SFAR 88 was amended by Amendment 21–82 (67 FR 57490, September 10, 2002; corrected at 67 FR 70809, November 26, 2002) and Amendment 21–83 (67 FR 72830, December 9, 2002; corrected at 68 FR 37735, June 25, 2003, to change ''21–82'' to ''21–83'').

Among other actions, SFAR 88 requires certain type design (*i.e.,* type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the final rule published on May 7, 2001, the FAA intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, the FAA has established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, combination of failures, and unacceptable (failure) experience. For all three failure criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The FAA has determined that the actions identified in this proposed AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosion or fire.

The FAA has received a report indicating that a certain type of fastener used in the fuel tank walls of Model 747 airplanes is insufficiently bonded to the airplane structure. Further, these fasteners do not have sufficient electrical insulation applied inside the fuel tanks to prevent arcing in the event of a lightning strike or high-powered short circuit. This condition, if not corrected, could result in a fuel tank explosion or fire.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020. This service information describes procedures for reconfiguring the clamps of certain wire bundles, applying sealant to certain fasteners that penetrate the fuel tank walls, and installing cushion clamps and TFE sleeves on the wire bundles of the front spars and rear spars of the wings.

The FAA also reviewed Boeing Service Bulletin 747–57–2326, Revision 1, dated January 31, 2008. This service information describes procedures for, among other actions, applying sealant to certain fasteners.

The FAA also reviewed The Boeing Company 747–400 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWL) and Certification Maintenance Requirements (CMRs), D621U400–9, Revision February 2020, which includes revised AWL tasks 28–AWL–33, 28–AWL–34, and 28–AWL–37; and The Boeing Company 747–100/200/300/SP/SR Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–13747–CMR, Revision September 2020, which includes revised AWL tasks 28–AWL–25, 28–AWL–27, and 28–AWL–28. The revised AWL tasks describe fuel airworthiness limitation items (ALIs) and critical design configuration control limitations (CDCCLs) that address fuel tank systems. These documents are distinct because they apply to different airplane models. The new AWLs include:

- An ALI (periodic inspections) of the cushion clamps and teflon sleeving installed on out-of-tank wire bundles installed on brackets that are mounted directly on the fuel tanks;
- A CDCCL for the cushion clamps and teflon sleeving installed on out-of-tank wire bundles installed on brackets that are mounted directly on the fuel tanks; and
- A CDCCL for lightning, fault current or hot short protection features.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Relevant Rulemaking

AD 2007–20–01, Amendment 39–15211 (72 FR 54533, September 26, 2007) (AD 2007–20–01), requires actions in accordance with Boeing Service Bulletin 747–57–2326, dated January 4, 2007; and Boeing Service Bulletin 747–57–2327, Revision 1, dated July 10, 2006. AD 2007–20–01 applies to certain The Boeing Company Model 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SP, 747–400, 747–400D, and 747–400F series airplanes. The FAA has determined that AD 2007–20–01 did not fully address the unsafe condition for Model 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SP, 747–400, 747–400D, and 747–400F series airplanes. The service information for AD 2007–20–01 has been revised and contains additional work as described previously.

FAA's Determination

The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require, for certain airplanes, reconfiguring the clamps of certain wire bundles, applying sealant to certain fasteners that penetrate the fuel tank walls, installing cushion clamps and TFE sleeves, inspecting to determine if sealant was applied to certain fasteners, and applying sealant if necessary. This proposed AD would also require, for all airplanes, revising the maintenance or inspection program, as applicable, to incorporate new, more restrictive airworthiness limitations.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020, specifies a compliance time of 60 months to accomplish Work Packages 13 through 20 and a compliance time of 27 months to accomplish Work Package 21. The FAA has determined that all work packages may be done within 60 months as it is not necessary to accomplish Work Package 21 prior to the other work packages. The FAA has determined that the 60-month compliance time is appropriate and will not adversely affect safety.

In The Boeing Company 747–100/200/300/SP/SR Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–

13747–CMR, Revision September 2020, the ''Applicability'' of airworthiness limitations 28–AWL–25 and 28–AWL–27 specifies ''ALL'' and ''NOTE.'' The FAA has determined that the applicability should be ''Airplanes L/N 645 and on'' as those limitations do not apply to airplanes having line numbers 1 through 644 inclusive. In addition, the ''Applicability Note'' in the Description column does not apply. This difference is specified in paragraph (h)(2) of the proposed AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 104 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Reconfiguring clamps, inspections, applying sealant, and installing clamps and TFE sleeves.	Up to 30 work-hours × $85 per hour = Up to $2,550.	Up to $2,004	Up to $4,554	Up to $473,616.

The FAA has determined that revising the maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

The FAA estimates the following costs to do any necessary application of sealant that would be required based on the results of the proposed inspections. The agency has no way of determining the number of aircraft that might need this action:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Applying sealant	Up to 102 work-hours × $85 per hour = Up to $8,670.	Up to $6,813	Up to $15,483.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2021–0877; Project Identifier AD–2020–01316–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 3, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SP, 747–400, 747–400D, and 747–400F series airplanes, certificated in any category, having line numbers 645 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by fuel system reviews conducted by the manufacturer. The FAA is issuing this AD to address arcing in the event of a lightning strike or high-powered short circuit, which could result in a fuel tank explosion or fire.

(f) Compliance

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

(g) Reconfiguration of Wire Bundle Clamps, Sealant Application, Installation of Clamps and Sleeves, Inspections, and Corrective Actions

(1) For Group 1 through 9, 11, and 16 through 45 airplanes identified in Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020: Within 60 months after the effective date of this AD, reconfigure the clamps of the specified wire bundles, apply sealant to the specified fasteners that penetrate the fuel tank walls, and install cushion clamps and polytetrafluoroethylene (TFE) sleeves on the wire bundles of the front spars and rear spars of the wings, as applicable, in accordance with Work Packages 13 through 21, as applicable, of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020.

(2) For airplanes on which the actions specified in Work Package 7, 8, or 9 of Boeing Special Attention Service Bulletin 747–57–2327 have been done: Within 60 months after the effective date of this AD: Inspect to determine if the fillet sealant identified in step 5 of Figure 23 of Boeing Special Attention Service Bulletin 747–57–2327, Revision 8, dated November 13, 2020, was applied to fully encapsulate the fastener penetrating the fuel tank; and if the sealant does not fully encapsulate the fastener, before further flight, apply sealant as specified in step 5 of Figure 23, except where note (f) of Figure 23 specifies to ''make sure to apply the fillet sealant on the fastener,'' this AD requires applying the fillet sealant to fully encapsulate the fastener penetrating the fuel tank.

(3) For Group 2 airplanes identified in Boeing Service Bulletin 747–57–2326, Revision 1, dated January 31, 2008: Within 60 months after the effective date of this AD, inspect to determine if all fasteners identified in Figures 4 and 5 of Boeing Service Bulletin 747–57–2326, Revision 1, dated January 31, 2008, have been sealed; and if any fasteners are not sealed, before further flight, apply sealant in accordance with Figure 1 of Boeing Service Bulletin 747–57–2326, Revision 1, dated January 31, 2008.

(h) Maintenance or Inspection Program Revision

(1) For Model 747–400, 747–400D, and 747–400F series airplanes: Within 60 days after the effective date of this AD: Revise the existing maintenance or inspection program, as applicable, by incorporating the information in airworthiness limitations 28–AWL–33, 28–AWL–34, and 28–AWL–37 of The Boeing Company 747–400 Maintenance Planning Data (MPD) Document, Section 9, Airworthiness Limitations (AWL) and Certification Maintenance Requirements (CMRs), D621U400–9, Revision February 2020. The initial compliance time for doing the tasks is at the time specified in Boeing 747–400 MPD Document, Section 9, AWL and CMRs, D621U400–9, Revision February 2020, or within 60 days after the effective date of this AD, whichever occurs later.

(2) For Model 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, and 747SP series airplanes: Within 60 days after the effective date of this AD: Revise the existing maintenance or inspection program, as applicable, by incorporating the information in airworthiness limitations 28–AWL–25, 28–AWL–27, and 28–AWL–28 of The Boeing Company 747–100/200/300/SP/SR Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–13747–CMR, Revision September 2020; except where the ''Applicability'' of airworthiness limitations 28–AWL–25 and 28–AWL–27 specifies ''ALL'' and ''NOTE,'' replace ''ALL'' and ''NOTE'' with ''Airplanes L/N 645 and on'' and remove the ''Applicability Note'' from the Description column of 28–AWL–25 and 28–AWL–27. The initial compliance time for doing the tasks is at the time specified in The Boeing Company Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–13747–CMR, Revision September 2020, or within 60 days after the effective date of this AD, whichever occurs later.

(i) No Alternative Actions, Intervals, and Critical Design Configuration Control Limitations (CDCCLs)

After the maintenance or inspection program has been revised as required by paragraph (h)(1) or (2) of this AD, no alternative actions (*e.g.,* inspections), intervals, and CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (k) of this AD.

(j) Credit for Previous Actions

(1) This paragraph provides credit for the Work Package 13 actions specified in paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (j)(1)(i) through (iv) of this AD.

(i) Boeing Special Attention Service Bulletin 747–57–2327, Revision 4, dated August 26, 2010.

(ii) Boeing Special Attention Service Bulletin 747–57–2327, Revision 5, dated September 20, 2011.

(iii) Boeing Special Attention Service Bulletin 747–57–2327, Revision 6, dated February 21, 2013.

(iv) Boeing Special Attention Service Bulletin 747–57–2327, Revision 7, dated November 30, 2017.

(2) This paragraph provides credit for the Work Package 14, 15, and 16 actions specified in paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (j)(2)(i) through (iii) of this AD.

(i) Boeing Special Attention Service Bulletin 747–57–2327, Revision 5, dated September 20, 2011.

(ii) Boeing Special Attention Service Bulletin 747–57–2327, Revision 6, dated February 21, 2013.

(iii) Boeing Special Attention Service Bulletin 747–57–2327, Revision 7, dated November 30, 2017.

(3) This paragraph provides credit for the Work Package 17 actions specified in paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (j)(3)(i) or (ii) of this AD.

(i) Boeing Special Attention Service Bulletin 747–57–2327, Revision 6, dated February 21, 2013.

(ii) Boeing Special Attention Service Bulletin 747–57–2327, Revision 7, dated November 30, 2017.

(4) This paragraph provides credit for the Work Package 18, 19, and 20 actions specified in paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using Boeing Special Attention Service Bulletin 747–57–2327, Revision 7, dated November 30, 2017.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO 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 (l)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(l) Related Information

(1) For more information about this AD, contact Rose Len, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3604; email: *rose.len@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740–5600;

telephone 562 797 1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on October 8, 2021.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–24834 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1022; Project Identifier AD–2020–01101–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that would have applied to certain The Boeing Company Model 757–200, –200CB, and –300 series airplanes. This action revises the NPRM by including additional airplanes that are also subject to the identified unsafe condition. Since this change would impose an additional burden over that in the NPRM, the FAA is requesting comments on this SNPRM.

DATES: The FAA must receive comments on this SNPRM by January 3, 2022.

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 *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.

For service information identified in this SNPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; phone: 562–797–1717; internet: *https://www.myboeingfleet.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1022.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1022; 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 SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Tony Koung, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3985; email: *tony.koung@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–2020–1022; Project Identifier AD–2020–01101–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 again revise this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *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 proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this SNPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this SNPRM. Submissions containing CBI should be sent to Tony Koung, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3985; email: *tony.koung@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to The Boeing Company Model 757–200, –200CB, and –300 series airplanes. The NPRM published in the **Federal Register** on December 30, 2020 (85 FR 86515). The NPRM was prompted by a report indicating that the passenger service units (PSUs) and life vest panels became separated from their attachments during several survivable accident sequences. In the NPRM, the FAA proposed to require installing lanyard assemblies on the PSUs, and, for certain airplanes, on the life vest panels and video panels as applicable.

Comments

The FAA received a comment from one individual who supported the NPRM without change.

The FAA received additional comments from four commenters, including Boeing, ST Engineering Aerospace, American Airlines, and Delta Air Lines. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Add Revised Service Information

Boeing asked that Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021, be added to the proposed AD (Revision 1, dated May 20, 2020, was referred to for accomplishing the actions in the NPRM). Boeing stated that Revision 2 includes airplanes having variable number NB451 and four other airplanes that have been determined to

be non-Boeing passenger converted freighters with passenger/combi capability after conversion.

The FAA agrees with the commenter for the reason provided. Since the FAA issued the NPRM, Boeing issued Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021. This revised service information added airplanes to the effectivity and regrouped the airplanes by moving certain airplanes to new Groups 6 and 7. The FAA has revised this proposed AD to refer to Revision 2 of the service information as the required service information and to give credit for airplanes identified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, on which the applicable actions have been done.

Request To Revise Discussion Section

Boeing asked that the FAA revise the Discussion section of the NPRM by deleting the statement ''In addition, there is no secondary means of retention (lanyards) for the PSU to the airplane structure.'' Boeing stated that this is to maintain consistency with similar rulemaking for the PSU lanyards on Model 737 classic airplanes (Model 737–100, –200, –200C, –300, –400, and –500 series airplanes), and added that no similar statement exists in those ADs.

The FAA partially agrees with the commenter's assertions. There is no secondary means of retention (lanyards) for the PSU to the production airplane installation. Statements referring to a secondary means of PSU retention may be confusing because the production airplane installation does not include a secondary means of retention. Although the quoted statement does appear in other rulemaking (specifically, AD 2020–17–04, Amendment 39–21209 (85 FR 52268, August 25, 2020)), that statement is not retained in this SNPRM.

Request To Remove an Exception

Boeing asked that the FAA remove the exception specified in paragraph (h)(2) of the proposed AD (in the NPRM). Boeing stated that Revision 2 of the service information includes airplanes having variable number NB451 and four other airplanes that have been determined to be non-Boeing passenger converted freighters with passenger/combi capability after conversion. Therefore, the exception identified in paragraph (h)(2) of the proposed AD is not necessary.

The FAA agrees with the commenter for the reasons provided. The FAA has removed the exception specified in paragraph (h)(2) of the proposed AD (in the NPRM) accordingly.

Request To Exclude Certain Airplanes From Applicability

VT Mobile Aerospace Engineering (VT MAE) asked that Model 757–200 airplanes modified per VT MAE supplemental type certificates (STCs) ST03952AT and ST04242AT be exempt from compliance with the proposed AD requirements specified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021. VT MAE stated that the passenger compartment is completely removed, including the PSUs and life vest panel, per drawing 1180120—Payloads Bulk deletions modification, as specified in the STCs.

The FAA agrees with the commenter's request for the reason provided. The FAA has added a new paragraph (h)(2) to this proposed AD to include this exception.

Clarification for PSU Installation

American Airlines (AAL) suggested that the NPRM provide clarification that the installation of the nylon coated cables is the compliance action required, since the PSU retention design and installation procedures determine the PSU drop height. AAL stated that Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, Tables 1 and 4 of paragraph 1.E., Compliance, in the ''Action'' column specify to ''[i]nstall additional nylon coated stainless steel lanyards on each Passenger Service Unit (PSU) panel, such that in the event of a survivable accident, any detached PSU panel does not extend lower than Body Water Line (BWL) 265.7.'' AAL added that the cables being installed are not adjustable, the physical installation of the cables does not adjust PSU drop height, and the ''Procedures'' section does not specify a height check of a dropped PSU. AAL concluded that the PSU drop height is defined by the installation design and is not adjustable. Delta Air Lines Inc. (Delta) asked that a new paragraph (h)(6) be added to the proposed AD to allow operators to deviate from the actions identified in Figure 1 of Boeing Special Attention Requirements Bulletin 757–25–0315 RB. Delta stated that the actions identified in the tables within Paragraph 3. ''Compliance'' and within Paragraph 5.(B) ''Work Instructions—Actions Required for Compliance'' include the following: ''Install additional nylon coated stainless steel lanyards on each Passenger Service Unit (PSU) panel, such that in the event of a survivable accident, any detached PSU panel does not extend lower than Body Water Line (BWL) 265.7.''

The FAA provides the following clarification. The PSU panel would not fall below BWL 265.7 due to the airplane design, which does not allow it; a PSU panel that detached and fell below BWL 265.7 would cause injury to passengers. Operators can use the top of the floor panel as a reference to this fact. For Model 757 airplanes, the original Boeing design BWL is 208.6 per the airplane flight manual, and the PSU lanyard is pre-assembled. Therefore, the FAA has not changed this proposed AD in this regard.

Request To Link Certain Part Numbers

Delta asked that the FAA add a new paragraph (h)(3) to the proposed AD stating ''Passenger Service Units reidentified to P/N 417N3011–5000 series following accomplishment of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, must also comply with AD 2007–07–02 [Amendment 39–15002 (72 FR 14400, March 28, 2007) (AD 2007–07–02)], except the new 417N3011–5000 series part number will supersede the 1000 dash number reidentification requirement of AD 2007–07–02.'' Delta stated that the –5XXX dash number needs further guidance between AD 2007–07–02 and the proposed AD (in the NPRM).

The FAA agrees that there is connection between the –1000 and –5000 series part numbers; however, the FAA does not agree that it is necessary to add a new paragraph (h)(3) to this proposed AD to include this as an exception. The required actions in each AD are clear and must be complied with as required; these ADs do not need to be linked to effectively accomplish the actions. The FAA has not changed this proposed AD in this regard.

Request To Add New Exception for Installing Lanyard Assemblies

Delta asked that the proposed AD be updated to add a new paragraph (h)(4) to the exceptions allowing operators to deviate from Figure 1 of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, and use Boeing Service Bulletin 737–25–1707, Revision 1, dated May 18, 2018, to install lanyard assemblies to the PSU panel. Delta stated that Model 737 airplanes specified in Boeing Service Bulletin 737–25–1707 share some part numbers in common for post-service bulletin PSUs specified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB.

The FAA does not agree with the commenter's request. Referring to a

different service bulletin that applies to a different airplane model could introduce problems in identifying the applicable information. Boeing has a specific service bulletin for each model referred to in an AD, and in some cases, for each minor model. Internal references in the service bulletin might not be appropriate for a different model (*e.g.,* the AMM or SRM reference for Model 757 airplanes might have a different number than that of Model 737 airplanes.) Under the provisions of paragraph (k) of this AD, the FAA will consider requests for approval of a deviation to the referenced service information if sufficient data are submitted to substantiate that the deviation would provide an acceptable level of safety. This proposed AD has not been changed in this regard.

Request To Add Exception for Certain Upgrades

Delta asked that a new paragraph (h)(5) be added to the proposed AD to allow for cosmetic changes made to Model 757 PSUs under the authority of 14 CFR part 121 (Owner/operator) and 14 CFR part 21 (STC) after compliance with AD 2007–07–02. Delta stated that other operators are also likely to have made similar cosmetic upgrades to PSUs in order to match the units to newer interior color schemes and furnishings. Delta added that this is also referenced in the language used in paragraph (l)(2)(ii) of AD 2012–11–09R1, Amendment 39–18221 (80 FR 44259, July 27, 2015).

The FAA does not agree with the commenter's request. The FAA does not need to approve minor cosmetic changes, such as interior color schemes, unless a flammability test is required. But further clarification is necessary regarding what type of cosmetic upgrades and modifications have been done and their affects on AD compliance. Under the provisions of paragraph (k) of this proposed AD, the FAA will consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that the upgrade or modification would provide an acceptable level of safety. This proposed AD has not been changed in this regard.

FAA's Determination

The FAA is proposing this AD after determining the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021. This service information specifies procedures for installing lanyard assemblies on the PSUs, life vest panels, and video panels as applicable. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This SNPRM

This proposed AD would require accomplishing the actions specified in the service information already described. For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1022.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 367 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Install Lanyard Assemblies.	Up to 75 work-hours × $85 per hour = Up to $6,375.	Up to $45,750	Up to $52,125	Up to $19,129,875.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2020–1022; Project Identifier AD–2020–01101–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 3, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 757–200, –200CB, and –300 series airplanes, certificated in any category, as identified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a report indicating the passenger service units (PSUs) and life vest panels became separated from their attachments during several survivable accident sequences. The FAA is issuing this AD to address the PSUs, life vest panels, and video panels becoming detached and falling into the cabin, which could lead to passenger injuries and impede egress during an evacuation.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Special Attention Service Bulletin 757–25–0315, Revision 2, dated March 17, 2021, which is referred to in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 2, dated March 17, 2021, uses the phrase ''the Revision 2 date of Requirements Bulletin 757–25–0315 RB,'' this AD requires using ''the effective date of this AD.''

(2) The lanyard installation specified in paragraph (g) of this AD is not required on Model 757–200 airplanes modified per VT Mobile Aerospace Engineering (VT MAE) supplemental type certificates (STCs) ST03952AT and ST04242AT.

(i) Credit for Previous Actions

For airplanes identified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020: This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020.

(j) Parts Installation Limitation

As of the applicable time specified in paragraph (j)(1) or (2) of this AD, no person may install on any airplane any PSU, life vest panel, or video panel without an updated lanyard assembly installed.

(1) For airplanes that have PSUs, life vest panels, or video panels without the updated lanyard assemblies installed as of the effective date of this AD: After modification of the airplane as required by paragraph (g) of this AD.

(2) For airplanes that do not have PSUs, life vest panels, or video panels without the updated lanyard assemblies installed as of the effective date of this AD: As of the effective date of this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(l) Related Information

(1) For more information about this AD, contact Tony Koung, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3985; email: *tony.koung@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; phone: 562–797–1717; internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on October 25, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–24269 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0506; Project Identifier MCAI–2021–00200–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) to supersede Airworthiness Directive (AD) 2013–25–11; this NPRM would apply to all Airbus SAS Model A318–111, and –112 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. This action revises the NPRM by establishing a different compliance time for the initial inspection on certain airplane configurations. The FAA is proposing this AD to address the unsafe condition on these products. Since these actions would impose an additional burden over those in the NPRM, the FAA is reopening the comment period to allow the public the chance to comment on these changes.

DATES: The FAA must receive comments on this SNPRM by January 3, 2022.

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 *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.

For EASA service information identified in this SNPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* For Airbus service information identified in this SNPRM, contact Airbus SAS, Airworthiness Office—EIAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St. Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0506; 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 SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email *sanjay.ralhan@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–2021–0506; Project Identifier MCAI–2021–00200–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 *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 proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this SNPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email *sanjay.ralhan@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2013–25–11, Amendment 39–17707 (78 FR 78705, December 27, 2013) (AD 2013–25–11). AD 2013–25–11 requires actions to address an unsafe condition on all Airbus SAS Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. AD 2013–25–11 requires repetitive inspections of the 80VU rack lower lateral fittings, upper fittings, and shelves for damage, repetitive inspections of the 80VU rack lower central support for cracking, and corrective action if necessary. AD 2013–25–11 also specifies optional terminating action for the repetitive inspections.

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD to supersede AD 2013–25–11 that would apply to all Airbus SAS Model A318–111, and –112, airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216. –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. The NPRM published in the **Federal Register** on June 22, 2021 (86 FR 32653) (the NPRM). The NPRM was prompted by reports of damaged lower lateral fittings of the 80VU rack, and reports of new damage on airplanes on which certain optional service information had been accomplished. The NPRM proposed to expand the applicability, remove the optional terminating action, and require new repetitive inspections.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, new damage occurrences have been reported, and a different compliance time has been determined for certain affected parts, depending on airplane configuration.

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0172, dated July 20, 2021 (EASA AD 2021–0172) (also referred to after this as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus SAS Model A318–111, A318–112, A319–111, A319–112, A319–113, A319–114, A319–115, A319–131, A319–132, A319–133, A320–211, A320–212, A320–214, A320–215, A320–216, A320–231, A320–232, A320–233, A321–111, A321–112, A321–131, A321–211, A321–212, A321–213, A321–231 and A321–232 airplanes. Model A320–215 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability. EASA AD 2021–0172 supersedes EASA AD 2021–0045, dated February 16, 2021 (EASA AD 2021–0045). The FAA NPRM corresponds to EASA AD 2021–0045. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0506.

This proposed AD was prompted by reports of damaged lower lateral fittings of the 80VU rack, and reports of new damage on airplanes on which certain optional service information had been accomplished. The FAA is proposing this AD to address damage or cracking of the 80VU fittings and supports, which could lead to possible disconnection of the cable harnesses to

one or more computers, and if occurring during a critical phase of flight, could result in reduced control of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0172 describes procedures for repetitive special detailed inspections of the 80VU rack lower lateral fittings, lower central support, upper fittings, central post, and shelves attachments for discrepancies (including broken fittings, missing bolts, an electronics rack FIN 80VU that is in contact with structure, any bush that has migrated, burred material, and cracks), and corrective action if necessary. Corrective actions include modification, repair, and replacement. EASA AD 2021–0172 also describes procedures for reporting inspection results to Airbus.

The FAA has also reviewed Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020. Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, describes inspections of the 80VU rack lower lateral fittings, lower central support, upper fittings, central post, and shelves attachments for discrepancies and corrective action.

The FAA has also reviewed Airbus Technical Adaptation 80827186/024/2020, Issue 1, dated September 18, 2020, which addresses discrepancies found in Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Comments

The FAA gave the public the opportunity to participate in developing this rule. The following presents the comments received on the NPRM and the FAA's response to those comments. Air Line Pilots Association (ALPA), International, supported the NPRM.

Request To Incorporate New EASA AD

American Airlines, Delta Air Lines, and United Airlines requested that the FAA incorporate new information into this proposed AD, because of the publication of EASA AD 2021–0172, which superseded EASA AD 2021–0045.

The FAA agrees to incorporate the new information by issuing this SNPRM and has revised this AD to refer to EASA AD 2021–0172 as the appropriate source of service information to accomplish the required actions.

Request To Allow Technical Adaptation (TA)

United Airlines requested that the FAA allow the use of TA 80827186/024/2020, Issue 1, dated September 18, 2020, to address inspections and corrective actions done using Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020. United Airlines stated that Airbus has issued TA 80827186/024/2020, Issue 1, dated September 18, 2020, to address discrepancies in Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, which is specified in EASA AD 2021–0045.

The FAA agrees with the request for the reasons provided by the commenter. The FAA has added paragraph (i) to the proposed AD to specify that Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, with corrections referenced in the Airbus Technical Adaptation 80827186/024/2020, Issue 1, dated September 18, 2020, is an acceptable method of compliance for the inspections and corrective actions specified in paragraphs (1), (2), and (3) of EASA AD 2021–0172.

Request To Use Drawing

United Airlines requested that the FAA allow the use of Airbus Drawing (DWG) D53924082. United Airlines stated that in Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, Config. 004, Figure ICN–A320–A–25XX1BKJ–A–FAPE3–00EOV–A–001–01, Sheet 2 of 2, detail D shows a fitting installation with a four fasteners configuration. United Airlines stated Airbus Drawing D53924082 indicates the fitting installation must have six fasteners configuration. United Airlines stated that Airbus confirmed it will update the service bulletin to show the assembly with a six fastener configuration.

The FAA acknowledges the commenter's request and notes the commenter did not submit the referenced drawing. However, the FAA has determined the Accomplishment Instructions steps in Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, are correct for most airplanes. United Airlines is one operator in Config. 004 and it has a unique configuration. The FAA does not consider it appropriate to include various provisions in an AD applicable only to an operator's unique configuration of affected airplanes. If an operator with an affected airplane cannot accomplish the required actions specified in the service information, or prefers to use different service information that is specific to their design, an alternative method of compliance (AMOC) can be requested in accordance with the provisions specified in paragraph (j)(1) of this proposed AD. The FAA has confirmed with EASA that the solution for United Airlines' configuration will be included in the next revision of the service information expected to be published in the fourth quarter of 2021; therefore, once published, based on incorporation of the Ref. Publications: Section of EASA AD 2021–0172 in this proposed AD, United Airlines may use that service information without the need for an AMOC. The FAA has not changed this proposed AD in this regard.

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 the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the FAA evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Certain changes described above expand the scope of the NPRM. As a result, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Proposed Requirements of This SNPRM

This proposed AD requires accomplishing the actions specified in the service information described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 1,528 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
New proposed actions ..	Up to 8 work-hours × $85 per hour = Up to $680.	$0	Up to $680	Up to $1,039,040.

* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the proposed reporting requirement in this proposed AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $129,880, or $85 per product.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Action	Labor cost	Parts cost	Cost per product
Repair	122 work-hours × $85 per hour = $10,370	$4,150	$14,520.
Replacement	Up to 189 work-hours × $85 per hour = Up to $16,065	Up to $6,928	Up to $22,993.
Modification	189 work-hours × $85 per hour = $16,065	$7,407	$23,472.

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators. The FAA does not control warranty coverage for affected operators. As a result, the FAA has included all known costs in the cost estimate.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) 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 Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2013–25–11, Amendment 39–17707 (78 FR 78705, December 27, 2013), and

■ b. Adding the following new AD:

Airbus SAS: Docket No. FAA–2021–0506; Project Identifier MCAI–2021–00200–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 3, 2022.

(b) Affected ADs

This AD replaces AD 2013–25–11, Amendment 39–17707 (78 FR 78705, December 27, 2013) (AD 2013–25–11).

(c) Applicability

This AD applies to all Airbus SAS airplanes, certificated in any category, identified in paragraphs (c)(1) through (4) of this AD.

(1) Model A318–111 and –112 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by reports of damaged lower lateral fittings of the 80VU rack, and reports of new damage on airplanes on which certain optional service information had been accomplished. The FAA is issuing this AD to address damage or cracking of the 80VU fittings and supports, which could lead to possible disconnection of the cable harnesses to one or more computers, and if occurring during a critical phase of flight, could result in reduced control of the airplane.

(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, European Union Aviation Safety Agency (EASA) AD 2021–0172, dated July 20, 2021 (EASA AD 2021–0172).

(h) Exceptions to EASA AD 2021–0172

(1) Where EASA AD 2021–0172 refers to its effective date, this AD requires using the effective date of this AD.

(2) The remarks section of EASA AD 2021–0172 does not apply to this AD.

(3) Where paragraph (3) of EASA AD 2021–0172 specifies ''any discrepancy,'' for this AD ''any discrepancy'' includes broken fittings, missing bolts, an electronics rack FIN 80VU that is in contact with structure, any bush that has migrated, burred material, and cracks.

(i) Method of Compliance for Paragraphs (1), (2), and (3) of EASA AD 2021–0172

Accomplishing inspections and correctives actions in accordance with the Accomplishment Instruction of Airbus Service Bulletin A320–25–1BKJ, Revision 02, dated April 9, 2020, with corrections referenced in the Airbus Technical Adaptation 80827186/024/2020, Issue 1, dated September 18, 2020, is an acceptable method of compliance for the inspections and corrective actions specified in paragraphs (1), (2), and (3) of EASA AD 2021–0172.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, 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 Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(ii) AMOCs approved previously for AD 2013–25–11 are approved as AMOCs for the corresponding provisions of EASA AD 2021–0172 that are required by paragraph (g) of this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2021–0172 that contains RC procedures and tests: Except as required by paragraph (j)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Related Information

(1) For information about EASA AD 2021–0172, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* For Airbus service information, contact Airbus SAS, Airworthiness Office—EIAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* internet *http://www.airbus.com.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St. Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. The EASA material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0506.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email *sanjay.ralhan@faa.gov.*

Issued on November 8, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–24791 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Chapter II

[Docket No. DEA–759]

RIN 1117–AB74

Regulation of Telepharmacy Practice

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration (DEA) is issuing this advanced notice of proposed rulemaking to obtain further information regarding the practice of telepharmacy. Telepharmacy is not specifically defined by the Controlled Substances Act (CSA) or DEA regulations; however, to the extent telepharmacies dispense controlled substances, they are under the purview of the CSA and DEA. DEA is considering promulgating regulations regarding telepharmacy and seeks to be fully informed about the practice, industry, and state regulation of telepharmacy.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before January 18, 2022. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''RIN 1117–AB74/Docket No. DEA–759'' on all correspondence, including any attachments.

• *Electronic comments:* DEA encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that

submitted comments are not instantaneously available for public view on *Regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted, and there is no need to resubmit the same comment.

• *Paper comments:* Paper comments that duplicate the electronic submission are not necessary. Should you wish to mail a paper comment in lieu of an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, VA 22152–2639.

FOR FURTHER INFORMATION CONTACT:

Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 776–2265.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. They will, unless reasonable cause is given, be made available by DEA for public inspection online at *https://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) that you voluntarily submit. The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all of the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment.

Comments containing personal identifying information or confidential business information identified as directed above will be made publicly available in redacted form. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *https://www.regulations.gov* may include any personal identifying information (such as your name, address, etc.) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this advanced notice of proposed rulemaking is available at *https://www.regulations.gov* for ease of reference.

Background and Purpose

I. Legal Authority

The Drug Enforcement Administration (DEA) implements and enforces the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act (CSIEA), (21 U.S.C. 801–971), as amended. DEA publishes the implementing regulations for these statutes in 21 CFR parts 1300 to end. These regulations are designed to ensure a sufficient supply of controlled substances for medical, scientific, and other legitimate purposes, and to deter the diversion of controlled substances for illicit purposes.

As mandated by the CSA, DEA establishes and maintains a closed system of control for manufacturing, distribution, and dispensing of controlled substances, and requires any person who manufactures, distributes, dispenses, imports, exports, or conducts research or chemical analysis with controlled substances to register with DEA, unless they meet an exemption, pursuant to 21 U.S.C. 822. The CSA authorizes the Administrator of DEA (by delegation of authority from the Attorney General) to register an applicant to manufacture, distribute or dispense controlled substances if the Administrator determines such registration is consistent with the public interest. 21 U.S.C. 823. The CSA further authorizes the Administrator to promulgate regulations necessary and appropriate to execute the functions of subchapter I (Control and Enforcement) and subchapter II (Import and Export) of the CSA. 21 U.S.C. 871(b) and 958(f). Pursuant to these authorities, DEA is considering promulgating regulations regarding telepharmacy and seeks to be fully informed about the practice, industry, and state regulation of telepharmacy.

II. Telepharmacy

The term telepharmacy is not currently defined by the CSA or DEA regulation. Generally speaking, however, telepharmacy is considered to be the provision of pharmacist care by a remote pharmacist, through the use of telecommunications and other technologies, to a patient located at a dispensing site. Such pharmacist care may include, but is not limited to: The dispensing and distribution of prescription drugs, drug use review, patient counseling services, and drug therapy monitoring. Depending on the relevant state authority and regulations, telepharmacies may fill paper prescriptions or electronic prescriptions.

While the practice of telepharmacy varies from state to state, they generally fall within one of two categories: (i) *Brick and mortar remote sites*; and (ii) *self-service, automated machines. Brick and mortar remote sites* are traditional, storefront businesses, physically staffed by non-pharmacist employees, *e.g.,* pharmacy technicians, who are remotely supervised by a pharmacist located in a separate ''parent'' or ''hub'' pharmacy, via continuous and real-time computer, video, and audio links (*i.e.,* telecommunication connection). Depending on the state, a pharmacy technician may assist the remote pharmacist by receiving and inputting prescriptions into the pharmacy's information management system and preparing prescriptions for dispensing.

Self-service, automated machines are kiosks, resembling an Automatic Teller Machine (ATM), which contain pharmacy prescription medication/inventory, labeling equipment, and the telecommunication technology that connects the patient-user to the remote pharmacist via real-time video and audio links. Such automated machines may accept prescriptions or refill orders, store prepackaged or repackaged medications, label and dispense patient-specific prescriptions, and ultimately dispense the prescription to the patient-user.

Telepharmacy has expanded nationwide over the past two decades to address the need for pharmacy care in rural and other underserved communities, which may have a difficult time recruiting or supporting the employment of a pharmacist full-time. Despite the benefit of increased access to pharmacist care, such telepharmacies may pose a heightened risk of diversion by not having a pharmacist physically present to supervise and oversee remote sites and by not having any in-person monitoring

of automated machines. As many of these telepharmacies may dispense controlled substances, DEA is considering promulgating regulations for a special or modified telepharmacy registration.

III. Online Pharmacies Under the Ryan Haight Act

As telepharmacies utilize the *internet* to dispense controlled substances, they may constitute Online Pharmacies under the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (Ryan Haight Act) and must therefore either: (1) Obtain a modified registration under 21 CFR 1301.19; or (2) meet one of the exceptions to an Online Pharmacy under 21 CFR 1300.04(h). The terms ''internet'' and ''online pharmacy'' are defined in the CSA. The internet is ''collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/internet Protocol, or any predecessor or successor protocol to such protocol, to communicate information of all kinds by wire or radio.'' 21 U.S.C. 802 (50) and 21 CFR 1300.04(g).

An online pharmacy is defined as any ''person, entity, or internet site, whether in the United States or abroad, that knowingly or intentionally delivers, distributes, or dispenses, or offers or attempts to deliver, distribute, or dispense, a controlled substance by means of the internet.'' 21 U.S.C. 802 (52) and 21 CFR 1300.04(h). It is unlawful for any person or entity to operate as an online pharmacy, unless that person or entity is a DEA registered pharmacy under 21 CFR 1301.13 and DEA has approved and issued that person or entity a modified registration. 21 U.S.C. 823(f) and 21 CFR 1301.13(a). DEA may deny registration of an internet pharmacy if it determines the issuance of the necessary license modification would be inconsistent with the public interest. 21 CFR 1301.19(a). To date, there are no online pharmacies registered with DEA.

Paragraph (h) of 21 CFR 1300.04, provides ten exceptions to the definition of ''online pharmacy,'' eight of which come directly from the Ryan Haight Act. 21 CFR 1300.04(h)(1)–(10); 21 U.S.C. 802(52)(B). The first seven exceptions of the regulation provide exemptions for: DEA-registered manufacturers, distributors, and non-pharmacy practitioners; certain hospitals and other health care facilities associated with the United States government, and their respective agents and employees; advertisements that do not attempt to facilitate an actual transaction involving a controlled substance; and non-domestic persons, entities, or internet sites that do not facilitate the delivery, distribution, or dispensing of a controlled substance to persons in the U.S. The last three exceptions exempt pharmacies whose dispensing of controlled substances by means of the internet consists solely of: Filling or refilling prescriptions for controlled substances in schedules III–V; filling prescriptions that were electronically prescribed; and transmitting prescription information between a pharmacy and an automated dispensing system located in a long-term care facility. Telepharmacies may not use the internet to facilitate the dispensing of controlled substances unless they have been issued a modified registration under 21 CFR 1301.19 or fall within one of these exceptions.

IV. Electronic Prescriptions of Controlled Substances (EPCS) Exception

The one exception DEA finds applicable in the context of telepharmacy is the Electronic Prescriptions of Controlled Substances (EPCS) exception. The EPCS exception provides that a DEA-registered pharmacy is not an Online Pharmacy if: ''. . . [its] dispensing of controlled substances by means of the internet consists solely of *filling prescriptions that were electronically prescribed* in a manner authorized by [chapter II of title 21 of the CFR] and otherwise in compliance with the [Controlled Substances Act]'' (emphasis added). 21 CFR 1300.04(h)(9). Pharmacies are authorized to fill electronically transmitted prescriptions for controlled substances provided that the pharmacy complies with the requirements of parts 1306 and 1311 of the regulations. 21 CFR 1306.08. Under this EPCS exception, telepharmacies are permitted to fill electronic prescriptions of controlled substances in compliance with DEA's EPCS regulations; however, they are not permitted to fill paper prescriptions of controlled substances. The EPCS exception does not, however, constitute a legal safe harbor that would excuse or cure other regulatory violations; telepharmacies must still otherwise comply with DEA regulations regarding registration, prescriptions, security, recordkeeping, and reporting.

V. State Regulations

DEA is aware that several states have authorized telepharmacy practice under their general legislative authority and through a variety of state regulatory entities, including state boards of pharmacy and state licensing commissions. While DEA has obtained some information regarding state telepharmacy regulations, it does not believe that the information it has is complete. Therefore, as discussed further below, DEA is specifically seeking information from state regulatory authorities regarding states' legislative and/or regulatory requirements for telepharmacy licensing and regulations.

Comments Requested

DEA is soliciting information from the state regulatory authorities, national and professional associations, industry, telepharmacy vendors and servicers, and the general public so that DEA may obtain a better understanding of telepharmacy and how it is currently working. DEA seeks to promulgate requirements for telepharmacies in light of the growth of this telehealth service nationwide, particularly in how they dispense controlled substances. Commenters are encouraged to include the question number enumerated below in their response (*e.g.,* ''I.4'' or ''II.20''). Although all comments are welcome, DEA is particularly interested in comments regarding the questions listed below and any other pertinent information and input on telepharmacy.

I. State Regulatory Authorities

1. Please describe the organization and operation of telepharmacy practices authorized in your state. *E.g.,* does your state permit or license both remote dispensing sites and automated machines?

2. How many telepharmacies are currently authorized or licensed in your state? Do you foresee even greater growth of telepharmacies in your state?

3. Please describe the telepharmacy licensing process in your state, including the criteria by which a licensing application is or will be approved or denied.

4. Is a patient-practitioner relationship required prior to telepharmacy services for a controlled and/or non-controlled drug product?

5. How many remote dispensing sites/automated machines can one remote pharmacist supervise at one time? If multiple remote sites, what happens when the pharmacist is needed by multiple remote dispensing sites at the same time?

6. Are there limits to how many remote pharmacists or organizations can access a dispensing site or automated machine?

7. Is there a controlled substance volume limit/restriction with telepharmacies?

8. What additional policies and procedures are required of telepharmacies that are not required of other pharmacies?

9. What additional security requirements are required of telepharmacies that are not required of other retail or community pharmacies?

10. Are there any regulatory considerations or policies regarding transfer of controlled and/or non-controlled substances to remote sites (in cases where drugs are stored at the remote site)?

11. Do remote dispensing sites or automated machines need to be at the same location as (or within a certain distance from) the remote pharmacist? Do the remote dispensing sites or automated machines need to be a certain distance from another remote dispensing site or automated machine?

12. Does the remote pharmacist need to be in the same state (board jurisdiction) as the remote sites or automated machines?

13. Are there other restrictions on where a remote site or automated machine may be located? *E.g.,* are they only permitted at hospitals? Can an automated machine be placed outside a gas station or convenience store, or in proximity to a school? Does your state allow telepharmacy services in nursing homes, assisted living facilities, or for hospice programs?

14. Does your state allow interstate practice of telepharmacy, *i.e.* the practice of telepharmacy across state lines? Do out-of-state pharmacists providing telepharmacy services into your state need to register with your state board?

15. Can a remote pharmacist with an out-of-state license, who is authorized under federal law to care for patients in your state (*e.g.,* Department of Veterans Affairs pharmacists), serve as the pharmacist for a dispensing site or automated machine?

16. What recordkeeping and reporting requirements are there for telepharmacies?

17. Please describe the state's inspection process for telepharmacies.

18. Do the pharmacy technicians that staff remote sites need to be certified or licensed by the state? Can telepharmacies hire pharmacy technicians with criminal histories?

19. Does your state limit the type or manner of prescriptions that can be filled by the remote site or automated machine? Are they only allowed to fill non-controlled substances? Do they only fill electronic prescriptions as opposed to paper prescriptions? Are faxed prescriptions permitted?

20. Are there any specific regulations or considerations regarding prescribing and dispensing of opioid reversal agents by telepharmacy or automated machines?

21. Please provide examples of major issues associated with telepharmacy that have been reported to your state regulatory authorities?

22. Please provide any information that could be used to help DEA quantify or discuss qualitatively the potential costs and benefits of a rule that would either promote or restrict the use of telepharmacy.

II. Industry and Health Care Providers

23. Are the remote sites or automated machines typically owned and operated by the owner of the parent or hub pharmacy? If they do not share owners, how is recordkeeping handled?

24. How are locations selected for the remote sites or automated machines? If locations are based on the sociodemographic of a region or community, can you provide the data or information considered.

25. What additional training, if any, do you provide telepharmacy pharmacists and telepharmacy support staff?

26. With the absence of the pharmacist at the remote site and automated machine, how does the pharmacist adequately supervise and oversee telepharmacy technicians and staff?

27. If controlled substances are dispensed at your telepharmacy practice, are they stored and accounted for separately from non-controlled substances?

28. If your practice has not implemented the use of electronic prescriptions, what is preventing you from full implementation?

29. For those that have not adopted telepharmacy, what are the reasons or barriers to adopting telepharmacy?

30. How does the pharmacist make his or her final verification of the filled prescription remotely?

31. Is your remote site or automated machine registered with the DEA? If so, under what business activity?

32. If you are a remote pharmacist at a telepharmacy, how many remote sites and automated machines can you adequately supervise during the same period of time?

33. Please provide any information that could be used to help DEA quantify or discuss qualitatively the potential costs and benefits of a rule that would either promote or restrict the use of telepharmacy.

III. Telepharmacy Vendors and Servicers

34. Please describe how telepharmacy technology and systems safeguard against diversion by the public at large, as well as by employees at remote sites and automated machines.

35. From a design standpoint, how are automated machines used in telepharmacy practices similar and dissimilar from the Automatic Dispensing Systems (ADSs) used at Long Term Care Facilities?

36. Are your telepharmacy technology and systems Health Insurance Portability and Accountability Act compliant?

37. Are your telepharmacy technology and systems accessible for individuals with disabilities, *e.g.,* such as hearing impaired or blind persons?

38. Do you offer 24/7 surveillance of the telepharmacy remote site or automated machine?

39. Please provide any information that could be used to help DEA quantify or discuss qualitatively the potential costs and benefits of a rule that would either promote or restrict the use of telepharmacy.

Statutory and Executive Order Review

This advanced notice of proposed rulemaking (ANPRM) has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review.'' The Office of Management and Budget has determined that this ANPRM is a significant regulatory action under Executive Order 12866, section 3(f), and accordingly this ANPRM has been reviewed by the Office of Management and Budget. However, this action does not propose or impose any requirements.

Furthermore, the requirements of the Regulatory Flexibility Act (RFA) do not apply to this action because, at this stage, it is an ANPRM and not a ''rule'' as defined in 5 U.S.C. 601. Following review of the comments received in response to this ANPRM, if DEA proceeds with a notice or notices of proposed rulemaking regarding this matter, DEA will conduct all relevant analyses as required by statute or Executive order.

Anne Milgram,

Administrator.

[FR Doc. 2021–24948 Filed 11–16–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Chapter I

Defense Acquisition Regulations System

48 CFR Chapter 2

Cybersecurity Maturity Model Certification (CMMC) 2.0 Updates and Way Forward

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: This document provides updated information on DoD's way forward for the approved Cybersecurity Maturity Model Certification (CMMC) program changes, designated as ''CMMC 2.0.'' CMMC 2.0 builds upon the initial CMMC framework to dynamically enhance Defense Industrial Base (DIB) cybersecurity against evolving threats. The CMMC framework is designed to protect sensitive unclassified information that is shared by the Department with its contractors and subcontractors and provide assurance that Federal Contract Information (FCI) and Controlled Unclassified Information (CUI) will be protected at a level commensurate with the risk from cybersecurity threats, including Advanced Persistent Threats. Under the CMMC program, DIB contractors will be required to implement certain cybersecurity protection standards, and, as required, perform self-assessments or obtain third-party certification as a condition of DoD contract award.

DATES: November 17, 2021.

ADDRESSES: Visit the updated CMMC website for CMMC 2.0 updates: *https://www.acq.osd.mil/cmmc/.*

FOR FURTHER INFORMATION CONTACT: Ms. Diane Knight, Office of the Under Secretary of Defense for Acquisition and Sustainment, at 202–770–9100 or *diane.l.knight10.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

Background

The CMMC program is designed to enhance DIB cybersecurity to meet evolving threats and safeguard the information that supports and enables the Warfighter.

Interim Defense Federal Acquisition Regulation Supplement (DFARS) rule, *Assessing Contractor Implementation of Cybersecurity Requirements* (DFARS Case 2019–D041), effective November 30, 2020, implemented DFARS clause 252.204–7021, *Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirement.* This clause implemented the initial version of CMMC program, hereafter ''CMMC 1.0.''

CMMC 1.0 was designed to protect FCI and CUI shared with and handled by DoD contractors and subcontractors on non-federal contractor information systems. CMMC 1.0 involved five progressively advanced levels of cybersecurity standards and required that DIB contractors undergo a certification process to demonstrate compliance with the CMMC cybersecurity standards at a given level.

In March 2021, the Department initiated an internal assessment of CMMC 1.0 implementation that was informed by more than 850 public comments in response to the interim DFARS rule. This comprehensive, programmatic assessment of CMMC engaged cybersecurity and acquisition leaders within DoD to refine policy and program implementation. This review resulted in ''CMMC 2.0,'' which updates the program structure and the requirements to streamline and improve implementation of the CMMC program.

Way Forward

The changes reflected in the CMMC 2.0 framework will be implemented through the rulemaking process. DoD will pursue rulemaking in both: (1) Title 32 of the Code of Federal Regulations (CFR); and, (2) title 48 CFR, to establish CMMC 2.0 program requirements and implement any needed changes to the CMMC program content in 48 CFR. Both rules will have public comment periods.

Publication of title 32 and title 48 CFR rules will implement DoD's requirements for the updated CMMC version 2.0, which include various modifications from CMMC 1.0.

These modifications include:

- Eliminating levels 2 and 4, and renaming the remaining three levels in CMMC 2.0 as follows:
  - Level 1 (Foundational) will remain the same as CMMC 1.0 Level 1;
  - Level 2 (Advanced) will be similar to CMMC 1.0 Level 3;
  - Level 3 (Expert) will be similar to CMMC 1.0 Level 5.
- Removing CMMC-unique practices and all maturity processes from all levels;
- For CMMC Level 1 (Foundational), allowing annual self-assessments with an annual affirmation by DIB company leadership;
- Bifurcating CMMC Level 2 (Advanced) assessment requirements:
  - Prioritized acquisitions involving CUI will require an independent third party assessment;
  - Non-prioritized acquisitions involving CUI will require an annual self-assessment and annual company affirmation;
- For CMMC Level 3 (Expert), requiring Government-led assessments.
- Developing a time-bound and enforceable Plan of Action and Milestone process; and,
- Developing a selective, time-bound waiver process, if needed and approved.

The title 32 CFR rulemaking for CMMC 2.0 will be followed by additional title 48 CFR rulemaking, as needed, to implement any needed changes to the CMMC program content in 48 CFR. DoD will work through the rulemaking processes as expeditiously as possible.

Until the CMMC 2.0 changes become effective through both the title 32 CFR and title 48 CFR rulemaking processes, the Department will suspend the CMMC Piloting efforts and will not approve inclusion of a CMMC requirement in DoD solicitations.

The CMMC 2.0 program requirements will not be mandatory until the title 32 CFR rulemaking is complete, and the CMMC program requirements have been implemented as needed into acquisition regulation through title 48 rulemaking.

Dated: November 8, 2021.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–24880 Filed 11–16–21; 8:45 am]

BILLING CODE 5001–06–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Parts 201, 220, 222, 223, and 224

[Docket No. 2021–6]

Copyright Claims Board: Initiation of Proceedings and Related Procedures

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

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The U.S. Copyright Office is further extending the deadline for the submission of written comments in response to its September 29, 2021, notice of proposed rulemaking regarding initiating proceedings before the Copyright Claims Board.

DATES: The comment period for the notice of proposed rulemaking

published September 29, 2021, at 86 FR 53897, is extended. Initial written comments must be received no later than 11:59 p.m. Eastern Time on November 30, 2021. Written reply comments must be received no later than 11:59 p.m. Eastern Time on December 15, 2021.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *http://copyright.gov/rulemaking/case-act-implementation/initiating-proceedings/.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

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

SUPPLEMENTARY INFORMATION: On September 29, 2021, the U.S. Copyright Office issued a notice of proposed rulemaking (''NPRM'') regarding initiating proceedings before the Copyright Claims Board (''CCB''). The Office solicited public comments on a broad range of procedures governing the initial stages of a CCB proceeding, including filing the initial claim, opting out of a proceeding, and filing a response and any counterclaims.

On October 27, 2021, the Office extended the comment period in this proceeding by two weeks. In response to stakeholder requests following that extension, the Office is now further extending the deadline for the submission of initial comments to no later than 11:59 p.m. Eastern Time on November 30, 2021, and the deadline for the submission of reply comments to no later than 11:59 p.m. Eastern Time on December 15, 2021. The Office does not intend to grant further extensions in this proceeding.

Dated: November 10, 2021.

Kevin R. Amer,

Acting General Counsel and Associate Register of Copyrights.

[FR Doc. 2021–25001 Filed 11–16–21; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2021–0055; FRL–8986–01–R4]

Air Plan Approval; North Carolina; Mecklenburg Volatile Organic Compounds

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision to the Mecklenburg County portion of the North Carolina SIP, hereinafter referred to as the Mecklenburg Local Implementation Plan (LIP). The revision was submitted by the State of North Carolina, through the North Carolina Division of Air Quality (NCDAQ), on behalf of Mecklenburg County Air Quality (MCAQ) via a letter dated April 24, 2020, and was received by EPA on June 19, 2020. The revision updates several Mecklenburg County Air Pollution Control Ordinance (MCAPCO) rules incorporated into the LIP, removes several rules, and adds several rules. The rules addressed in this proposal relate to volatile organic compound (VOC) emissions and include several VOC Reasonably Available Control Techniques (RACT) rules. EPA is proposing to approve these changes pursuant to the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before December 17, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2021–0055 at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Jane Spann, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9029. Ms. Spann can also be reached via electronic mail at *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Overview

The Mecklenburg County LIP was submitted to EPA on June 14, 1990, and EPA approved the plan on May 2, 1991. *See* 56 FR 20140. Mecklenburg County is now requesting that EPA approve changes to the LIP for, among other things, general consistency with the North Carolina SIP.[1] Mecklenburg County prepared three submittals in order to update the LIP and reflect regulatory and administrative changes that NCDAQ made to the North Carolina SIP since EPA's 1991 LIP approval.[2] The three submittals were submitted as follows: NCDAQ transmitted the October 25, 2017, submittal to EPA but later withdrew it from review through a letter dated February 15, 2019. On April 24, 2020, NCDAQ resubmitted the October 25, 2017, update to EPA and also submitted the January 21, 2016, and January 14, 2019, updates. Due to an inconsistency with public notices at the local level, these submittals were withdrawn from EPA through a letter dated February 15, 2019. Mecklenburg County corrected this error, and NCDAQ submitted the updates to EPA in a submittal dated April 24, 2020.[3] This proposed rule proposes to modify the LIP by revising, adding, and removing several rules related to the control of VOCs, including several VOC RACT rules, located in MCAPCO Article 2.0000, *Air Pollution and Control Regulations and Procedures,* Section 2.0900, *Volatile Organic Compounds.*

On April 30, 2004, EPA designated the Charlotte-Gastonia-Rock Hill, NC-SC

[1] Hereinafter, the terms ''North Carolina SIP'' and ''SIP'' refer to the North Carolina regulatory portion of the North Carolina SIP (*i.e.,* the portion that contains SIP-approved North Carolina regulations).

[2] The Mecklenburg County, North Carolina revision that is dated April 24, 2020, and received by EPA on June 19, 2020, is comprised of three previous submittals—one dated January 21, 2016; one dated October 25, 2017; and one dated January 14, 2019.

[3] EPA notes that the April 24, 2020, submittal was received by EPA on June 19, 2020.

area (hereinafter referred to as the ''bi-state Charlotte Area'') as a moderate nonattainment area with respect to the 1997 8-hour ozone national ambient air quality standards (NAAQS). *See* 69 FR 23858. The bi-state Charlotte Area includes six full counties and one partial county in North Carolina and one partial county in South Carolina.[4] The North Carolina portion of the bi-state Charlotte Area consists of Cabarrus, Gaston, Lincoln, Mecklenburg, Rowan, and Union Counties and a portion of Iredell County which includes Davidson and Coddle Creek Townships.

As a result of this designation, North Carolina and South Carolina were required to amend their SIPs for their respective portions of the bi-state Charlotte Area to satisfy the relevant requirements of section 182 of the CAA. On July 25, 2013, EPA approved the RACT requirements for the North Carolina portion of the bi-state Charlotte Area.[5] *See* 78 FR 44890. Section 182(b)(2) of the CAA requires states to adopt RACT rules for all areas designated nonattainment for ozone and classified as moderate or above. The three parts of CAA section 182(b)(2) RACT requirements are: (1) RACT for sources covered by an existing Control Technique Guideline (CTG) (*i.e.,* a CTG issued prior to enactment of the 1990 amendments to the CAA); (2) RACT for sources covered by a post CAA 1990 amendments enactment CTG; and (3) RACT for all major sources not covered by a CTG (*i.e.,* non-CTG sources).

Pursuant to 40 CFR 51.165, a major source for a moderate ozone nonattainment area is a source that emits 100 tons per year or more of VOC or nitrogen oxides (NO_X). On May 9, 2013, EPA took final action to approve the North Carolina SIP revisions addressing NO_X RACT, VOC RACT, and CTG requirements. *See* 78 FR 27065. Together, these SIP revisions established the RACT requirements for the major sources located in the North Carolina portion of the bi-state Charlotte Area. NCDAQ submitted a SIP revision on May 1, 2013, to address deficiencies with the State's VOC RACT rules as identified in EPA's May 9, 2013, conditional approval of North Carolina's VOC RACT rules.[6] *See* 78 FR 27065.

II. What action is EPA proposing to take?

The April 24, 2020, submittal updates several MCAPCO rules incorporated into the LIP, removes several rules, and adds several rules to more closely align the LIP with the SIP. The January 21, 2016, changes include updates to MCAPCO Rules 2.0926, *Bulk Gasoline Plants;* 2.0927, *Bulk Gasoline Terminals;* 2.0928, *Gasoline Service Stations Stage 1;* and 2.0958, *Work Practice for Sources of Volatile Organic Compounds.* The submittal also seeks to remove MCAPCO Rules 2.0910, *Alternative Compliance Schedules* and 2.0929, *Petroleum Refinery Sources;* and add MCAPCO Rules 2.0947, *Manufacture of Synthesized Pharmaceutical Products;* 2.0948, *VOC Emissions from Transfer Operations;* and 2.0949, *Storage of Miscellaneous Volatile Organic Compounds.*[7]

The January 21, 2016 submittal also asks EPA to reincorporate the following rules with no changes or very few minor grammatical edits into the LIP with a new effective date: MCAPCO Rules 2.0906, *Circumvention;* 2.0918, *Can Coating;* 2.0919, *Coil Coating;* 2.0924, *Magnet Wire Coating;* 2.0925, *Petroleum Liquid Storage in Fixed Roof Tanks;* 2.0930, *Solvent Metal Cleaning;* 2.0931, *Cutback Asphalt;* 2.0933, *Petroleum Liquid Storage in External Floating Roof Tanks;* 2.0937, *Manufacture of Pneumatic Rubber Tires;* and 2.0944, *Manufacture of Polyethylene: Polypropylene and Polystyrene.*[8]

III. EPA's Analysis of North Carolina's Submittal

The April 24, 2020, SIP revision updates, removes, and adds rules in Section 2.0900, *Volatile Organic Compounds.* EPA is proposing to approve these changes to the LIP because they are consistent with the CAA and more closely align the LIP with the SIP.[9]

A. Rule 2.0910, Alternative Compliance Schedules

The April 24, 2020, revision removes Rule 2.0910, *Alternative Compliance Schedules,* from the LIP because the alternative compliance schedules became obsolete. They are obsolete because Rule 2.0910 only allows alternative compliance schedules if they are submitted before January 1, 1980.

Rule 2.0910 was first adopted into the MCAPCO in 1979, was approved by EPA into the LIP on May 2, 1991 (56 FR 20140), and established requirements for alternative compliance schedules for VOC sources. The proposed removal of Rule 2.0910 from the LIP is consistent with the removal of the corresponding state rule, 15A NCAC 02D .0910, *Alternative Compliance Schedules,* from the SIP on October 15, 1999. *See* 64 FR 55831. EPA approved North Carolina's March 19, 1997, SIP submittal seeking removal of Rule 02D .0910 because the alternative compliance schedules had become obsolete.

EPA is proposing to approve the removal of Rule 2.0910 because the alternate compliance schedules are obsolete, it better aligns the LIP with the SIP, and it will not interfere with any applicable CAA requirements.

B. Rule 2.0926, Bulk Gasoline Plants

The April 24, 2020, revision modifies Rule 2.0926, *Bulk Gasoline Plants,* by adding a definition for ''Average daily throughput;'' adding ''Incoming vapor balance system,'' and ''Outgoing vapor balance system'' to replace and clarify the definition for ''Vapor balance system;'' removing paragraph (c) and redistributing its components into paragraphs (b) and (d); clarifying language in a new paragraph (c); adding language to require outgoing vapor balance systems on certain receiving truck tanks and trailers at certain bulk gasoline plants and in nonattainment areas; making a few grammatical edits including renumbering and changing ''immediately'' to ''automatically and immediately'' in paragraph (i); requiring that gasoline storage tanks be painted white or silver; requiring pressure relief valves on stationary storage tanks to be

[4] The South Carolina portion of the bi-state Charlotte Area consists of the portion of York County, South Carolina that falls within the Rock Hill-Fort Mill Area Transportation Study Metropolitan Planning Organization Area.

[5] EPA approved the RACT requirements for the South Carolina portion of the bi-state Charlotte Area on November 28, 2011, at 76 FR 72844.

[6] The bi-state Charlotte Area was redesignated to attainment for the 1997 ozone NAAQS on December 2, 2013, and December 26, 2012, for North Carolina and South Carolina, respectively. The Charlotte-Rock Hill, North Carolina—South Carolina Area was designated as a marginal nonattainment area for the 2008 ozone NAAQS on May 21, 2012, and redesignated to attainment for that NAAQS on July 28, 2015 and December 11, 2015, for North Carolina and South Carolina, respectively. That area was designated attainment for the 2015 ozone NAAQS on November 6, 2017. The Charlotte area is currently attaining all ozone NAAQS.

[7] EPA notes that the Agency received revisions to several rules updating the Mecklenburg County portion of the North Carolina SIP transmitted with the same April 24, 2020, cover letter. EPA will be considering these other SIP revisions, including certain Section 2.2600 and Section 2.0900 rules in separate rulemakings.

[8] Hereinafter, the MCAPCO Rules will be identified by ''Rule'' and the accompanying number, *e.g.,* Rule 2.0901.

[9] This section does not analyze Rules 2.0906, *Circumvention;* 2.0918, *Can Coating;* 2.0919, *Coil Coating;* 2.0924, *Magnet Wire Coating;* 2.0925, *Petroleum Liquid Storage in Fixed Roof Tanks;* 2.0930, *Solvent Metal Cleaning;* 2.0931, *Cutback Asphalt;* 2.0933, *Petroleum Liquid Storage in External Floating Roof Tanks;* 2.0937, *Manufacture of Pneumatic Rubber Tires;* and 2.0944, *Manufacture of Polyethylene: Polypropylene and* Polystyrene because there are no changes or very few minor grammatical edits.

set at 0.5 psi for storage tanks placed in service on or after November 1, 1992, and 0.25 psi for storage tanks existing before November 1, 1992; requiring transfer of gasoline to be discontinued if liquid or vapor leaks are observed; and requiring truck tank and trailers to be certified leak tight in accordance with Rule 2.0932. The changes more closely align the rule with the corresponding SIP-approved state rule at 15A NCAC 02D .0926, *Bulk Gasoline Plants,* which reflects EPA's Bulk Gasoline Plants CTG.

Rule 2.0926 was first approved by EPA into the LIP on May 2, 1991 (56 FR 20140), was revised on June 23, 1994 (59 FR 32362), and established requirements to meet the 1977 CTG for controlling VOC emissions from bulk gasoline plants. EPA most recently approved amendments to the state rule in North Carolina's SIP, including updates that correspond to those proposed for incorporation into the LIP-approved version of Rule 2.0926, on August 1, 1997. *See* 62 FR 41277.

EPA is proposing to approve the changes to Rule 2.0926 because they add and clarify necessary definitions, require outgoing vapor balance systems, set required pressures for pressure relief valves and address leaks to be consistent with EPA's CTG, better align the LIP with the SIP, and will not interfere with any applicable CAA requirements.

C. Rule 2.0927, Bulk Gasoline Terminals

The April 24, 2020, revision modifies Rule 2.0927, *Bulk Gasoline Terminals,* by adding definitions for ''Degassing,'' ''Leak,'' ''Liquid balancing,'' and ''Liquid displacement;'' making a few grammatical edits including renumbering; and adding requirements for collecting, controlling, inspecting for leaks and documenting emissions from external and internal floating roof tanks at a bulk gasoline terminal, citing Rule 2.0903. The changes more closely align the rule with the corresponding SIP-approved state rule at 15A NCAC 02D .0927, *Bulk Gasoline Terminals,* which reflects EPA's Tank Truck Gasoline Loading Terminals CTG.

Rule 2.0927 was first approved by EPA into the LIP on May 2, 1991 (56 FR 20140), and established requirements to meet the 1977 CTG for controlling VOC emissions from bulk gasoline terminals. EPA most recently approved amendments to the state rule in North Carolina's SIP, including updates that correspond to those proposed for incorporation into the LIP-approved version of Rule 2.0927, on October 31, 2007. *See* 72 FR 61531.[10]

EPA is proposing to approve the changes to Rule 2.0927 because they add details on leak inspection, recordkeeping, and requirements for leak repair; standardize procedures used at bulk gasoline terminals to locate, repair and document leaks of VOC; require routine inspections; make it easier for MCAQ to determine compliance; better align the LIP with the SIP; and will not interfere with any applicable CAA requirements.

D. Rule 2.0928, Gasoline Service Station Stage 1

The April 24, 2020, revision modifies Rule 2.0928, *Gasoline Service Station Stage 1,* by adding definitions for ''Coaxial system,'' ''Dual point system,'' ''Line,'' ''Poppeted vapor recovery adaptor,'' ''Stationary storage tank,'' and ''Throughput;'' amending the definition for ''Submerged fill pipe'' to clarify the distance above the bottom of the tank depending on if there is a vapor recovery adaptor or not and measurement depending on whether the pipe is cut at a slant; adding applicability to delivery vessels delivering gasoline to a gasoline dispensing facility or gasoline service station; changing an exemption for certain transfers; adding clarifying language related to submerged fill pipes; adding an exemption for certain stationary storage tanks with a capacity of not more than 2,000 gallons of gasoline and for any tanks used exclusively to test the fuel dispensing meters except for those in ozone nonattainment areas; clarifying that vapor control systems must have a vapor tight connection and delivery vessels and vapor collections systems must comply with rule 2.0932 in order for gasoline to be transferred from any delivery vessel into any stationary storage tank; clarifying requirements for the vapor control system depending on whether it is a coaxial or dual point vapor recovery system and adding additional paragraphs to further explain these clarifications; removing allowance for alternative vapor control system requirements; requiring that vent lines on tanks with Stage 1 controls shall have pressure release valves or restrictors; changing the requirement that refilled vapor-laden delivery vessels that are refilled in nonattainment areas shall be refilled only at plants meeting Rules 2.096 or 2.0927 to requiring that refilled vapor-laden delivery vessels that are refilled in North Carolina shall be refilled only at plants meeting Rules 2.096 or 2.0927; and making a few grammatical edits including renumbering. The changes more closely align the rule with the corresponding SIP-approved state rule at 15A NCAC 02D .0928, *Gasoline Service Stations Stage 1,* which reflects EPA's Stage 1 Vapor Control Systems CTG.

Rule 2.0928 was first approved by EPA into the LIP on May 2, 1991 (56 FR 20140) and last revised on June 23, 1994 (59 FR 32362). The rule established requirements to meet the 1975 CTG for controlling VOC emissions from gasoline service stations through the Stage 1 Vapor Recovery systems. EPA most recently approved amendments to the state rule in North Carolina's SIP, including updates that correspond to those proposed for incorporation into the LIP-approved version of Rule 2.0928, on August 1, 1997. *See* 62 FR 41277.

EPA is proposing to approve the changes to Rule 2.0928 because they clarify Stage 1 vapor recovery requirements, better align the LIP with the SIP, and will not interfere with any applicable CAA requirements.

E. Rule 2.0929, Petroleum Refinery Sources

The April 24, 2020, revision removes Rule 2.0929 from the LIP because there are no sources in Mecklenburg County for which the Petroleum Refinery Leaks CTG category applies.

Rule 2.0929 was first adopted into the MCAPCO in 1979, was approved by EPA into the LIP on May 2, 1991 (56 FR 20140), and was revised in the LIP on June 23, 1994 (59 FR 32362). Rule 2.0929 established requirements to meet the 1978 Petroleum Refinery Leaks CTG for controlling VOC emissions from petroleum refinery equipment. The proposed removal of Rule 2.0929 from the LIP is consistent with the removal of the corresponding state rule 15A NCAC 02D .0929, *Petroleum Refinery Sources,* from the SIP on August 1, 1997. *See* 62 FR 41277.[11]

[10] EPA's action at 78 FR 27065, identified in the entry for Rule 02D .0927 at 40 CFR 52.1770(c), did not modify the rule text.

[11] In an April 6, 2010, SIP revision, North Carolina made a negative declaration for the Petroleum Refinery Sources CTG source category stating that there are no applicable sources in the North Carolina portion of the bi-state Charlotte Area, including Mecklenburg County, North Carolina. EPA approved that SIP revision on May 9, 2013 (78 FR 27065). On October 18, 2021, Mecklenburg County confirmed there are currently no petroleum refineries in Mecklenburg County. *See* email from Leslie Rhodes, Air Quality Director, Mecklenburg County Air Quality to Lynorae Benjamin, Branch Chief, Air Planning and Implementation Branch, EPA Region 4 found in the docket for this proposed action.

EPA is proposing to approve the removal of Rule 2.0929 because there are no petroleum refineries in Mecklenburg County, it better aligns the LIP with the SIP, and will not interfere with any applicable CAA requirements.

F. Rule 2.0947, Manufacture of Synthesized Pharmaceutical Products

The April 24, 2020, revision adds Rule 2.0947, *Manufacture of Synthesized Pharmaceutical Products,* to Section 2.0900. Mecklenburg adopted Rule 2.0947 on July 1, 1994, and it contains requirements to meet the 1978 CTG for controlling VOC emissions from the manufacture of synthesized pharmaceutical products. Rule 2.0947 includes definitions for ''Production equipment exhaust system'' and ''Synthesized pharmaceutical manufacturing;'' applicability and emission control requirements for reactors, distillation operations, crystallizers, centrifuges, vacuum dryers, air dryers, production equipment exhaust systems, storage tanks and centrifuges, rotary vacuum filters, and other filters related to VOC and in-process tanks; requirements for leak repairs; and required temperatures for condenser outlets.

Approving the April 24, 2020 SIP revision would add these CTG requirements to the LIP and more closely align the LIP with the SIP which contains a state rule analog at 15A NCAC 02D .0947, *Manufacture of Synthesized Pharmaceutical Products.* North Carolina adopted Rule 02D .0947 in 1994, and EPA approved it into the SIP on January 26, 1995. *See* 60 FR 5136.

EPA is proposing to incorporate Rule 2.0947 into the LIP to add the aforementioned CTG requirements and better align the LIP with the SIP. Adding this rule to the LIP will not interfere with any applicable CAA requirements.

G. Rule 2.0948, VOC Emissions From Transfer Operations

The April 24, 2020, revision adds Rule 2.0948, *VOC Emissions From Transfer Operations,* to Section 2.0900. Mecklenburg adopted Rule 2.0948 on July 1, 1994. Rule 2.0948 applies to operations that transfer VOC from a storage tank to truck-tanks, trailers, or railroad tank cars that are not covered by Rule 2.0929, *Bulk Gasoline Plants,* 2.0927, *Bulk Gasoline Terminals,* or 2.0928, *Gasoline Stations Stage I,* and provides requirements for loading VOCs into a truck-tank, trailer, or railroad tank car from storage tanks regulated by Rule 2.0948.

Approving the April 24, 2020 SIP revision would add these VOC emissions requirements to the LIP and more closely align the LIP with the SIP which contains a state rule analog at 15A NCAC 02D .0948, *VOC Emissions From Transfer Operations.* North Carolina adopted Rule 02D .0948 in 1994, and EPA approved it into the SIP on January 26, 1995. *See* 60 FR 5136. EPA most recently approved amendments to the state rule in North Carolina's SIP on August 27, 2001, to make minor administrative changes and clarifications. *See* 66 FR 34117.

EPA is proposing to incorporate Rule 2.0948 into the LIP to add the aforementioned VOC emissions requirements and better align the LIP with the SIP. Adding this rule to the LIP will not interfere with any applicable CAA requirements.

H. Rule 2.0949, Storage of Miscellaneous Volatile Organic Compounds

The April 24, 2020, revision adds Rule 2.0949, *Storage of Miscellaneous Volatile Organic Compounds,* to Section 2.0900. Mecklenburg adopted Rule 2.0949 on July 1, 1994. Rule 2.0949 applies to the storage of VOCs in stationary tanks, reservoirs, or other containers with a capacity greater than 50,000 gallons that are not covered by Rule 2.0925, *Petroleum Liquid Storage in Fixed Roof Tanks,* or Rule 2.0933, *Petroleum Liquid Storage in External Floating Roof Tanks,* and provides requirements for VOC storage at sources to which Rule 2.0949 applies.

Approving the April 24, 2020 SIP revision would add these VOC emissions requirements to the LIP and more closely align the LIP with the SIP which contains a state rule analog at 15A NCAC 02D .0949, *Storage of Miscellaneous Volatile Organic Compounds.* North Carolina adopted Rule 02D .0949 in 1994, and EPA approved it into the SIP on January 26, 1995. *See* 60 FR 5136. EPA most recently approved amendments to Rule 02D .0949 on August 27, 2001, to remove the requirement of having the director approve the vapor recovery system or any other means of air pollution. *See* 66 FR 34117.

EPA is proposing to incorporate Rule 2.0949 into the LIP to add the aforementioned VOC emissions requirements and better align the LIP with the SIP. Adding this rule to the LIP will not interfere with any applicable CAA requirements.

I. Rule 2.0958, Work Practice for Sources of Volatile Organic Compounds

The April 24, 2020, revision modifies Rule 2.0958, *Work Practice for Sources of Volatile Organic Compounds,* by adding an exemption for sources subject to 40 CFR part 63 Subpart JJ (National Emissions Standards For Wood Furniture Manufacturing);[12] amending the requirement from cleaning up spills within 30 minutes to cleaning them up as soon as possible following proper safety procedures; changing ''painting'' to ''coating'' to clarify that solvents from the cleaning of all coating equipment must be contained properly; removing the requirement to minimize over application and over spray of all material containing VOCs; and changing ''all reasonable precautions'' to ''precautions'' when reducing the pooling of solvent on and in the parts and making minor edits. These changes more closely align Rule 2.0958 with the corresponding SIP-approved state rule at 15A NCAC 02D .0958, *Work Practice for Sources of Volatile Organic Compounds.*

Rule 2.0958 was approved by EPA into the LIP on October 22, 2002 (67 FR 64999). The rule established general work practices for VOC sources for controlling VOCs. EPA most recently approved amendments to the state rule in North Carolina's SIP on July 25, 2013. *See* 78 FR 44890.

EPA is proposing to approve this revision to make the aforementioned revisions and to better align the LIP with the SIP. EPA has preliminarily determined that this is consistent with federal regulations.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference MCAPCO Rules 2.0906, *Circumvention;* 2.0918, *Can Coating;* 2.0919, *Coil Coating;* 2.0924, *Magnet Wire Coating;* 2.0925, *Petroleum Liquid Storage in Fixed Roof Tanks;* 2.0926, *Bulk Gasoline Plants;* 2.0927, *Bulk Gasoline Terminals;* 2.0928, *Gasoline Service Stations Stage I;* 2.0930, *Solvent Metal Cleaning;* 2.0931, *Cutback Asphalt;* 2.0933, *Petroleum Liquid Storage in External Floating Roof Tanks;* 2.0937, *Manufacture of Pneumatic Rubber Tires;* 2.0944, *Manufacture of Polyethylene: Polypropylene and Polystyrene;* 2.0947, *Manufacture of Synthesized Pharmaceutical Products;* 2.0948, *VOC Emissions from Transfer Operations;* 2.0949, *Storage of Miscellaneous Volatile Organic Compounds;* and 2.0958, *Work Practice for Sources of Volatile Organic Compounds,* all of

[12] 40 CFR part 63 Subpart JJ contains work practice standards at 40 CFR 63.803.

which have an effective date of December 15, 2015, into the Mecklenburg County portion of the North Carolina SIP to update the rules to more closely align with their analog North Carolina rules in the SIP. Also in this document, EPA is proposing to remove MCAPCO Rules 2.0910, *Alternative Compliance Schedules* and 2.0929, *Petroleum Refinery Sources* from the Mecklenburg County portion of the North Carolina SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make, the SIP generally available at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Proposed Action

EPA is proposing to approve the aforementioned revisions to the Mecklenburg LIP. Specifically, EPA is proposing to approve revisions to MCAPCO Rules 2.0926, *Bulk Gasoline Plants;* 2.0927, *Bulk Gasoline Terminals;* 2.0928, *Gasoline Service Stations Stage 1;* and 2.0958, *Work Practice for Sources of Volatile Organic Compounds.* EPA is also proposing to remove Rules 2.0910, *Alternative Compliance Schedules* and 2.0929, *Petroleum Refinery Sources* and to add Rules 2.0947, *Manufacture of Synthesized Pharmaceutical Products;* 2.0948, *VOC Emissions from Transfer Operations;* and 2.0949, *Storage of Miscellaneous Volatile Organic Compounds.* EPA is proposing to approve these changes to the LIP because they are consistent with the CAA.

EPA is also proposing to reincorporate the following rules with no changes or very few minor grammatical edits with a new effective date into the LIP: MCAPCO Rules 2.0906, *Circumvention;* 2.0918, *Can Coating;* 2.0919, *Coil Coating;* 2.0924, *Magnet Wire Coating;* 2.0925, *Petroleum Liquid Storage in Fixed Roof Tanks;* 2.0930, *Solvent Metal Cleaning;* 2.0931, *Cutback Asphalt;* 2.0933, *Petroleum Liquid Storage in External Floating Roof Tanks;* 2.0937, *Manufacture of Pneumatic Rubber Tires;* and 2.0944, *Manufacture of Polyethylene: Polypropylene and Polystyrene.*

VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds, Reporting and recordkeeping requirements.

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

Dated: November 8, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

[FR Doc. 2021–24900 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2021–0216, FRL–9168–01–R10]

Air Plan Approval; AK; Incorporation by Reference Updates and Permit Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Alaska State Implementation Plan (SIP) submitted on November 10, 2020. The revisions update the adoption by reference of certain Federal air regulations and add a pre-approved emission limit option that may be used to permit diesel engine facilities, among other changes. The EPA is proposing to approve the submitted revisions as consistent with Clean Air Act requirements.

DATES: Comments must be received on or before December 17, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2021–0216, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *https://www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on

making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Kristin Hall, EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101, at (206) 553–6357 or *hall.kristin@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we'' and ''our'' mean ''the EPA''.

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I. Background

Each state has a SIP containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS) established by the EPA for the criteria pollutants (carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, sulfur dioxide). The SIP is governed by section 110 of the Clean Air Act (CAA), and contains such elements as air pollution control regulations, emission inventories, monitoring network, attainment demonstrations, and enforcement mechanisms. The SIP is a living compilation of these elements and is revised and updated by the state over time—to remain consistent with Federal requirements and to address changing air quality conditions in the state.

Alaska establishes state air quality requirements in Alaska Administrative Code Title 18 Environmental Conservation, Chapter 50 Air Quality Control (18 AAC 50). The State then submits these provisions for EPA approval and incorporation by reference into the Alaska SIP in the Code of Federal Regulations (CFR) at 40 CFR part 52, subpart C, making the provisions federally enforceable. The Alaska SIP includes a variety of air pollution control measures, including permitting programs designed to limit emissions from new and modified major and minor stationary sources. To ensure the permitting programs remain consistent with Federal requirements, the State adopts certain provisions of the Federal air regulations by reference as of a certain date and submits updates to the EPA for approval. Alaska also makes periodic changes to State permitting programs to improve implementation and to address changing air quality conditions in the State.

II. Evaluation of Submission

A. Updates to Adoption by Reference

On November 10, 2020, Alaska submitted revisions to the SIP that, among other things, update the adoption by reference of certain Federal regulations as of July 1, 2019.[1] These regulations include Federal test procedures and methods, major source pre-construction permitting requirements, public notice requirements for stationary source permits, guidelines on air quality models, and specific air quality definitions used in the Alaska SIP and adopted by reference in 18 AAC 50.035, 040, 250, 311, 502, and 990.

Alaska also submitted a revision to 18 AAC 50.077 to correct the date by which the State has adopted the National Fireplace Institute Policy Handbook. This change corrects the date of adoption from November 19, 2019, to November 22, 2019, the date on which the Hearth, Patio and Barbeque Board of Governors formally adopted the National Fireplace Institute Policy Handbook in its current form. In addition, the submitted revisions update references in 18 AAC 50.015 to area designations and classifications codified in 40 CFR part 81, revised as of July 1, 2019.

We have evaluated the submitted adoption updates and propose to approve them because these routine updates are designed keep state requirements current with requirements for SIPs. Additional details on the adoption updates may be found in the submission which is placed in the docket for this action.

B. Pre-Approved Emission Limit Option

Alaska submitted a revision to the SIP to add a pre-approved emission limit option to the existing minor stationary source permitting program. This new option, added to 18 AAC 50.230, is available to certain diesel engine facilities comprised entirely of newer, cleaner ''EPA-tiered'' diesel engines. EPA-tiered diesel engines are designed and manufactured to be cleaner-burning than older, pre-tiered engines.

Under this option, Alaska establishes standard fuel limits based on engine type, capacity, and certification tier under the EPA New Source Performance Standards for Stationary Compression Ignition Internal Combustion Engines.[2] The standard fuel limits are designed to effectively limit nitrogen oxide emissions to below the nitrogen oxide minor source permitting threshold, and by adhering to the fuel limit, sources may be able to avoid more complex permitting requirements in 18 AAC 50.

The EPA has recognized that for certain classes of sources, such as fuel-burning equipment, it is possible for states to establish enforceable emission limits that serve to limit potential to emit through exclusionary rules that apply to certain source categories.[3] To be approvable, an exclusionary rule must, among other things, be technically justified, require that the owner or operator specifically apply for coverage under the rule, require the applicant to comply with the limit in the rule, and provide that a violation of the rule is a violation of the SIP.[4]

Alaska's new pre-approved limit option is an exclusionary rule that allows a subject source to limit nitrogen oxide emissions by limiting the amount of diesel fuel used during the year. Alaska used updated EPA emissions factors to calculate the maximum quantity of fuel that may be burned by a specific engine type and certification tier, while staying below the 40 tons per year minor source potential to emit threshold in the Alaska SIP for nitrogen oxide emissions (18 AAC 50.502(c)(1)(B)). The submission states that the new option establishes ''a diesel fuel limit corresponding to the lowest tiered engine at the facility; allowing 200,000; 300,000; 500,000; and 1,000,000 gallons of diesel fuel be consumed in any 12 consecutive months for engine tiers 1; 2; 3; and 4 respectively.'' Alaska compiled these

[1] The November 10, 2020, SIP revision also requests EPA approval of the Mendenhall Valley and Eagle River Limited Maintenance Plans. We are addressing these submitted plans in separate actions. Please see our proposed rulemakings published August 11, 2021 (86 FR 43984), and September 2, 2011 (86 FR 49278).

[2] Codified at 40 CFR part 60, subpart IIII, most recently revised on November 13, 2019, at 84 FR 61563.

[3] See Memorandum from JD Kent Berry, Acting Director, Air Quality Management Division, Office of Air Quality Planning and Standards (OAQPS), entitled ''Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based on Volatile Organic Compound Use,'' dated October 15, 1993; Memorandum from John Seitz, Director, OAQPS, entitled ''Approaches for Creating Federally-Enforceable Emission Limits,'' dated November 3, 1993; Memorandum from Kathie A. Stein, Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, entitled ''Enforceability Requirements for Limiting Potential to Emit Through SIP Rules and General Permits,'' dated January 25, 1995 (''Enforceability Requirements for Limiting PTE''); Memorandum from John Seitz, Director, OAQPS, entitled ''Potential to Emit Guidance for Specific Source Categories,'' dated April 14, 1998.

[4] Enforceability Requirements for Limiting PTE, at 6.

fuel limits for the pre-approved emission limit option into a new table, Table 5a, added to 18 AAC 50.230.

In addition, Alaska established specific procedures a source must follow to operate under a pre-approved limit. To qualify for coverage, a source must submit a request to the State to operate under a specific limit in Table 5a, and a source must provide information justifying they qualify for coverage under the limit. After submitting the request, a source must follow specific monitoring, recordkeeping, and reporting requirements to ensure compliance with the limit.

The first pre-approved emission limit option for limiting nitrogen oxide emissions from certain stationary diesel engines was approved by the EPA as consistent with EPA exclusionary rules on August 14, 2007 (72 FR 45378). We have reviewed the new pre-approved emission limit option submitted on November 10, 2021, and find it is consistent with EPA guidance for exclusionary rules. Therefore, we proposed to approve the revision to 18 AAC 50.230 and incorporate it by reference into the Alaska SIP.

C. Electronic Notification and Reporting

Alaska submitted revisions to several rules to clarify permit notification to the EPA and modernize permit reporting processes (18 AAC 50.205, 230, 502 and 542). Alaska revised minor source permit procedural requirements to make clear that upon receipt of a complete minor source permit application, the Alaska Department of Environmental Conservation (ADEC) will not only notify the public and interested parties via SIP-approved procedures, but will also notify the EPA, consistent with EPA regulations at 40 CFR 51.161. In addition, Alaska revised the minor source permit regulations to encourage stationary source owners and operators to submit reports and other documents electronically to ADEC. Finally, Alaska added a requirement that permit reports and other documents be signed using state-approved digital signature procedures.

We propose to approve the electronic notification and reporting changes because they clarify SIP-approved requirements and are consistent with 40 CFR 51.161 public notice requirements for minor pre-construction permits and EPA guidance on federally enforceable state operating permit programs (54 FR 27274, June 28, 1989).

D. Standard Permit Conditions

The provision at 18 AAC 50.346 sets forth and incorporates by reference conditions that are required to be in certain air permits, unless ADEC determines that emissions unit-specific or stationary source-specific conditions more adequately meet the requirements of state air quality regulations in 18 AAC 50 or, in some cases, that no comparable condition is appropriate for the stationary source or emissions unit. This provision is not currently in the SIP. In the November 10, 2020, SIP submission, Alaska made changes to this regulation and the standard conditions it incorporates by reference.

The EPA continues to believe that 18 AAC 50.346 is not appropriate for SIP approval. By its terms, the standard conditions referenced in this section are used in permits ''unless the department determines that emissions unit-specific or stationary source-specific conditions more adequately meet the requirements of this chapter.'' Therefore, the final decision on the extent to which such permit conditions, or modifications thereof, are included in a permit issued under the SIP is made in the context of issuing the permit. See generally 80 FR 33840, pp. 33917–33918 (June 12, 2015). After consultation with the EPA, ADEC requested to remove this rule and associated standard conditions from the submission.

E. Contingency Measures

The submitted revisions to the SIP add new rule language to centralize contingency measure triggers for nonattainment and maintenance areas in the state. There is only one nonattainment area in Alaska, specifically the Fairbanks North Star Borough fine particulate matter ($PM_{2.5}$) nonattainment area. There are also are a handful of areas that were formerly in nonattainment for carbon monoxide and coarse particulate matter (PM_{10}), but that have since been redesignated to attainment based on an approved maintenance plans that include contingency measures.

The revisions add paragraph (c) to 18 AAC 50.030 to specify that contingency measures are triggered upon (1) the effective date of an EPA finding that the area failed to attain the NAAQS by the applicable attainment date, failed to meet a quantitative milestone, failed to submit a required quantitative milestone report, or failed to meet a reasonable further progress requirement, or (2) an occurrence of a condition identified in the State Air Quality Control Plan as requiring implementation of a contingency measure. We have reviewed the centralized contingency measure provision and propose to approve it because it is consistent with title I, part D nonattainment and maintenance planning requirements and is also consistent with the EPA's implementing regulations for $PM_{2.5}$ in 40 CFR part 51, subpart Z.

F. Editorial Changes

The revisions to the SIP also include editorial changes to several rules to update the name of the Port of Alaska and to make consistent use of terms and fix cross-references. We propose to approve the editorial changes because they are administrative in nature and do not change the meaning of the regulations.

III. Proposed Action

The EPA is proposing to approve, and incorporate by reference, the regulatory revisions to the Alaska SIP submitted on November 10, 2020, as being consistent with CAA section 110 and part C and D requirements. Upon final approval, the Alaska SIP will include the following regulations, State effective November 7, 2020:

- 18 AAC 50.015 Air Quality Designations, Classifications, and Control Regions;
- 18 AAC 50.030 State Air Quality Control Plan, except (a);
- 18 AAC 50.035 Documents, Procedures and Methods Adopted by Reference, except (a)(6), (a)(9), and (b)(4);
- 18 AAC 50.040 Federal Standards Adopted by Reference, except (a), (b), (c), (d), (e), (g), (j) and (k);
- 18 AAC 50.077 Standards for Wood-Fired Heating Devices, except (h);
- 18 AAC 50.205 Certification;
- 18 AAC 50.230 Preapproved Emission Limits;
- 18 AAC 50.250 Procedures and Criteria for Revising Air Quality Classifications;
- 18 AAC 50.311 Nonattainment Area Major Stationary Source Permits;
- 18 AAC 50.502 Minor Permits for Air Quality Protection;
- 18 AAC 50.540 Minor Permit: Application;
- 18 AAC 50.542 Minor Permit: Review and Issuance; and
- 18 AAC 50.990 Definitions.

IV. Incorporation by Reference

In this document, the EPA is proposing to include in a final rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the provisions described in Section III of this preamble. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA

Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of the requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rulemaking would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rulemaking does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

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

Dated: November 8, 2021.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2021–24965 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0705; FRL–9235–01–R4]

Air Plan Approval; North Carolina: Mecklenburg General Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision to the Mecklenburg County portion of the North Carolina SIP, hereinafter referred to as the Mecklenburg County Local Implementation Plan (LIP). The revision was submitted through the North Carolina Division Air Quality (NCDAQ), on behalf of Mecklenburg County Air Quality (MCAQ), via a letter dated April 24, 2020, and was received by EPA on June 19, 2020. The revision updates several Mecklenburg County Air Pollution Control Ordinance (MCAPCO) rules incorporated into the LIP, including updating and revising certain definitions. EPA is proposing to approve these changes pursuant to the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before December 17, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2020–0705, at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Pearlene Williams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9144. Ms. Williams can also be reached via electronic mail at *williams.pearlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Mecklenburg County LIP was originally submitted to EPA on June 14, 1990, and EPA approved the plan on May 2, 1991. *See* 56 FR 20140. Mecklenburg County prepared three submittals in order to modify the LIP for, among other things, general consistency with the North Carolina SIP.[1] The three submittals were submitted to EPA as follows: NCDAQ transmitted the October 25, 2017, submittal to EPA but withdrew it from review through a letter dated February 15, 2019. On April 24, 2020, NCDAQ resubmitted the October 25, 2017, update to EPA and also submitted the January 21, 2016, and January 14, 2019, updates. Due to an inconsistency with public notice at the local level, these submittals were withdrawn from EPA through a letter dated February 15, 2019. Mecklenburg County corrected this error, and NCDAQ submitted the

[1] The Mecklenburg County, North Carolina revision that is dated April 24, 2020, and received by EPA on June 19, 2020, is comprised of three previous submittals—one dated January 21, 2016; one dated October 25, 2017; and one dated January 14, 2019.

updates in a revision dated April 24, 2020.[2]

II. What action is EPA proposing to take?

On April 24, 2020, NCDAQ submitted to EPA changes to the MCAPCO to be incorporated into the LIP.[3] The January 14, 2019 portion of this submission includes changes to Rules 1.5102—*Definition of Terms* and 1.5111—*General Recordkeeping, Reporting and Monitoring Requirements* of MCAPCO Article 1.0000—*Permitting Provisions for Air Pollution Sources, Rules and Operating Regulations for Acid Rain Sources, Title V and Toxic Air Pollutants.* The January 21, 2016 portion of this submission includes changes and updates to Rule 1.5104—*General Duties and Powers of the Director, With the Approval of the Board* of MCAPCO Article 1.0000. These revisions are described in more detail below:

1. Rule 1.5102—*Definition of Terms* is revised to add several new terms and to remove several obsolete terms from Rule 1.5102.[4] [5] The term ''*Construction*'' is added and defined as the change in the method of operation or any change, including on-site fabrication, erection, installation, replacement, demolition, or modification of a source, that results in a change in emissions or affects the compliance status. Some activities excluded from the definition include clearing and grading, building access roads, and other activities. ''*EPA Approves*'' is added and defined as the full, interim or partial approvals by EPA. ''*Facility*'' is added and defined as all pollutant-emitting activities located on one or more contiguous or adjacent properties under common control. ''*Insignificant Activities*'' is added and defined as activities that are insignificant due to their category, size, or production rate. ''*Potential Emissions*'' is added and defined as ''emissions of any air pollutant that would occur at the facility's maximum capacity to emit any air pollutant under its physical and operational design.'' This term allows Federally enforceable limitations, placed on the facility's physical or operational capacities, to be considered as part of the facility's design, and includes air pollution control equipment, restriction on hours of operation or the type or amount of material combusted, stored, or processed. This term also includes fugitive emissions as defined at 40 CFR 70.2, however it does not include a facility's secondary emissions nor emissions from insignificant activities. ''*Regulated Air Pollutant*'' is defined as nitrogen oxides or any volatile organic compound as defined under 40 CFR 51.100; any pollutant for which there is an ambient air quality standard as defined pursuant to 40 CFR part 50; any pollutant that is regulated pursuant to MCAPCO Regulation 2.0524—*New Source Performance Standards,* MCAPCO Regulation 2.1110—*National Emission Standards for Hazardous Air Pollutants,* MCAPCO Regulation 2.1111—*Maximum Achievable Control Technology,* or 40 CFR parts 60, 61, or 63; any pollutant subject to a standard promulgated pursuant to section 112 of the CAA or other requirements established pursuant to section 112 of the CAA, including section 112(g) (but only for the facility subject to section 112 (g)(2) of the CAA), section 112 (G) or (r) of the CAA and any Class I or II substance listed pursuant to section 602 of the CAA; or any toxic air pollutant listed in MCAPCO Regulation 2.1104—*Toxic Air Pollutant Guidelines.* Rule 1.5102 is also revised to add the following additional terms: ''*Administrator,*'' ''*Air Pollutant,*'' ''*Allowable Emissions,*'' ''*Applicable Requirements,*'' ''*Applicant,*'' ''*Application Package,*'' ''*CFR,*'' ''*EPA,*'' ''*Equivalent Unadulterated Fuels,*'' ''*Federally Enforceable*'' or ''*Federal Enforceable,*'' ''*Fuel Combustion Equipment,*'' ''*Green Wood,*'' ''*Hazardous Air Pollutant,*'' ''*Lesser Quantity Cutoff,*'' ''*Major Facility,*'' ''*Modification,*'' ''*Modified Facility,*'' ''*New Facility,*'' ''*Owner*'' or ''*Operator,*'' ''*Peak Shaving Generator,*'' ''*Permit,*'' ''*Permittee,*'' ''*Plans and Specifications,*'' ''*Responsible Official,*'' ''*Saw Mill,*'' ''*Title IV Source,*'' ''*Title V Source,*'' ''*Toxic Air Pollutants,*'' and ''*Unadulterated Fossil Fuel.*'' These revisions generally correspond to the definitions in the state-approved SIP at 15A NCAC 02Q .0103 with minor exceptions.[6] Lastly, Rule 1.5102 is revised to remove the definitions of Cleaning Fires, Condensed Fumes, Dust-separating Equipment, Effective Stack Height, Low Volatile Solid Fuel, Smoke Density Measuring Device and Undesirable Level. Each of these terms are not operative in the currently approved version of the LIP because these terms do not appear elsewhere in the LIP. Therefore, their removal has no practical effect and will streamline Rule 1.5102.

2. Rule 1.5104—*General Duties and Powers of the Director, With the Approval of the Board* is revised to make minor changes to wording, such as removing the word ''to'' from the beginning of certain paragraphs throughout for uniformity, capitalizing the word ''regulations'' in paragraph (c), and capitalizing the first letter of each word in the paragraphs where the word ''to'' was removed.

Paragraph (l) adds language to clarify that the Director makes inspections of sources and conducts tests as necessary.

Finally, the word ''and'' is also removed at the end of paragraph (k) to allow for the addition of a new paragraph, paragraph (m), which identifies the Director's duty to require the facility to conduct tests and gather information to document compliance with emission standards and to effectuate the purpose of the Ordinance.

3. Rule 1.5111—*General Recordkeeping, Reporting and Monitoring Requirements* is revised to make minor edits to punctuation, changing commas to semi-colons, and changing the word ''under'' to ''pursuant to.'' Additionally, the phrase ''and transportation facilities'' is removed from Rule 1.5111(f) and the reporting threshold in Rule 1.5111(f) is reduced from 25 tons per year to 5 tons per year of actual emissions of nitrogen oxides or volatile organic compounds for sources that emit these pollutants.

EPA is proposing to approve the incorporation of the aforementioned revisions to the MCAPCO rules into the Mecklenburg LIP because these rules add clarity to the LIP and are consistent

[2] The April 24, 2020, submittal was received by EPA on June 19, 2020.

[3] The April 24, 2020, submittal contains changes to other Mecklenburg LIP-approved rules that are not addressed in this notice. EPA will be acting on those rules in separate actions.

[4] Although the definitions in Rule 1.5102 are global definitions that generally apply throughout the LIP, these definitions do not apply where they ''conflict[ ] with any definition(s) included in MCAPCO Article 2.0000—'Air Pollution Control Regulations and Procedures.' '' For example, the Rule 1.5102 definitions do not apply where they conflict with definitions applicable to Mecklenburg's prevention of significant deterioration (PSD) or nonattainment new source review (NNSR) programs. For Mecklenburg's PSD program, ''the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 apply'' pursuant to Rule 2.0530(a) (unless an exception is explicitly stated in Rule 2.0530). For Mecklenburg's NNSR program, ''the definitions contained in 40 CFR 51.165(a)(1) and 40 CFR 51.301 apply'' pursuant to Rule 2.0531(a) (unless an exception is explicitly stated in Rule 2.0531). Mecklenburg has requested minor changes to Rule 2.0530 (relating to PSD), which EPA will address in a separate notice.

[5] The reader should refer to the underlying submittal from MCAQ for the precise language of each definition. The descriptions of the definitions in this section are intended merely as a summary, and not as a complete restatement of each definition.

[6] The SIP-approved statewide rules for North Carolina include a related ''Definitions'' section at 15A NCAC 02Q .0103. Due to differences between the LIP and the SIP, MCAPCO Rule 1.5102 and 15A NCAC 02Q .0103 are not identical, with each containing certain definitions that do not exist in the other version.

with the CAA and applicable regulations.

III. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference MCAPCO Rules 1.5102—*Definition of Terms* and 1.5111—*General Recordkeeping, Reporting and Monitoring Requirements,* both which have an effective date of December 18, 2018; as well as Rule 1.5104—*General Duties and Powers of the Director, With the Approval of the Board,* with an effective date of December 15, 2015, into the Mecklenburg County portion of the North Carolina SIP. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Proposed Action

EPA is proposing to approve and incorporate into the Mecklenburg County LIP revisions to MCAPCO Rules 1.5102—*Definition of Terms* and 1.5111—*General Recordkeeping, Reporting and Monitoring Requirements,* effective on December 18, 2018, as well as Rule 1.5104—*General Duties and Powers of the Director, With the Approval of the Board,* effective on December 15, 2015. EPA is proposing to approve these changes because they are consistent with the CAA.

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 1356–3 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting, and recordkeeping requirements.

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

Dated: November 8, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

[FR Doc. 2021–24901 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2021–0540; FRL–9201–01–R5]

Air Plan Approval; Wisconsin; Redesignation of the Rhinelander Sulfur Dioxide Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to redesignate the Rhinelander nonattainment area, which consists of a portion of Oneida County (Crescent Township, Newbold Township, Pine Lake Township, Pelican Township, and the City of Rhinelander), to attainment for the 2010 primary, health-based 1-hour sulfur dioxide (SO_2) National Ambient Air Quality Standard (NAAQS). EPA is also proposing to approve Wisconsin's maintenance plan for the Rhinelander SO_2 nonattainment area. Wisconsin submitted the request for approval of the Rhinelander area's redesignation and maintenance plan on July 28, 2021. EPA proposed to approve Wisconsin's attainment plan for the Rhinelander area on July 22, 2021, and EPA will not finalize this action until the attainment plan is approved.

DATES: Comments must be received on or before December 17, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2021–0540 at *http://www.regulations.gov,* or via email to *arra.sarah@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, *etc.*) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the

full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Abigail Teener, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–7314, *teener.abigail@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. Background and Redesignation Requirements
II. Determination of Attainment
III. Wisconsin's State Implementation Plan (SIP)
IV. Permanent and Enforceable Emission Reductions
V. Maintenance Plan
VI. Requirements for the Area Under Section 110 and Part D
VII. What action is EPA taking?
VIII. Statutory and Executive Order Reviews

I. Background and Redesignation Requirements

In 2010, EPA established a revised primary, health-based 1-hour SO_2 NAAQS of 75 parts per billion (ppb) (75 FR 35520, June 22, 2010). On August 5, 2013, EPA designated the Rhinelander area as nonattainment for the 2010 SO_2 NAAQS based on air quality monitoring data for calendar years 2009–2011 (78 FR 47191). The Rhinelander area is comprised of Crescent Township, Newbold Township, Pine Lake Township, Pelican Township, and the City of Rhinelander in Oneida County. Wisconsin submitted an attainment plan for the Rhinelander area on January 22, 2016, and supplemented it on July 18, 2016, and November 29, 2016. On March 23, 2021, EPA partially approved and partially disapproved Wisconsin's Rhinelander SO_2 plan, as submitted and supplemented in 2016, for failure to comply with EPA's stack height regulations (86 FR 15418).[1] On March 29, 2021, Wisconsin submitted a permit containing a more stringent emission limit for Ahlstrom-Munksjö's Rhinelander facility (Ahlstrom-Munksjö) (formerly Expera Specialty Solutions LLC (Expera)), the main SO_2 source in the area, and supplemental information in order to remedy the plan's deficiencies specified in EPA's March 23, 2021, rulemaking. The plan includes modeling to show that compliance with emission limits results in attainment of the standard and ongoing maintenance. EPA proposed to approve Wisconsin's revised plan for bringing the Rhinelander area into attainment on July 22, 2021 (86 FR 38643), and EPA will not finalize this action until the attainment plan is approved and effective. On July 28, 2021, Wisconsin submitted a request to redesignate the Rhinelander area to attainment.

Under Clean Air Act (CAA) section 107(d)(3)(E), there are five criteria which must be met before a nonattainment area may be redesignated to attainment:

1. EPA has determined that the relevant NAAQS has been attained in the area.

2. The applicable implementation plan has been fully approved by EPA under section 110(k).

3. EPA has determined that improvement in air quality is due to permanent and enforceable reductions in emissions resulting from the SIP, Federal regulations, and other permanent and enforceable reductions.

4. EPA has fully approved a maintenance plan, including a contingency plan, for the area under section 175A of the CAA.

5. The State has met all applicable requirements for the area under section 110 and part D.

II. Determination of Attainment

The first requirement for redesignation is to demonstrate that the NAAQS has been attained in the area. As stated in EPA's April 2014 ''Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions,'' there are two components needed to support an attainment determination: A review of representative air quality monitoring data and a further analysis, generally requiring air quality modeling, to demonstrate that the entire area is attaining the applicable NAAQS, based on current actual emissions or the fully implemented control strategy. Wisconsin has addressed both components.

Under EPA regulations at 40 CFR 50.17, the SO_2 NAAQS is met at an ambient air quality monitoring site when the three-year average of the annual 99th percentile of one-hour daily maximum concentrations is less than or equal to 75 ppb, as determined in accordance with appendix T of 40 CFR part 50 at all relevant monitoring sites in the subject area. Wisconsin operates one SO_2 monitoring site in the Rhinelander area: Rhinelander Tower monitor (AQS ID 55–085–0996). The Rhinelander Tower monitor site is located at 434 High Street under the Rhinelander municipal water tower. EPA has reviewed the ambient air monitoring data from the Rhinelander Tower monitor, focusing on air quality data collected from 2012 through 2020. For each of these calendar years, the data are quality-assured, certified, and recorded in EPA's Air Quality System database.[2]

Tables 1 and 2 of this document show the 99th percentile results and three-year average design values, respectively, for the Rhinelander Tower monitor for 2012–2020. The Rhinelander Tower monitor design values are 69 ppb for 2016–2018, 36 ppb for 2017–2019, and 36 ppb for 2018–2020, which are all below the SO_2 NAAQS. Therefore, EPA finds that Wisconsin has demonstrated that Rhinelander's SO_2 monitor shows attainment.

TABLE 1—WISCONSIN'S MONITORING DATA FOR THE RHINELANDER SO_2 NONATTAINMENT AREA FOR 2012–2020—99TH PERCENTILE VALUES

[ppb]

Site ID	Location	2012	2013	2014	2015	2016	2017	2018	2019	2020
55–085–0996	Rhinelander Tower Monitor.	174	153	162	156	129	38	40	29	39

[1] For more discussion on stack height, *see* EPA's November 25, 2020, proposed partial approval and partial disapproval (85 FR 75273).

[2] The 2020 quarter 4 data did not meet the completeness criterion due to some invalidated data. However, when data from all 4 quarters of 2020 were evaluated together, the completeness criterion was met for the 2020 calendar year.

TABLE 2—WISCONSIN'S MONITORING DATA FOR THE RHINELANDER SO_2 NONATTAINMENT AREA FOR 2012–2019—DESIGN VALUES

[ppb]

Site ID	Location	2012–2014	2013–2015	2014–2016	2015–2017	2016–2018	2017–2019	2018–2020
55–085–0996	Rhinelander Tower Monitor	163	157	149	108	69	36	36

In addition to ambient air quality monitoring data, Wisconsin utilized an approach based on computer modeling, which relied on allowable emissions in Wisconsin's attainment plan to additionally characterize the attainment status of the SO_2 NAAQS and to provide for maintaining SO_2 emissions in the Rhinelander area below the SO_2 NAAQS through 2032. EPA proposed to approve this modeling on July 22, 2021, as part of Wisconsin's attainment plan, and EPA will not finalize this action until Wisconsin's attainment plan is approved and effective.

Regarding the requirement for Wisconsin to demonstrate that the entire area is attaining the SO_2 NAAQS, Wisconsin also referred to the dispersion modeling analysis which was submitted as part of its attainment plan for Rhinelander. This analysis demonstrated that revised SO_2 emission limits for Ahlstrom-Munksjö would provide for attainment, as Ahlstrom-Munksjö accounts for over 94 percent of the modeled SO_2 concentration in the Rhinelander area. Wisconsin has confirmed that Ahlstrom-Munksjö and the other facilities included in the modeling analysis are currently in full compliance with their emission limits. Beginning December 31, 2021, Ahlstrom-Munksjö will be subject to a more stringent emission limit, which will ensure that actual emissions are at or below the levels Wisconsin used in its modeling analysis. The modeling analysis was discussed in detail in the July 22, 2021, notice of proposed rulemaking for the Rhinelander SO_2 attainment plan (86 FR 38643). In this action, EPA proposes to find that this modeling analysis and the monitored air quality data demonstrate that the Rhinelander area has attained the 2010 SO_2 NAAQS.

III. Wisconsin's State Implementation Plan (SIP)

EPA's proposed approval of Wisconsin's attainment SIP for the Rhinelander area (86 FR 38643) included revised emission limits for Ahlstrom-Munksjö, which is the main SO_2 source in the Rhinelander area. In that action, EPA proposed to find that Wisconsin had satisfied requirements for providing for attainment of the 1-hour SO_2 NAAQS in the Rhinelander area. The proposed SO_2 SIP regulations for Ahlstrom-Munksjö are contained in Air Pollution Control Construction Permit Revision 15–DMM–128–R1.[3] EPA will not finalize this action until the approval of Wisconsin's SIP for the Rhinelander area is finalized. Wisconsin has shown that it maintains an active enforcement program to ensure ongoing compliance with these requirements.[4] Wisconsin's new source review/prevention of significant deterioration program will address emissions from potential new sources in the area (79 FR 60064, October 6, 2014).

IV. Permanent and Enforceable Emission Reductions

For an area to be redesignated, the State must be able to reasonably attribute the improvement in air quality to emission reductions that are permanent and enforceable. Wisconsin's 2016 attainment plan established SO_2 emission limits for Ahlstrom-Munksjö boiler B26 through Administrative Order AM–15–01. In 2018, these emission limits, in combination with the retirement of four coal boilers and reduced coal sulfur content at Ahlstrom-Munksjö, resulted in an actual average decrease of 2.07 tons per day (tpd) of SO_2 (25 percent) from 2011 actual emissions. As part of its 2021 revised attainment plan, Wisconsin submitted a more stringent SO_2 limit for Ahlstrom-Munksjö. This limit and the associated requirements are contained in a title I construction permit revision (Air Pollution Control Construction Permit Revision 15–DMM–128–R1), which will render them federally enforceable after the permit compliance date of December 31, 2021. EPA included the revised limits in the proposed approval of Wisconsin's SIP on July 22, 2021 (86 FR 38643). A redesignation to attainment of the Rhinelander area would not be effective before December 31, 2021, when the permit is enforceable.

As shown in Table 2 of this document, the monitored design values in the Rhinelander area at the time of its nonattainment designation were above the NAAQS of 75 ppb. Subsequent monitoring data in the Rhinelander area indicate that the 99th percentile ambient SO_2 levels dropped below the NAAQS after the imposition of enforceable limits at Ahlstrom-Munksjö. EPA proposes to find that the improvement in air quality in the Rhinelander area can be attributed to permanent and enforceable emission reductions at Ahlstrom-Munksjö.

V. Maintenance Plan

CAA section 175A sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the nonattainment area is redesignated to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the ten years following the initial ten-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures as EPA deems necessary to ensure prompt correction of any future one-hour violations.

Specifically, the maintenance plan should address five requirements: The attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan. Wisconsin's July 28, 2021, redesignation request contains its maintenance plan,

[3] The portions of Air Pollution Control Construction Permit Revision 15–DMM–128–R1 that EPA proposed to incorporate into the Wisconsin SIP include the permit cover sheet, emissions limitations for Ahlstrom-Munksjö (Conditions A.3.a.(1)–(3)), compliance demonstration (Conditions A.3.b.(1)–(3)), reference test methods, recordkeeping and monitoring requirements (Conditions A.3.c.(1)–(5) and A.3.c.(7)–(9)), and the effective date (Condition YYY.1.a.(1)).

[4] Wisconsin Department of Natural Resources (WDNR) maintains an enforcement program to ensure compliance with SIP requirements. The Bureau of Air Management houses an active statewide compliance and enforcement team that works in all geographic regions of the State. WDNR refers actions as necessary to the Wisconsin Department of Justice with the involvement of WDNR. *Wis. Stats.* 285.83 and *Wis. Stats.* 285.87 provide WDNR with the authority to enforce violations and assess penalties, to ensure that required measures are ultimately implemented.

which Wisconsin has committed to review eight years after redesignation.

In its redesignation request, Wisconsin provided an emission inventory which addresses the 2011 base year actual emissions of 2,440 tons per year (tpy) for the Rhinelander area. Wisconsin chose 2018 as an attainment year in order to demonstrate actual emissions reductions that have occurred in an attaining year. Total actual SO_2 emissions in the Rhinelander area for the attainment year were 1,289 tpy. As Ahlstrom-Munksjö boiler B26 was not operational for part of 2018, Wisconsin also included average daily emission values of 8.23 tpd in 2011 and 6.15 tpd in 2018. Wisconsin demonstrated a 25 percent reduction in actual average daily emissions, which is more than sufficient to attain the SO_2 NAAQS in the Rhinelander area. Wisconsin's projected Rhinelander area emissions for the maintenance year of 2032 are 2,204 tpy, over 99 percent of which are projected from Ahlstrom-Munksjö. This quantity is 10 percent lower than actual emissions in 2011. The projected emissions for 2032 are lower than the SO_2 potential-to-emit for Ahlstrom-Munksjö of 2,710 tpy, based on the revised limits in Air Pollution Control Construction Permit Revision 15–DMM–128–R1. The modeling analysis shows that the area will continue to attain based on the potential-to-emit in the revised permit and associated control requirements.

Wisconsin's maintenance demonstration consists of the nonattainment SIP air quality analysis showing that the emission reductions now in effect in the Rhinelander area will provide for attainment of the SO_2 NAAQS. The permanent and enforceable SO_2 emission reductions described above ensure that area emissions will be equal to or less than the emission levels that were evaluated in the air quality analysis, and Wisconsin's enforceable emission requirements will ensure that the Rhinelander area SO_2 emission limits are met continuously.

For continuing verification, Wisconsin has committed to track the emissions and compliance status of the major facilities in the Rhinelander area so that future emissions will not exceed the allowable emissions-based attainment inventory. All major sources in Wisconsin are required to submit annual emissions data, which the State uses to update its emission inventories as required by the CAA.

The requirement to submit contingency measures in accordance with section 172(c)(9) of the CAA can be adequately addressed for SO_2 by the operation of a comprehensive enforcement program, which can quickly identify and address sources that might be causing exceedances of the NAAQS. Wisconsin's enforcement program is active and capable of prompt action to remedy compliance issues. Wisconsin commits to study SO_2 emission trends and identify areas of concern and potential additional measures and, if necessary, Wisconsin will consider additional control measures that can be implemented quickly. Wisconsin has the authority to expeditiously adopt, implement, and enforce any subsequent emissions control measures deemed necessary to correct any future SO_2 violations. Wisconsin commits to adopting and implementing such corrective actions as necessary to address violations of the SO_2 NAAQS. The public will have the opportunity to participate in the contingency measure implementation process. Based on the foregoing, EPA proposes to find that Wisconsin has addressed the contingency measure requirement. Further, EPA proposes to find that Wisconsin's maintenance plan adequately addresses the five basic components necessary to maintain the SO_2 NAAQS in the Rhinelander nonattainment area.

VI. Requirements for the Area Under Section 110 and Part D

Wisconsin has submitted information demonstrating that it meets all of the SIP requirements of the CAA for the Rhinelander nonattainment area. EPA approved most elements of Wisconsin's infrastructure SIP on September 11, 2015 (80 FR 54725), revisions to Prevention of Significant Deterioration and Nonattainment New Source Review programs on October 6, 2014 (79 FR 60064), state board requirements on January 21, 2016 (81 FR 3334), and the remaining components on February 7, 2017 (82 FR 9515). These infrastructure SIP approvals confirm that Wisconsin's SIP meets the applicable requirements of CAA section 110(a)(1) and 110(a)(2) to contain the basic program elements, such as an active enforcement program and permitting program.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a State from significantly contributing to air quality problems in another State. To implement this provision, EPA has required certain States to establish programs to address the interstate transport of air pollutants. The section 110(a)(2)(D) requirements for a State are not linked with a nonattainment area's designation and classification in that State. EPA believes that the requirements linked with a nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a State regardless of the designation of any one area in the State. Thus, EPA does not believe that the CAA's interstate transport requirements should be construed to be applicable requirements for purposes of redesignation.

In addition, EPA believes that other section 110 elements that are neither connected with nonattainment plan submissions nor linked with an area's SO_2 attainment status are not applicable requirements for purposes of redesignation. The area will still be subject to these requirements after the area is redesignated to attainment of the 2010 SO_2 NAAQS. The section 110 and part D requirements that are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This approach is consistent with EPA's existing policy on applicability (*i.e.,* for redesignations) of conformity and oxygenated fuels requirements.[5]

Section 191 of the CAA requires Wisconsin to submit a part D SIP for the Rhinelander nonattainment area by April 6, 2015. Wisconsin submitted its part D SIP on January 22, 2016 and supplemented it on July 18, 2016 and November 29, 2016. However, on March 23, 2021, EPA partially disapproved Wisconsin's part D SIP, as submitted and supplemented in 2016, for failure to comply with EPA's stack height regulations. Consequently, Wisconsin submitted a revised plan to EPA on March 29, 2021. The revised SIP included a demonstration of attainment and a more stringent SO_2 emission limit for Ahlstrom-Munksjö. EPA proposed to approve the revised Rhinelander attainment plan on July 22, 2021 (86 FR 38643), and EPA will not finalize this action until the attainment plan is approved and effective. In the July 22, 2021, rulemaking, EPA proposed to conclude that Wisconsin had satisfied the various requirements under CAA section 110 and part D for the Rhinelander SO_2 nonattainment area. EPA concluded that Wisconsin satisfied requirements for reasonably available

[5] *See* Reading, Pennsylvania proposed and final rulemakings, 61 FR 53174–53176 (October 10, 1996) and 62 FR 24826 (May 7, 1997); Cleveland-Akron-Loraine, Ohio final rulemaking, 61 FR 20458 (May 7, 1996); and Tampa, Florida final rule, 60 FR 62748 (December 7, 1995). *See also* the discussion of this issue in the Cincinnati, Ohio ozone redesignation (65 FR 37890, June 19, 2000), and the Pittsburgh, Pennsylvania ozone redesignation (66 FR 50399, October 19, 2001).

control measures (required under section 173(c)(1)) and reasonable further progress (required under section 173(c)(2)). That rulemaking supplemented a previous action in which EPA concluded that Wisconsin satisfied requirements for an attainment inventory of the SO_2 emissions from sources in the nonattainment area (required under section 173(c)(3)).

Wisconsin chose 2011 for its base year emissions inventory, as comprehensive emissions data were available and updated that year, which satisfies the 172(c)(3) requirements. In that year, Ahlstrom-Munksjö was the main source in the nonattainment area.

Table 3 of this document compares Wisconsin's SO_2 emissions data for Ahlstrom-Munksjö for 2011 (the base nonattainment year identified by Wisconsin), 2018 (the attainment year identified by Wisconsin), and 2032 (the maintenance year identified by Wisconsin). For each of these years, Wisconsin's submittal shows that Ahlstrom-Munksjö accounts for over 99 percent of the SO_2 emissions in the Rhinelander area.

By providing actual emissions from Ahlstrom-Munksjö, the main SO_2 source, from a time period when the area was not meeting the SO_2 NAAQS, and from a time period when the area was attaining the NAAQS, Wisconsin demonstrates a 25 percent reduction in actual average daily SO_2 emissions. Wisconsin's submittal shows that actual average daily 2018 Ahlstrom-Munksjö SO_2 emissions were 75 percent of the actual emissions in 2011. Wisconsin also shows by modeling that Ahlstrom-Munksjö's compliance with its revised SO_2 emission limit, which will be federally enforceable beginning December 31, 2021, will result in the area maintaining attainment of the SO_2 NAAQS.

TABLE 3—ACTUAL AND PROJECTED AHLSTROM-MUNKSJÖ EMISSIONS

Affected source	Type of reduction	2011 Nonattainment year (actual)		2018 Attainment year (actual)		2011–2018 Change (actual)		2032 Maintenance year (projected)	
		(tpy)	(tpd)	(tpy)	(tpd)	(tpy)	(tpd)	(tpy)	(tpd)
Ahlstrom-Munksjö.	Emission limits, unit shut-downs, fuel changes.	2,422	8.17	* 1,280	6.13	− 1,142	− 2.04	2,195	6.13

* Annual emissions for 2018 are lower than the projected annual maintenance year emissions because Ahlstrom-Munksjö boiler B26 was not operational from mid-May to mid-October 2018

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability that EPA promulgated pursuant to its authority under the CAA. Based on EPA's 2014 SO_2 guidance, transportation conformity only applies to SO_2 SIPs if transportation-related emissions of SO_2 as a precursor are a significant contributor to a $PM_{2.5}$ nonattainment problem, or if the SIP has established an approved or adequate budget for such emissions as part of the RFP, attainment or maintenance strategy, neither of which apply to the Rhinelander area. Nevertheless, EPA approved Wisconsin's transportation conformity procedures on February 27, 2014 (79 FR 10995). EPA approved Wisconsin's general conformity procedures on July 29, 1996 (61 FR 39329).

Based on the above, EPA is proposing to find that Wisconsin has satisfied the applicable requirements for the redesignation of the Rhinelander nonattainment area under section 110 and part D of title I of the CAA.

VII. What action is EPA taking?

In accordance with Wisconsin's July 28, 2021, request, EPA is proposing to redesignate the Rhinelander nonattainment area from nonattainment to attainment of the 2010 SO_2 NAAQS. The redesignation will not be effective until EPA approves the Wisconsin attainment plan for the Rhinelander area. EPA finds that Wisconsin has demonstrated that the area is attaining the 2010 SO_2 NAAQS and that the improvement in air quality is due to permanent and enforceable SO_2 emission reductions in the area. EPA is also proposing to approve Wisconsin's maintenance plan, which is designed to ensure that the area will continue to maintain the SO_2 NAAQS.

VIII. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

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

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

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of SO_2 national ambient air quality standards on tribal lands.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: November 8, 2021.

Cheryl Newton,

Deputy Regional Administrator, Region 5.

[FR Doc. 2021–24915 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[EPA–HQ–OPPT–2021–0227; FRL–8985–01–OCSPP]

RIN 2070–AB27

Significant New Use Rules on Certain Chemical Substances (21–2.F)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances that were the subject of premanufacture notices (PMNs). The chemical substances received ''not likely to present an unreasonable risk'' determinations pursuant to TSCA. The SNURs require persons who intend to manufacture (defined by statute to include import) or process any of these chemical substances for an activity that is proposed as a significant new use by this rule to notify EPA at least 90 days before commencing that activity. The required notification initiates EPA's evaluation of the use, under the conditions of use for that chemical substance, within the applicable review period. Persons may not commence manufacture or processing for the significant new use until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken such actions as are required by that determination.

DATES: Comments must be received on or before December 17, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0227, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: William Wysong, New Chemicals Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–4163; email address: *wysong.william@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, process, or use the chemical substances contained in this proposed rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

• Manufacturers or processors of one or more subject chemical substances (NAICS codes 325 and 324110), *e.g.,* chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import provisions promulgated at 19 CFR 12.118 through 12.127 and 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and Orders under TSCA, which would include the SNUR requirements should these proposed rules be finalized. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, pursuant to 40 CFR 721.20 any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after December 17, 2021 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the

disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Background

A. What action is the Agency taking?

EPA is proposing these SNURs under TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) for chemical substances that were the subject of PMNs. These proposed SNURs would require persons to notify EPA at least 90 days before commencing the manufacture or processing of any of these chemical substances for an activity proposed as a significant new use. Receipt of such notices would allow EPA to assess risks and, if appropriate, to regulate the significant new use before it may occur.

The docket for these proposed SNURs, identified as docket ID number EPA–HQ–OPPT–2021–0227, includes information considered by the Agency in developing these proposed SNURs.

B. What is the Agency's authority for taking this action?

TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the four TSCA section 5(a)(2) factors listed in Unit III.

C. Applicability of General Provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. Pursuant to 40 CFR 721.1(c), persons subject to these SNURs must comply with the same significant new use notice (SNUN) requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). These requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1), the exemptions authorized by TSCA sections 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN and before the manufacture or processing for the significant new use can commence, EPA must either determine that the use is not likely to present an unreasonable risk of injury under the conditions of use for the chemical substance or take such regulatory action as is associated with an alternative determination. If EPA determines that the use is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

III. Significant New Use Determination

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In determining what would constitute a significant new use for the chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances, potential human exposures and environmental releases that may be associated with possible uses of these chemical substances, in the context of the four TSCA section 5(a)(2) factors listed in this unit.

The proposed rules include PMN substances that EPA has determined ''not likely'' to present an unreasonable risk under the conditions of use. EPA is proposing to identify other circumstances that, while not reasonably foreseen, would warrant further EPA review before manufacture or processing for such a use is commenced.

IV. Substances Subject to This Proposed Rule

EPA is proposing significant new use and recordkeeping requirements for certain chemical substances in 40 CFR part 721, subpart E. In this unit, EPA provides the following information for each chemical substance that is identified in this unit as subject to this proposed rule:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Potentially Useful Information.
- CFR citation assigned in the regulatory text section of the proposed rule.

The chemicals subject to these proposed SNURs are as follows:

PMN Number: P–15–632

Chemical Name: Mixed amine salt (generic).

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as a salt for polymers. Based on the estimated physical/chemical properties of the PMN substance, test data on components of the PMN substance, and comparison to analogous aliphatic amines, EPA has identified concerns for irritation, bladder effects, carcinogenicity, developmental effects, corrosion, pulmonary effects, and aquatic toxicity if the chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

- No use involving an application method that generates a vapor, mist, aerosol, or dust.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of reproductive/developmental toxicity, specific target organ toxicity, and pulmonary effects testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11659.

PMN Number: P–17–233

Chemical Name: Oxyalkylene modified polyalkyl amine alkyl diacid polymer with 2-(chloromethyl)oxirane (generic).

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as

a creping aid for Yankee dryers to manufacture tissue and towel paper. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous polycationic polymers, EPA has identified concerns for irritation and corrosion to eyes, lung, and skin, lung effects, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- No manufacturing, processing, or use in any manner that results in inhalation exposure; and
- No release of the PMN substance resulting in surface water concentrations that exceed 20 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of aquatic toxicity, specific target organ toxicity, and pulmonary effects testing may be potentially useful to characterize the health and environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11660.

PMN Number: P–17–298

Chemical Name: Formaldehyde, homopolymer, reaction products with N-propyl-1-propanamine.

CAS Number: 1374859–50–3.

Basis for action: The PMN states that the use of the PMN substance will be as a hydrogen sulfide scavenger used in controlling hydrogen sulfide in the vapor space of fuel storage, shipping vessels, and pipelines. Based on the estimated physical/chemical properties of the PMN substance, available data on the PMN substance, available data on a degradate of the PMN substance, and comparison to structurally analogous chemical substances, EPA has identified concerns for irritation to the skin, eyes, and lungs, skin and eye corrosion, dermal sensitization, mutagenicity, carcinogenicity, systemic effects, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- No use of the PMN substance other than as a hydrogen sulfide scavenger used in controlling hydrogen sulfide in the vapor space of fuel storage, shipping vessels, and pipelines; and
- No release of the PMN substance resulting in surface water concentrations that exceed 3 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of metabolism or pharmacokinetics, carcinogenicity, and specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11661.

PMN Number: P–17–325

Chemical Name: 2-Propenoic acid, polymer with 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonic acid.

CAS Number: 40623–75–4.

Basis for action: The PMN states that the use of the PMN substance will be in the textile industry in bleaching and dyeing operations as a dispersing agent and for professional use. Based on the estimated physical/chemical properties of the PMN substance and comparison to structurally analogous chemical substances, EPA has identified concerns for aquatic toxicity if the new chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

- No release of the PMN substance resulting in surface water concentrations that exceed 50 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of aquatic toxicity testing may be potentially useful to characterize the environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11662.

PMN Number: P–17–355

Chemical Name: Benzoic acid, alkyl derivs. (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a site intermediate. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous phenols, EPA has identified concerns for lung effects (lung surfactancy), dermal sensitization, and systemic and developmental toxicity if the chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

- No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of sensitization, specific target organ toxicity, and reproductive toxicity (developmental effects) testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11663.

PMN Number: P–17–396

Chemical Name: Aminoalkylated imidazole (generic).

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as an intermediate for a polyurethane catalyst. Based on the estimated physical/chemical properties of the PMN substance, available data on a component of the PMN substance, and comparison to analogous aliphatic amines and pyrroles/diazoles, EPA has identified concerns for corrosion and severe irritation to the skin, eyes, lungs, and mucous membranes, neurotoxicity, systemic effects, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- Use of the PMN substance only for the confidential use described in the PMN;

• No use of the PMN substance in a consumer product; and

• No release of the PMN substance resulting in surface water concentrations that exceed 33 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin corrosion, eye damage, specific target organ toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11664.

PMN Number: P–18–29

Chemical Name: Fatty acids and fatty acid unsatd., reaction products with ethyleneamines and maleic anhydride (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be for industrial use in oilfields. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous anionic surfactants, EPA has identified concerns for skin sensitization and lung effects if the chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

• No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin sensitization and pulmonary effects testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11665.

PMN Number: P–18–108

Chemical Name: Aromatic anhydride polymer with bisalkylbiphenylbisamine compound with alkylamino acrylate ester (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as an ionic salt of a polyamic acid for coatings, open, non-dispersive use. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous aliphatic amines, EPA has identified concerns for acute toxicity, skin, eye, and respiratory tract irritation, dermal and respiratory sensitization, developmental toxicity, neurotoxicity, systemic toxicity, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

• Use of the PMN substance only for the confidential use described in the PMN; and

• No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin sensitization, pulmonary effects, developmental toxicity, specific target organ toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11666.

PMN Number: P–18–114

Chemical Name: Propanoic acid, hydroxyl- (hydroxyalkyl)-alkyl-, polymer with 1,6-diisocyanatoalkane and poly[oxy(alkyl-alkanediyl)] ether with alkyl (hydroxyalkyl)- alkanediol, 2-propenoate (ester), lithium salt, glycerol monoacrylate 1-neodecanoate- and alkylene glycol monoacrylate-blocked (generic).

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as resin for industrial coatings. Based on the estimated physical/chemical properties of the PMN substance, comparison to analogous chemical substances, and comparison to analogous polyanionic polymers, EPA has identified concerns for irritation and sensitization (respiratory and skin), developmental toxicity, kidney toxicity, thyroid toxicity, and neurotoxicity if the chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

• No use of the PMN substance in spray applications.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity, skin sensitization, skin irritation, eye irritation, and reproductive/developmental toxicity testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11667.

PMN Number: P–18–133

Chemical Name: Polyol adduct of bisaldehyde (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a component in hydraulic fracturing fluids. Based on the estimated physical/chemical properties of the PMN substance, comparison to analogous chemical substances, and comparison to analogous neutral organics, EPA has identified concerns for systemic toxicity, eye and skin irritation, and skin sensitization if the chemical substance is not used following the limitation noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

• No use of the PMN substance involving an application method that generates a vapor, mist, or aerosol.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor

is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of sensitization and specific target organ toxicity testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11668.

PMN Numbers: P–18–165 and P–18–166

Chemical Names: 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy-substituted butyl amide, sodium salts (generic) (P–18–165) and 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy- substituted butyl[3-[2-[1-[[(2-methoxyphenyl)amino]carbonyl]-2-oxopropyl]diazenyl]phenyl]substituted, sodium salts (generic) (P–18–166).

CAS Numbers: Not available.

Basis for action: The PMNs state that the use of the PMN substances will be as chemical intermediates. Based on the estimated physical/chemical properties of the PMN substances, comparison to structurally analogous chemical substances, and comparison to analogous polyanionic polymers and monomers, EPA has identified concerns for developmental toxicity, systemic effects, irritation to eyes, lungs, and mucous membranes, and aquatic toxicity if the new chemical substances are not used following the limitations noted. The conditions of use of the PMN substances as described in the PMNs include the following protective measures:

- No release of the PMN substances to water;
- No use of the PMN substances in consumer products; and
- No manufacturing, processing, or use of the PMN substances in any manner that results in inhalation exposure.

The proposed SNURs would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substances if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by these SNURs. EPA has determined that the results of reproductive (developmental) toxicity, specific target organ toxicity, skin irritation, eye irritation, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substances.

CFR Citations: 40 CFR 721.11669 (P–18–165) and 40 CFR 721.11670 (P–18–166).

PMN Number: P–18–167

Chemical Name: Butanamide, 2-[2-[(substituted phenyl)diazenyl]-N-(2-methoxyphenyl)-3-oxo- (generic).

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as a chemical intermediate. Based on the estimated physical/chemical properties of the PMN substance and comparison to structurally analogous chemical substances, EPA has identified concerns for irritation to the eyes, lungs, and skin, systemic effects, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- No use of the PMN substance in a consumer product;
- No release of the PMN substance to water; and
- No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin irritation, eye irritation, specific target organ toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11671.

PMN Numbers: P–18–214, P–18–215, and P–18–216

Chemical Names: Polycyclic substituted alkane, polymer with cyclicalkylamine, epoxide, and polycyclic epoxide ether, reaction products with dialkylamine substituted alkyl amine (generic) (P–18–214); Polycyclic alkane, polymer with monocyclic amine, polycyclic epoxide ether, reaction products with dialkylamine alkyl amine (generic) (P–18–215); and Polycyclic substituted alkane, polymer with epoxide, reaction products with cyclicalkylamine and dialkylamine substituted alkyl amine (generic) (P–18–216).

CAS Numbers: Not available.

Basis for action: The PMNs state that the generic (non-confidential) use of the PMN substances will be as curing agents. Based on the estimated physical/chemical properties of the PMN substances and comparison to structurally analogous chemical substances, EPA has identified concerns for systemic toxicity, lung toxicity, and irritation if the chemical substances are not used following the limitations noted. The conditions of use of the PMN substances as described in the PMNs include the following protective measure:

- No spray application of the PMN substances other than by the method described in the spray analysis report submitted with the PMNs.

The proposed SNURs would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substances if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by these SNURs. EPA has determined that the results of pulmonary effects, absorption, specific target organ toxicity, skin irritation/corrosion, and eye irritation testing may be potentially useful to characterize the health effects of the PMN substances.

CFR Citations: 40 CFR 721.11672 (P–18–214), 40 CFR 721.11673 (P–18–215), and 40 CFR 721.11674 (P–18–216).

PMN Number: P–18–329

Chemical Name: Substituted carbopolycyclic dicarboxylic acid dialkyl ester, polymer with alkanediol and carbopolycyclic bis(substituted carbopolycycle) bisalkanol (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a component of lenses used in electronic applications. Based on the estimated physical/chemical properties of the PMN substance and comparison to structurally analogous chemical substances, EPA has identified concerns for lung effects (lung overload) if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

- No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results specific target organ toxicity and pulmonary effects testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11675.

PMN Number: P–18–385

Chemical Name: D-Glucopyranose, oligomeric, Bu glycosides, polymers with epichlorohydrin, 2-hydroxy-3-sulfopropyl ethers, sodium salts.

CAS Number: 2139271–53–5.

Basis for action: The PMN states that the use of the PMN substance will be for liquid laundry. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous polyanionic polymers and monomers, EPA has identified concerns for surfactant effects on the lung if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measure:

- No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary toxicity testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11676.

PMN Number: P–19–135

Chemical Name: Alkyl polyoxyethylene ethers, carboxymethylated (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a lubricant additive. Based on the estimated physical/chemical properties of the PMN substance, test data submitted on the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous anionic surfactants and nonionic surfactants, EPA has identified concerns for lung effects (surfactancy), dermal and eye irritation, systemic effects, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure; and
- No release of the PMN substance resulting in surface water concentrations that exceed 60 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of skin irritation, eye damage, specific target organ toxicity, and pulmonary effects testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11677.

PMN Numbers: P–19–148, P–19–149, P–19–150, and P–19–151

Chemical Names: Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, potassium salts (generic) (P–19–148); Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid potassium salt (1:1)-potassium 2-oxoacetate (1:1) reaction products, potassium salts (generic) (P–19–149); Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, sodium salts (generic) (P–19–150); and Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid sodium salt (1:1)-sodium 2-oxoacetate (1:1) reaction products, sodium salts (generic) (P–19–151).

CAS Numbers: Not available.

Basis for action: The PMNs state that the generic (non-confidential) use of the PMN substances will be as fertilizer ingredients. Based on the estimated physical/chemical properties of the PMN substances, comparison to structurally analogous chemical substances, and comparison to analogous polyanionic polymers and monomers, EPA has identified concerns for systemic effects, developmental effects, and aquatic toxicity if the new chemical substances are not used following the limitations noted. The conditions of use of the PMN substances as described in the PMNs include the following protective measures:

- Use of the PMN substances only for the confidential uses described in the PMNs; and
- No domestic manufacture of the PMN substances.

The proposed SNURs would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substances if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by these SNURs. EPA has determined that the results of reproductive (developmental) toxicity, specific target organ toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substances.

CFR Citations: 40 CFR 721.11678 (P–19–148), 40 CFR 721.11679 (P–19–149), 40 CFR 721.11680 (P–19–150), and 40 CFR 721.11681 (P–19–151).

PMN Number: P–19–152

Chemical Name: Alkaneic acid, dialkyl ester polymer with alkanediol, (isocyanatocarbomonocycle) alkyl)carbomonocycle) carbamate (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a pre-polymer for polyurethane roll covers. Based on estimated physical/chemical properties of the PMN substance and comparison to structurally analogous chemical substances, EPA has identified concerns for respiratory and skin sensitization, carcinogenicity, thyroid effects, and respiratory effects toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

- No manufacture of the PMN substance to contain greater than 25% residual isocyanate by weight;
- No use of the PMN substance in a consumer product; and

• No manufacturing, processing, or use of the PMN substance in any manner that results in inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of specific target organ toxicity and skin sensitization testing may be potentially useful to characterize the health effects of the PMN substance.

CFR Citation: 40 CFR 721.11682.

PMN Numbers: P–19–155, P–19–156, and P–19–157

Chemical Names: Amides, from C8–18 and C18-unsatd. glycerides and diethylenetriamine, ethoxylated (P–19–155); Amides, from diethylenetriamine and palm kernel-oil, ethoxylated (P–19–156); and Amides, from coconut oil and diethylenetriamine, ethoxylated (P–19–157).

CAS Numbers: 2173332–72–2 (P–19–155), 2173332–69–7 (P–19–156), and 2173332–70–0 (P–19–157).

Basis for action: The PMNs state that the use of the PMN substances will be as adjuvants in agrochemical formulations. Based on the estimated physical/chemical properties of the PMN substances, submitted test data on the new chemical substances, comparison to structurally analogous chemical substances, and comparison to analogous amphoteric surfactants, EPA has identified concerns for lung effects (surfactancy), skin corrosion, skin sensitization, systemic effects, and aquatic toxicity if the new chemical substances are not used following the limitations noted. The conditions of use of the PMN substances as described in the PMNs include the following protective measures:

• No manufacturing or processing of the PMN substances in a manner that results in inhalation exposure;

• No release of the PMN substances resulting in surface water concentrations that exceed 2 ppb;

• Use of the PMN substances only as adjuvants for industrial herbicide agrochemical formulations; and

• No use of the PMN substances in consumer products.

The proposed SNURs would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substances if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by these SNURs. EPA has determined that the results of pulmonary effects, specific target organ toxicity, and aquatic toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substances.

CFR Citations: 40 CFR 721.11683 (P–19–155), 40 CFR 721.11684 (P–19–156), and 40 CFR 721.11685 (P–19–157).

PMN Number: P–20–24

Chemical Name: Phenol-formaldehyde polymer with amino-oxirane copolymer and benzoates (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a dispersant polymer for coatings. Based on the estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and comparison to analogous polycationic polymers, EPA has identified concerns for lung effects (surfactancy), irritation to the skin, eyes, and respiratory tract, and aquatic toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

• No use of the PMN substance in a consumer product;

• Use of the PMN substance only for the confidential use described in the PMN; and

• No use of the PMN substance in a final product formulation at concentration greater than 8%.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the human health and environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that will be designated by this SNUR. EPA has determined that the results of pulmonary effects, aquatic toxicity, skin irritation, eye irritation, and specific target organ toxicity testing may be potentially useful to characterize the health and environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11686.

V. Rationale and Objectives of the Proposed Rule

A. Rationale

During review of the chemical substances that are the subject of these SNURs and as further discussed in Unit IV, EPA identified certain circumstances that raised potential risk concerns. EPA determined that deviations from the limitations identified in the submissions could result in changes in the type or form of exposure to the chemical substances and/or increased exposures to the chemical substances and/or changes in the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of the chemical substances, and therefore warranted SNURs. The SNURs would identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the certain limitations in the submission.

B. Objectives

EPA is proposing these SNURs for specific chemical substances which have undergone premanufacture review because the Agency wants:

• To have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing a listed chemical substance for the described significant new use.

• To be able to either determine that the prospective manufacture or processing is not likely to present an unreasonable risk, or to take necessary regulatory action associated with any other determination, before the described significant new use of the chemical substance occurs.

VI. Applicability of the Proposed Significant New Use Designation

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule have undergone premanufacture review. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no person may commence such activities without first submitting a PMN. Therefore, for chemical substances for which an NOC has not been submitted EPA concludes that the designated significant new uses are not ongoing.

When chemical substances identified in this proposed rule are added to the

TSCA Inventory, EPA recognizes that, before the rule is effective, other persons might engage in a use that has been identified as a significant new use. The identities of many of the chemical substances subject to this proposed rule have been claimed as confidential per 40 CFR 720.85. Based on this, the Agency believes that it is highly unlikely that any of the significant new uses described in the regulatory text of this proposed rule are ongoing.

Therefore, EPA designates November 17, 2021 as the cutoff date for determining whether the new use is ongoing. The objective of EPA's approach is to ensure that a person cannot defeat a SNUR by initiating a significant new use before the effective date of the final rule.

In the unlikely event that a person began commercial manufacture or processing of the chemical substances for a significant new use identified as of that date would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and wait until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken such actions as are required with that determination.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Chemical Substance Inventory (TSCA Inventory). Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

VII. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require developing any particular new information (*e.g.,* generating test data) before submission of a SNUN. There is an exception: If a person is required to submit information for a chemical substance pursuant to a rule, TSCA Order or consent agreement under TSCA section 4, then TSCA section 5(b)(1)(A) requires such information to be submitted to EPA at the time of submission of the SNUN.

In the absence of a rule, TSCA Order, or consent agreement under TSCA section 4 covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known or reasonably ascertainable (see 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. Unit IV. lists potentially useful information for all SNURs listed here. Descriptions of this information is provided for informational purposes. The potentially useful information identified in Unit IV. of the proposed rule will be useful to EPA's evaluation in the event that someone submits a SNUN for the significant new use.

EPA strongly encourages persons, before performing any testing, to consult with the Agency. Furthermore, pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the recommended test data. EPA encourages dialog with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h). For more information on alternative test methods and strategies to reduce vertebrate animal testing, visit *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/alternative-test-methods-and-strategies-reduce.*

The potentially useful information listed in Unit IV. may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data or other information may increase the likelihood that EPA will take action under TSCA section 5(e) or 5(f). EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.

VIII. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40. E-PMN software is available electronically at *https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca.*

IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers and processors of the chemical substances subject to this proposed rule. EPA's complete economic analysis is available in the docket for this rulemaking.

X. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This proposed rule would establish SNURs for several new chemical substances that were the subject of PMNs. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act (PRA)

According to the PRA (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection activities related to this action have already been approved by OMB under the PRA under OMB control number 2070–0012 (EPA ICR No. 574). This proposed rule does not contain any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including using automated collection techniques, to the

Director, Regulatory Support Division, Office of Mission Support (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act (RFA)

Pursuant to the RFA section 605(b) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of these SNURs would not have a significant adverse economic impact on a substantial number of small entities. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices per year. For example, the number of SNUNs received was seven in Federal fiscal year (FY) 2013, 13 in FY2014, six in FY2015, 10 in FY2016, 14 in FY2017, and 18 in FY2018 and only a fraction of these were from small businesses. In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from $16,000 to $2,800. This lower fee reduces the total reporting and recordkeeping of cost of submitting a SNUN to about $10,116 for qualifying small firms. Therefore, the potential economic impacts of complying with this proposed SNUR are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this action. As such, EPA has determined that this proposed rule would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1501 *et seq.*).

E. Executive Order 13132: Federalism

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This action would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175 (65 FR 67249, November 9, 2000), do not apply to this action.

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

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

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

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this proposed rule is not expected to affect energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve any technical standards subject to NTTAA section 12(d) (15 U.S.C. 272 note).

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 26, 2021.

Tala Henry,

Deputy Director, Office of Pollution Prevention and Toxics.

Therefore, for the reasons stated in the preamble, EPA proposes to amend 40 CFR chapter I as follows:

PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 2. Add §§ 721.11659 through 721.11686 to subpart E to read as follows:

Subpart E—Significant New Uses for Specific Chemical Substances

* * * * *

Sec.

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721.11659 Mixed amine salt (generic).
721.11660 Oxyalkylene modified polyalkyl amine alkyl diacid polymer with 2-(chloromethyl)oxirane (generic).
721.11661 Formaldehyde, homopolymer, reaction products with N-propyl-1-propanamine.
721.11662 2-Propenoic acid, polymer with 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonic acid.
721.11663 Benzoic acid, alkyl derivs. (generic).
721.11664 Aminoalkylated imidazole (generic).
721.11665 Fatty acids and fatty acid unsatd., reaction products with ethyleneamines and maleic anhydride (generic).
721.11666 Aromatic anhydride polymer with bisalkylbiphenylbisamine compound with alkylamino acrylate ester (generic).
721.11667 Propanoic acid, hydroxyl-(hydroxyalkyl)-alkyl-, polymer with 1,6-diisocyanatoalkane and poly[oxy(alkyl-alkanediyl)] ether with alkyl (hydroxyalkyl)- alkanediol, 2-propenoate (ester), lithium salt, glycerol monoacrylate 1-neodecanoate- and alkylene glycol monoacrylate-blocked (generic).
721.11668 Polyol adduct of bisaldehyde (generic).

721.11669 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy-substituted butyl amide, sodium salts (generic).
721.11670 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy- substituted butyl[3-[2-[1-[[(2-methoxyphenyl)amino]carbonyl]-2-oxopropyl]diazenyl]phenyl]substituted, sodium salts (generic).
721.11671 Butanamide, 2-[2-[(substituted phenyl)diazenyl]-N-(2-methoxyphenyl)-3-oxo- (generic).
721.11672 Polycyclic substituted alkane, polymer with cyclicalkylamine, epoxide, and polycyclic epoxide ether, reaction products with dialkylamine substituted alkyl amine (generic).
721.11673 Polycyclic alkane, polymer with monocyclic amine, polycyclic epoxide ether, reaction products with dialkylamine alkyl amine (generic).
721.11674 Polycyclic substituted alkane, polymer with epoxide, reaction products with cyclicalkylamine and dialkylamine substituted alkyl amine (generic).
721.11675 Substituted carbopolycyclic dicarboxylic acid dialkyl ester, polymer with alkanediol and carbopolycyclic bis(substituted carbopolycycle) bisalkanol (generic).
721.11676 D-Glucopyranose, oligomeric, Bu glycosides, polymers with epichlorohydrin, 2-hydroxy-3-sulfopropyl ethers, sodium salts.
721.11677 Alkyl polyoxyethylene ethers, carboxymethylated (generic).
721.11678 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, potassium salts (generic).
721.11679 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid potassium salt (1:1)-potassium 2-oxoacetate (1:1) reaction products, potassium salts (generic).
721.11680 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, sodium salts (generic).
721.11681 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid sodium salt (1:1)-sodium 2-oxoacetate (1:1) reaction products, sodium salts (generic).
721.11682 Alkaneic acid, dialkyl ester polymer with alkanediol, (isocyanatocarbomonocycle) alkyl)carbomonocycle) carbamate (generic).
721.11683 Amides, from C8–18 and C18-unsatd. glycerides and diethylenetriamine, ethoxylated.
721.11684 Amides, from diethylenetriamine and palm kernel-oil, ethoxylated.
721.11685 Amides, from coconut oil and diethylenetriamine, ethoxylated.
721.11686 Phenol-formaldehyde polymer with amino-oxirane copolymer and benzoates (generic).

* * * * *

§ 721.11659 Mixed amine salt (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as mixed amine salt (PMN P–15–632) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(y)(1) and (2).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11660 Oxyalkylene modified polyalkyl amine alkyl diacid polymer with 2-(chloromethyl)oxirane (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as oxyalkylene modified polyalkyl amine alkyl diacid polymer with 2-(chloromethyl)oxirane (PMN P–17–233) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=20.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11661 Formaldehyde, homopolymer, reaction products with N-propyl-1-propanamine.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as formaldehyde, homopolymer, reaction products with N-propyl-1-propanamine (PMN P–17–298; CAS No. 1374859–50–3) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to use the PMN substance other than as a hydrogen sulfide scavenger used in controlling hydrogen sulfide in the vapor space of fuel storage, shipping vessels, and pipelines.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=3.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11662 2-Propenoic acid, polymer with 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonic acid.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 2-propenoic acid, polymer with 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonic acid (PMN P–17–325; CAS No. 40623–75–4) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=50.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11663 Benzoic acid, alkyl derivs. (generic).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as benzoic acid, alkyl derivs. (PMN P–17–355) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11664 Aminoalkylated imidazole (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as aminoalkylated imidazole (PMN P–17–396) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) and (o).

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=33.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section

§ 721.11665 Fatty acids and fatty acid unsatd., reaction products with ethyleneamines and maleic anhydride (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as fatty acids and fatty acid unsatd., reaction products with ethyleneamines and maleic anhydride (PMN P–18–29) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11666 Aromatic anhydride polymer with bisalkylbiphenylbisamine compound with alkylamino acrylate ester (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as aromatic anhydride polymer with bisalkylbiphenylbisamine compound with alkylamino acrylate ester (PMN P–18–108) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j). It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

§ 721.11667 Propanoic acid, hydroxyl-(hydroxyalkyl)-alkyl-, polymer with 1,6-diisocyanatoalkane and poly[oxy(alkyl-alkanediyl)] ether with alkyl (hydroxyalkyl)-alkanediol, 2-propenoate (ester), lithium salt, glycerol monoacrylate 1-neodecanoate- and alkylene glycol monoacrylate-blocked (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as propanoic acid, hydroxyl-(hydroxyalkyl)-alkyl-, polymer with 1,6-diisocyanatoalkane and poly[oxy(alkyl-alkanediyl)] ether with alkyl (hydroxyalkyl)- alkanediol, 2-propenoate (ester), lithium salt, glycerol monoacrylate 1-neodecanoate- and alkylene glycol monoacrylate-blocked (PMN P–18–114) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to use the PMN substance in spray applications.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11668 Polyol adduct of bisaldehyde (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polyol adduct of bisaldehyde (PMN P–18–133) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(y)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The

provisions of § 721.185 apply to this section.

§ 721.11669 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy-substituted butyl amide, sodium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 2,5-furandione, polymer with ethenylbenzene, 4-hydroxy-substituted butyl amide, sodium salts (PMN P–18–165) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11670 2,5-Furandione, polymer with ethenylbenzene, 4-hydroxy- substituted butyl[3-[2-[1-[[(2-methoxyphenyl)amino]carbonyl]-2-oxopropyl]diazenyl]phenyl]substituted, sodium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 2,5-furandione, polymer with ethenylbenzene, 4-hydroxy-substituted butyl[3-[2-[1-[[(2-methoxyphenyl)amino]carbonyl]-2-oxopropyl]diazenyl]phenyl]substituted, sodium salts (PMN P–18–166) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11671 Butanamide, 2-[2-[(substituted phenyl)diazenyl]-N-(2-methoxyphenyl)-3-oxo- (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as butanamide, 2-[2-[(substituted phenyl)diazenyl]-N-(2-methoxyphenyl)-3-oxo- (PMN P–18–167) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80 (o). It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11672 Polycyclic substituted alkane, polymer with cyclicalkylamine, epoxide, and polycyclic epoxide ether, reaction products with dialkylamine substituted alkyl amine (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polycyclic substituted alkane, polymer with cyclicalkylamine, epoxide, and polycyclic epoxide ether, reaction products with dialkylamine substituted alkyl amine (PMN P–18–214) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to use the PMN substance in a spray application method other than the method described in the spray analysis report submitted with the PMN.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11673 Polycyclic alkane, polymer with monocyclic amine, polycyclic epoxide ether, reaction products with dialkylamine alkyl amine (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polycyclic alkane, polymer with monocyclic amine, polycyclic epoxide ether, reaction products with dialkylamine alkyl amine (PMN P–18–215) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to use the PMN substance in a spray application method other than the method described in the spray analysis report submitted with the PMN.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11674 Polycyclic substituted alkane, polymer with epoxide, reaction products with cyclicalkylamine and dialkylamine substituted alkyl amine (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polycyclic substituted alkane, polymer with epoxide, reaction products with cyclicalkylamine and dialkylamine substituted alkyl amine (PMN P–18–216) is subject to reporting

under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to use the PMN substance in a spray application method other than the method described in the spray analysis report submitted with the PMN.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11675 Substituted carbopolycyclic dicarboxylic acid dialkyl ester, polymer with alkanediol and carbopolycyclic bis(substituted carbopolycycle) bisalkanol (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as substituted carbopolycyclic dicarboxylic acid dialkyl ester, polymer with alkanediol and carbopolycyclic bis(substituted carbopolycycle) bisalkanol (PMN P–18–329) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11676 D-Glucopyranose, oligomeric, Bu glycosides, polymers with epichlorohydrin, 2-hydroxy-3-sulfopropyl ethers, sodium salts.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as D-glucopyranose, oligomeric, Bu glycosides, polymers with epichlorohydrin, 2-hydroxy-3-sulfopropyl ethers, sodium salts (PMN P–18–385; CAS No. 2139271–53–5) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11677 Alkyl polyoxyethylene ethers, carboxymethylated (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkyl polyoxyethylene ethers, carboxymethylated (PMN P–19–135) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=60.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11678 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, potassium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, potassium salts (PMN P–19–148) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (j).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

§ 721.11679 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid potassium salt (1:1)-potassium 2-oxoacetate (1:1) reaction products, potassium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid potassium salt (1:1)-potassium 2-oxoacetate (1:1) reaction products, potassium salts (PMN P–19–149) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (j).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions

of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

§ 721.11680 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, sodium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid-2-oxoacetic acid reaction products, sodium salts (PMN P–19–150) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (j).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

§ 721.11681 Iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid sodium salt (1:1)-sodium 2-oxoacetate (1:1) reaction products, sodium salts (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as iron, complexes with ethylenediamine-4-hydroxycarbomonocycle hetero-acid sodium salt (1:1)-sodium 2-oxoacetate (1:1) reaction products, sodium salts (PMN P–19–151) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (j).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

§ 721.11682 Alkaneic acid, dialkyl ester polymer with alkanediol, (isocyanatocarbomonocycle) alkyl)carbomonocycle) carbamate (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkaneic acid, dialkyl ester polymer with alkanediol, (isocyanatocarbomonocycle) alkyl)carbomonocycle) carbamate (PMN P–19–152) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture the PMN substance with greater than 25.0% residual isocyanate by weight. It is a significant new use to manufacture, process, or use the PMN substance in any manner that results in inhalation exposure.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11683 Amides, from C8-18 and C18-unsatd. glycerides and diethylenetriamine, ethoxylated.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as amides, from C8-18 and C18-unsatd. glycerides and diethylenetriamine, ethoxylated (PMN P–19–155; CAS No. 2173332–72–2) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture or process the PMN substance in any manner that results in inhalation exposure. It is a significant new use to use the PMN substance other than as an adjuvant for industrial herbicide agrochemical formulations.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=2.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11684 Amides, from diethylenetriamine and palm kernel-oil, ethoxylated.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as amides, from diethylenetriamine and palm kernel-oil, ethoxylated (PMN P–19–156; CAS No. 2173332–69–7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture or process the PMN substance in any manner that results in inhalation exposure. It is a significant new use to use the PMN substance other than as an adjuvant for industrial herbicide agrochemical formulations.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=2.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11685 Amides, from coconut oil and diethylenetriamine, ethoxylated.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as amides, from coconut oil and

diethylenetriamine, ethoxylated (PMN P–19–157; CAS No. 2173332–70–0) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to manufacture or process the PMN substance in any manner that results in inhalation exposure. It is a significant new use to use the PMN substance other than as an adjuvant for industrial herbicide agrochemical formulations.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=2.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11686 Phenol-formaldehyde polymer with amino-oxirane copolymer and benzoates (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as phenol-formaldehyde polymer with amino-oxirane copolymer and benzoates (PMN P–20–24) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) and (o). It is a significant new use to use the PMN substance in final product formulation at a concentration greater than 8%.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA–HQ–OPPT–2021–0622; FRL–9100–01–OCSPP]

TSCA Section 21 Petition for Rulemaking Under TSCA Section 6; Reasons for Agency Response; Denial of Requested Rulemaking

AGENCY: Environmental Protection Agency (EPA).

ACTION: Petition; reasons for Agency response.

SUMMARY: This action announces the availability of EPA's response to a petition received on August 16, 2021, from William D. Bush. The petition requests that EPA determine that the ''chemical mixtures contained within cosmetics present an unreasonable risk of injury to health and the environment,'' and issue a rule or order under the Toxic Substances Control Act (TSCA) to ''eliminate the hazardous chemicals used in mixtures [in cosmetics].'' After careful consideration, EPA has denied the petition for the reasons set forth in this document.

DATES: EPA's response to this TSCA section 21 petition was signed November 10, 2021.

ADDRESSES: The docket for this petition, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0622, is available at *https://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Public Reading Room is by appointment only. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Amy Shuman, Existing Chemicals Risk Management Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–2978; email address: *shuman.amy@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those persons who manufacture (including import), distribute in commerce, process, use, or dispose of cosmetics. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What is EPA's authority for taking this action?

Under TSCA section 21 (15 U.S.C. 2620), any person can petition EPA to initiate a proceeding for the issuance, amendment, or repeal of a rule under TSCA sections 4, 6, or 8, or to issue an order under TSCA sections 4, 5(e), or 5(f). A TSCA section 21 petition must set forth the facts which it is claimed establish that it is necessary to initiate the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. If EPA denies the petition, the Agency must publish its reasons for the denial in the **Federal Register**. A petitioner may commence a civil action in a U.S. district court seeking to compel initiation of the requested proceeding within 60 days of a denial or, if EPA does not issue a decision, within 60 days of the expiration of the 90-day period.

C. What criteria apply to a decision on this TSCA section 21 petition?

1. Legal Standard Regarding TSCA Section 21 Petitions

TSCA section 21(b)(1) requires that the petition ''set forth the facts which it is claimed establish that it is necessary'' to initiate the proceeding requested. 15 U.S.C. 2620(b)(1). Thus, TSCA section 21 implicitly incorporates the statutory standards that apply to the requested actions. Accordingly, EPA has relied on the standards in TSCA section 21 and in

the provisions under which actions have been requested in evaluating this TSCA section 21 petition.

2. Legal Standard Regarding TSCA Section 6(a)

In general, to promulgate a rule under TSCA section 6(a), EPA must first determine ''in accordance with section 6(b)(4)(A) that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture . . . presents an unreasonable risk.'' 15 U.S.C. 2605(a). TSCA section (b)(4)(A) is part of the risk evaluation process whereby EPA must determine ''whether a chemical substance presents an unreasonable risk of injury to health or the environment,'' and thus, whether a rule under TSCA section 6(a) is necessary. 15 U.S.C. 2605(b)(4)(A). In particular, EPA must conduct this evaluation ''without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.'' Id. Unless EPA establishes an exemption under TSCA section 6(g) (whereby certain unreasonable risks may be allowed to persist for a limited period) or EPA is addressing a persistent, bioaccumulative, and toxic substance as set forth in TSCA section 6(h), the standard for an adequate rule under TSCA section 6(a) is that it regulates ''so that the chemical substance or mixture no longer presents'' unreasonable risks under the conditions of use. 15 U.S.C. 2605(a). EPA may eliminate the unreasonable risk of a chemical substance or mixture by regulating manufacture, processing, distribution in commerce, commercial use, or disposal of the chemical substance in one or more of the manners described in TSCA section 6(a).

3. Legal Standard Regarding TSCA Sections 3(2) and (10)

TSCA section 3(2) excludes from the definition of a ''chemical substance'' ''any food, food additive, drug, *cosmetic,* or device (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, *cosmetic,* or device.'' 15 U.S.C. 2602(2) (emphases added). In addition, TSCA section 3(10) defines ''mixture'' as ''any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined.'' 15 U.S.C. 2602(10).

4. Legal Standard Regarding TSCA Section 26

TSCA section 26(h) requires EPA, in carrying out TSCA sections 4, 5, and 6, to make science-based decisions using ''scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science,'' while also taking into account other considerations, including the relevance of information and any uncertainties. 15 U.S.C. 2625(h). TSCA section 26(i) requires that decisions under TSCA sections 4, 5, and 6 be ''based on the weight of scientific evidence.'' 15 U.S.C. 2625(i). TSCA section 26(k) requires that EPA consider information that is reasonably available in carrying out TSCA sections 4, 5, and 6. 15 U.S.C. 2625(k).

II. Summary of the TSCA Section 21 Petition

A. What action was requested?

On August 16, 2021, EPA received a TSCA section 21 petition (Ref. 1) from William D. Bush (the petitioner) that requests EPA take several actions under TSCA section 6. The petition asks EPA to determine that the ''chemical mixtures contained within cosmetics present an unreasonable risk of injury to health and the environment'' and seeks the issuance of a rule or order to ''eliminate the hazardous chemicals used in mixtures [in cosmetics].'' The petition also requests ''any other prudent [methods] of toxic mixture substance control [EPA] may see due and fit.''

1. Request for Determination That the Chemical Mixtures Contained Within Cosmetics Present an Unreasonable Risk of Injury to Health and the Environment

The petition requests that EPA determine that the ''chemical mixtures contained within cosmetics present an unreasonable risk of injury to health and the environment.'' With respect to actions under TSCA section 6, TSCA section 21 provides only for the submission of a petition seeking the initiation of a proceeding for the issuance, amendment, or repeal of a rule under TSCA section 6(a). In general, before promulgating a TSCA section 6(a) rule, EPA must first determine ''in accordance with section 6(b)(4)(A)''—that is, through a TSCA risk evaluation—whether a chemical substance presents an unreasonable risk to health or the environment under the conditions of use. To initiate a TSCA section 6(b) risk evaluation, however, EPA generally must designate the chemical substance a high priority for risk evaluation. Prioritization of high priority substances for risk evaluation under TSCA section 6(b) and risk evaluation under TSCA section 6(b) are activities distinct from rulemaking under TSCA section 6(a). Because TSCA section 21 does not provide an avenue for petitioners to request the initiation of the prioritization process or the risk evaluation process through which EPA would determine whether ''chemical mixtures contained within cosmetics'' present an unreasonable risk, this **Federal Register** document does not address this specific request.

2. Request for Order by Rule That the Manufacturing Producers of Cosmetics Eliminate the Hazardous Chemicals Used in Mixtures in Cosmetics

The petition requests that EPA ''[o]rder by [r]ule that the manufacturing producers of cosmetics eliminate the hazardous chemicals used in mixtures [in cosmetics].'' TSCA section 21 provides for the submission of a petition to initiate a proceeding for the issuance, amendment, or repeal of a rule under TSCA sections 4, 6, or 8, or to issue an order under TSCA sections 4, 5(e), or 5(f). As the petitioner is seeking issuance of a rule under TSCA section 6, this **Federal Register** document addresses this request.

3. Request for Other Methods of Toxic Mixture Substance Control the Agency Determines To Be Required

The petition requests that EPA exercise ''any other prudent [methods] of toxic mixture substance control'' that the Agency deems ''due and fit.'' As a regulatory body, EPA cannot deviate from the statutory remedies established under TSCA section 21. Therefore, a solicitation for EPA to exercise ''any other prudent [methods]'' that the Agency deems ''due and fit'' does not adequately identify an objective that is executable within TSCA section 21. Therefore, this **Federal Register** document does not address this specific request.

B. What support did the petitioner offer?

To support the request for an order by rule that the manufacturing producers of cosmetics eliminate the hazardous chemicals used in mixtures in cosmetics, the petitioner offers information relating to human health impacts as a result of cosmetic application, human health and environmental impacts affected by cosmetic manufacture and import volume, and lack of cosmetic regulatory policy (Ref. 1, pp. 1–4). Of 13 points included in that discussion, seven are excerpts from an article on the toxicity of chemicals and contaminants of cosmetics (Ref. 2); these points are discussed in detail below. For the remaining six points, the petitioner paraphrases information from the article (Ref. 2), and references the authority of the U.S. Food and Drug Administration and regulatory actions taken worldwide as each relates to human health and environmental impacts from cosmetic chemicals.

Regarding the seven points attributed to the article on the toxicity of chemicals and contaminants in cosmetics, the petitioner cites various metrics associated with the manufacture and use of cosmetic products (Ref. 1, points 5, 10, 11, and 12) and the alleged environmental and human health effects resulting from exposure thereto (Ref. 1, points 1, 5, and 10).

Regarding manufacturing metrics, the petitioner highlights references from the article by stating, ''[s]ince 2009, 595 cosmetic manufacturers reported using 88 chemicals, in more than 73,000 [cosmetic] products'' (Ref. 1, point 5). The petitioner further states that ''American women use an average of 12 personal care products that contain 168 different chemicals'' and that the United States cosmetic industry since 2010 ''has grown an average of 4.1 percent annually'' with sales from 2016 totaling over $169 billion (Ref. 1, points 10 and 11). Lastly, the petitioner points to increased import of cosmetics from 181 different countries by highlighting ''[c]osmetic imports from China increased 79 percent between FY 2011 and FY 2016'' (Ref. 1, point 12).

The associated health affects statements mentioned by the petitioner include that cosmetic chemicals ''have been linked to cancer, birth defects, and reproductive harm'' and that ''[m]any of these products are applied directly to the skin, the body's largest organ, where ingredients can be absorbed directly into the bloodstream'' (Ref. 1, points 5 and 10). To expand on this point, the petitioner states ''[n]ot only are these toxic chemicals entering our bodies through direct application, but excess product that is washed down the drain pollutes our waterways and drinking water, and compounds doses of hazardous chemicals in air, water, food, and other consumer products'' (Ref. 1, point 1).

In addition, the petitioner includes a summary of the findings and policy section of the Pollution Prevention Act (42 U.S.C. 13101) (Ref. 1, points 14 and 15), though TSCA section 21 does not provide an avenue for recourse under such Act. The petitioner cites language from the Pollution Prevention Act which states that ''pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner'' and that ''source reduction is fundamentally different and more desirable than waste management and pollution control.''

The petitioner also provides two claims: (1) ''[t]oxic [c]hemicals added to and included in [c]osmetics are unreasonable;'' and (2) ''[c]osmetic [d]isposal presents a clear unreasonable risk to the [e]nvironment.'' (Ref. 1, pp. 5–6). To support the former claim, the petitioner argues that the chemical mixtures contained in cosmetics provide no benefit to consumers considering said chemicals can ''harm public welfare and the environment through their use consumption and disposal,'' but does not cite or provide reference. To support the latter claim, the petitioner states that ''research studies of toxic waste entering the environment are clear in identifying cosmetics as a major hazardous waste emission,'' but does not cite or provide any reference to such studies.

III. Disposition of TSCA Section 21 Petition

A. What is EPA's response?

After careful consideration, EPA has denied this TSCA section 21 petition. A copy of the Agency's response, which consists of the letter to the petitioner and this document, is posted on the EPA petition website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-section-21#cosmetics.* The response, the petition (Ref. 1), and other information is available in the docket for this TSCA section 21 petition.

B. What was EPA's reason for this response?

TSCA section 21 does provide for the submission of a petition seeking the initiation of a proceeding for the issuance of a rule under TSCA section 6(a). The petition must ''set forth the facts which it is claimed establish that it is necessary to issue'' the requested rule. 15 U.S.C. 2620(b)(1). When determining whether the petition meets that burden, EPA will consider whether the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance or mixture, or any combination of such activities, may present an unreasonable risk of injury to health or the environment.

EPA evaluated the information presented in the petition and considered that information in the context of the applicable authorities and requirements of TSCA sections 3(2), 6, 21, and 26. Notwithstanding that the burden is on the petitioner to present ''the facts which it is claimed establish that it is necessary'' for EPA to initiate the rule or issue the order sought, EPA nonetheless also considered relevant information that was reasonably available to the Agency during the 90-day petition review period. As detailed further in this Unit, EPA finds that the petitioner has not met its burden to support the requested actions.

Under TSCA section 6(a), EPA must, by rule, issue regulations applying one or more of the listed requirements to the extent necessary so that a chemical substance or mixture found to present unreasonable risk no longer presents such risk.–TSCA section 3(2)(B), which defines ''chemical substance,'' excludes ''any food, food additive, drug, *cosmetic,* or device (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, *cosmetic,* or device'' (emphases added). According to section 201(i) of the Federal Food, Drug, and Cosmetic Act (FFDCA), ''cosmetic'' means ''articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles; except that such term shall not include soap.'' 21 U.S.C. 321(i). Under TSCA, ''cosmetics'' are not a ''chemical substance'' when manufactured, processed, or distributed in commerce for use as a cosmetic. Therefore, EPA cannot issue a rule pursuant to TSCA

section 6(a) to apply requirements to such cosmetics. In addition, while a ''mixture'' can be subject to TSCA section 6(a), because the requested action is for ''hazardous chemicals used in mixtures [in cosmetics],'' EPA cannot issue a rule pursuant to TSCA section 6(a) to apply requirements to cosmetics when manufactured, processed, or distributed in commerce for use as a cosmetic. To the extent the petition seeks action on ''cosmetics'' when manufactured, processed, or distributed in commerce as cosmetics—including direct regulation of cosmetics through an order by rule that cosmetic manufacturers eliminate hazardous chemicals used in mixtures in cosmetics or through an action to address the first claim that ''[t]oxic [c]hemicals added to and included in [c]osmetics are unreasonable''—the petition does not request actions that are within EPA's jurisdiction under TSCA.

To the extent the petition seeks action on ''chemical substances'' within the TSCA section 3(2) definition of that term—including action to address the petitioner's second claim that ''[c]osmetic [d]isposal presents a clear unreasonable risk to the [e]nvironment''—EPA finds that the petitioner did not set forth facts establishing that it is necessary to initiate an appropriate proceeding pursuant to TSCA section 21. In particular, with respect to the second claim, EPA finds that the petition did not demonstrate facts that could support an EPA determination of unreasonable risk to the environment. Rather, the specific chemical substances identified by the petition as examples are discussed by reference to their potential human health effects when used in manufactured cosmetic products. In addition, while the petition cites TSCA and Pollution Prevention Act authorities applicable to disposal, there are no data or references offered to support the assertion that ''research studies of toxic waste entering the environment are clear in identifying cosmetics as a major hazardous waste emission'' (Ref. 1, p. 6). As explained above, TSCA section 21(b)(1) requires that the petition ''set forth the facts which it is claimed establish that it is necessary'' to initiate the proceeding requested. 15 U.S.C. 2620(b)(1). TSCA section 21(b)(4)(B) also provides the standard for judicial review should EPA deny a request for rulemaking under TSCA section 6(a): ''If the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that . . . the chemical substance or mixture to be subject to such rule . . . presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation, under the conditions of use,'' the court shall order the EPA Administrator to initiate the requested action. 15 U.S.C. 2620(b)(4)(B). Consistent with these provisions, a petition for a TSCA section 6(a) rulemaking must set forth facts which would enable EPA to conclude that there is an unreasonable risk for which a TSCA section 6(a) risk management rule is warranted. EPA does not find that the petition in this case sets forth facts which would enable EPA to conclude that the disposal of particular chemical substance(s) or mixture(s) in cosmetics presents unreasonable risk and that an appropriate proceeding should be initiated. To the extent the petition seeks other action cognizable under TSCA section 21 to address ''chemical substances'' in cosmetics outside of cosmetic disposal, EPA similarly finds that the petition does not set forth sufficient facts to establish the necessity of initiating an appropriate proceeding under TSCA section 21.

Finally, to the extent that the petition referenced the Pollution Prevention Act (42 U.S.C. 13101), the Agency reiterates that TSCA section 21 does not provide an avenue for recourse under such Act.

B. What were EPA's conclusions?

EPA denied the request to issue a rule under TSCA section 6(a). TSCA section 3(2)(B) excludes ''cosmetic'' from the definition of ''chemical substance'' when manufactured, processed, or distributed in commerce for use as a cosmetic. Therefore, cosmetics, and any combination of chemicals contained therein, are not chemical substances under TSCA when manufactured, processed, or distributed in commerce for use as a cosmetic. To the extent the petition seeks TSCA section 6 action on ''cosmetics'' when manufactured, processed, or distributed in commerce as cosmetics, the requested actions are not within EPA's jurisdiction under TSCA. In addition, to the extent the petition seeks action on ''chemical substances'' within the TSCA section 3(2) definition of that term, EPA finds that the petition did not set forth facts establishing that it is necessary to initiate an appropriate proceeding pursuant to TSCA section 21. In particular, the petition did not identify the disposal of any particular chemical substance(s) or mixture(s) that could support an EPA determination of unreasonable risk to the environment and, therefore, did not set forth sufficient facts establishing that it is necessary to issue a TSCA section 6(a) rule addressing cosmetic disposal.

IV. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

1. Bush, William D. Petition for Issuance of New Rules under Section 15 U.S.C. 2605 re: [COSMETICS]. Received August 16, 2021.
2. Faber, S. (2020). The Toxic Twelve Chemicals and Contaminants in Cosmetics. Available at *https://www.ewg.org/the-toxic-twelve-chemicals-and-contaminants-in-cosmetics.*

Authority: 15 U.S.C. 2601 *et seq.*

Dated: November 10, 2021.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2021–25027 Filed 11–16–21; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 802, 804, 811, 812, 824, 839, and 852

RIN 2900–AQ41

VA Acquisition Regulation: Acquisition of Information Technology; and Other Contracts for Goods and Services Involving Information, VA Sensitive Information, and Information Security; and Liquidated Damages Requirements for Data Breach

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. This rulemaking revises the VAAR by adding a part covering Acquisition of Information

Technology and revising coverage concerning Other Contracts for Goods and Services involving mandatory information, privacy, and security requirements to include policy concerning VA Sensitive Personal Information, information security, and liquidated damages requirements for data breach in the following parts: Administrative and Information Matters; Describing Agency Needs; Protection of Privacy and Freedom of Information, as well as Acquisition of Commercial Items. It also revises affected parts concerning Definitions of Words and Terms, and Solicitation Provisions and Contract Clauses.

DATES: Comments must be received on or before January 18, 2022 to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov* or mailed to Mr. Rafael Taylor, 003A2A, Department of Veterans Affairs, Procurement Policy and Warrant Management Services (PPS), 810 Vermont Avenue NW, Washington, DC 20420. Comments should indicate that they are submitted in response to ''RIN 2900–AQ41—VA Acquisition Regulation: Acquisition of Information Technology; and Other Contracts for Goods and Services involving Information, VA Sensitive Personal Information, and Information Security, and Liquidated Damages Requirements for Data Breach.'' Comments received will be available at *regulations.gov* for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 810 Vermont Avenue NW, Washington, DC 20420, (202) 714–8560. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is issued under the authority of the Office of Federal Procurement Policy (OFPP) Act which provides the authority for an agency head to issue agency acquisition regulations that implement or supplement the FAR.

VA is proposing to revise the VAAR to add new policy or regulatory requirements, to update existing policy, and to remove any redundant guidance where it may exist in affected parts, and to place guidance that is applicable only to VA's internal operating processes or procedures in the VAAM. Codified acquisition regulations may be amended and revised only through rulemaking. All amendments, revisions, and removals have been reviewed and concurred with by VA's Integrated Product Team of agency stakeholders.

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are consistent with the FAR content. The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

The Office of Federal Procurement Policy Act, as codified in 41 U.S.C. 1707, provides the authority for the Federal Acquisition Regulation and for the issuance of agency acquisition regulations consistent with the FAR.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The VAAR is set forth at title 48 CFR, chapter 8, parts 801 through 873.

Discussion and Analysis

VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. This rule adds a new VAAR part 839 along with proposed revisions to other parts as described below. Where necessary, procedural guidance has been considered for inclusion in VA's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authorities will be included in the VA Acquisition Manual (VAAM) as internal agency guidance. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition procedures. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, will publish them in the **Federal Register**. VA will combine related topics, as appropriate. The VAAM is being created in parallel with these revisions to the VAAR and is not subject to the rulemaking process as the VAAM contains internal VA procedures and guidance. Therefore, the VAAM will not be finalized and available online for any new parts until corresponding VAAR parts are finalized.

VAAR Part 802—Definitions of Words and Terms

VA proposes to add the following 11 definitions in section 802.101 to reflect terms VA uses in more than one part as related to the amendatory text, parts and clauses and provisions outlined in this VAAR case: Business Associate, Business Associate Agreement (BAA), Gray market items, Information system, Information technology, Information technology-related contracts, Privacy officer, Security plan, Sensitive personal information, VA Information Security Rules of Behavior for Organizational Users, and VA sensitive information.

VAAR Part 804—Administrative and Information Matters

We propose to add the following authorities to part 804:

- 38 U.S.C. 5723, which requires all users of VA information and information systems to (1) Comply with all VA security policies, procedures, and practices; (2) Take security awareness training on at least an annual basis; (3) Report all actual or suspected security and privacy incidents immediately to the Information System Security Officer (ISSO) or Privacy Officer of the facility and to their immediate supervisor (in VA contracts contractors will be required to report security incidents to the contracting officer and the contractor officer's representative (COR), as identified or directed in the contract, within one hour of discovery or suspicion); and (4) Sign and acknowledge VA's Information Security Rules of Behavior for Organizational Users (*i.e.,* ''VA National Rules of Behavior'') on an annual basis;
- 38 U.S.C. 5724, which requires VA, in the event the Secretary determines there exists a reasonable risk for the potential misuse of sensitive personal information involved in a data breach, to provide credit protection services, as well as notification to the affected individual; and
- 38 U.S.C. 5725(a)–(c), which requires the Secretary to ensure that if a contract is entered into for the performance of any Department function that requires access to sensitive personal information include, as a condition of the contract, that a contractor shall not, directly or through an affiliate of the contractor, disclose such information to any other person unless the disclosure is lawful and is expressly permitted under the contract. This statute also requires the contractor, or any subcontractors under the contract, to promptly notify VA (within one hour of discovery or suspicion) of any actual or suspected data breach that occurs with respect to sensitive personal information. It further requires that each such contract is subject to liquidated damages to be paid by the contractor to VA in the event of a data breach of any sensitive personal information

processed or maintained by the contractor or any subcontractor under the contract. Such liquidated damages will be used for the purpose of VA providing credit protection services.

VA proposes to amend part 804 by adding subpart 804.19, Basic Safeguarding of Covered Contractor Information Systems, and sections 804.1900–70, Scope of subpart; 804.1902, Applicability; 804.1970, Information security policy—contractor general responsibilities; and 804.1903, Contract clause.

In section 804.1900–70, Scope of subpart, it would state that the subpart prescribes policies and procedures for information security and protection of VA information, information systems, and VA sensitive information, including sensitive personal information.

In section 804.1902, Applicability, VA stipulates that the subpart would apply to all VA acquisitions, including acquisitions of commercial items other than commercially available off-the-shelf items, when a contractor's information system may contain VA information.

In section 804.1970, Information security policy—contractor general responsibilities, VA provides policy requiring contractors, subcontractors, business associates and their employees who are users of VA information or information systems, or have access to VA information and VA sensitive information to—

- Comply with all VA information security program policies, procedures, practices and related contract requirements, specifications and clauses;
- Complete VA security awareness training on an annual basis;
- Complete VHA's Privacy and Health Insurance Portability and Accountability Act of 1996 (HIPAA) Training on an annual basis when access to protected health information (PHI) is required;
- Report all actual or suspected security/privacy incidents and reporting information to the contracting officer, and COR as identified or as directed in the contract, within one hour of discovery or suspicion;
- Comply with VA policy as it relates to personnel security and suitability program requirements for background screening of both employees and non-employees who have access to VA information systems and data;
- Comply with directions that may be issued by the contracting officer or COR, or from the VA Assistant Secretary for Information and Technology or a designated representative through the contracting officer or COR, directing specific activities when a security/privacy incident occurs;
- Sign an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior for Organizational Users (VA National Rules of Behavior) as required by 38 U.S.C. 5723, FAR 39.105, Privacy, and clause 852.204–71, Information and Information Systems Security, on an annual basis. The VA Information Security Rules of Behavior describe the responsibilities and expected behavior of contractors, subcontractors, business associates and their employees who are users of VA information or information systems, information assets and resources, or have access to VA information;
- Maintain records and compliance reports regarding HIPAA Security and Privacy Rule compliance in order to provide such information to VA upon request to ascertain whether the business associate is complying with all applicable provisions under both rules' regulatory requirements; and
- Flow down requirements in all subcontracts and Business Associate Agreements (BAAs), at any level, as provided in the clause at 852.204–71, Information and Information Systems Security.

Section 804.1903, Contract clause, would require contracting officers to insert clause 852.204–71, Information and Information Systems Security, as further described in VAAR part 852 below in the preamble, when FAR clause 52.204–1, Basic Safeguarding of Covered Contractor Information Systems is required to be included in accordance with FAR 4.1903.

VAAR Part 811—Describing Agency Needs

We propose to add the following authorities to supplement the existing authorities for the proposed policies and procedures under part 811 as follows:

- 38 U.S.C. 5723, which requires all users of VA information and information systems to (1) Comply with all VA security policies, procedures, and practices; (2) Take security awareness training on at least an annual basis; (3) Report all actual or suspected security and privacy incidents and report the information to the appropriate Information System Security Officer (ISSO) or Privacy Officer of the facility and to their immediate supervisor (in VA contracts contractors will be required to report security incidents to the contracting officer and the contractor officer's representative (COR), as identified or directed in the contract, within one hour of discovery or suspicion); and (4) Sign and acknowledge VA's Information Security Rules of Behavior for Organizational Users (*i.e.,* VA National Rules of Behavior) on an annual basis.
- 38 U.S.C. 5724, which requires VA, in the event the Secretary determines there exists a reasonable risk for the potential misuse of sensitive personal information involved in a data breach, to provide credit protection services, as well as notification to the affected individual.
- 38 U.S.C. 5725(a)–(c), which requires the Secretary to ensure that if a contract is entered into for the performance of any Department function that requires access to sensitive personal information include, as a condition of the contract, that a contractor shall not, directly or through an affiliate of the contractor, disclose such information to any other person unless the disclosure is lawful and is expressly permitted under the contract. This statute also requires the contractor, or any subcontractors under the contract, to promptly notify VA (within one hour of discovery or suspicion) of any actual or suspected data breach that occurs with respect to sensitive personal information. It further requires that each such contract is subject to liquidated damages to be paid by the contractor to VA in the event of a data breach of any sensitive personal information processed or maintained by the contractor or any subcontractor under the contract. Such liquidated damages will be used for the purpose of VA providing credit protection services.

We propose to add a new subpart 811.5, Liquidated damages, including underlying sections as follows:

We propose to add 811.500, Scope, that would provide that the subpart is to prescribe policies and procedures for using a liquidated damages clause in solicitations and contracts that involve sensitive personal information. It also states that it pertains to any solicitations and contracts involving sensitive personal information issued by another agency for or on behalf of VA through an interagency acquisition in accordance with (IAW) FAR subpart 17.5 and VAAR subpart 817.5.

We propose to add 811.501–70, Policy—statutory requirement, that provides that contracting officers are required to include a liquidated damages clause pertaining to the protection of sensitive personal information in accordance with 38 U.S.C. 5725(b), to be paid by the contractor to the VA for the provision of credit protection services to affected individuals pursuant to 38 U.S.C. 5724(b) in the event of a data breach with respect to any sensitive personal

information processed or maintained by the contractor or any subcontractor under the contract.

We propose to add 811.503–70, Contract clause, that would prescribe new clause 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs, as described in the section describing the proposed revisions to part 852 in this preamble. The proposed clause would be required to be incorporated in VA solicitations, contracts, purchase orders, and other instruments (for both commercial and non-commercial acquisitions, as well as when using the procedures of FAR parts 8 and/or 12, or FAR part 13 as described in the Alternate versions of the clause), when access to sensitive personal information (as defined in 38 U.S.C. 5727 and in part 839) is required whether as a contractor, subcontractor, business associate or an employee of one of these entities. The clause—

- Would prohibit the disclosure of sensitive personal information to any other person or entity unless the disclosure is lawful and is expressly permitted under the contract;
- Would require contractors, subcontractors, business associates or their employees to promptly notify the contracting officer and the contracting officer's representative (COR), of any security incident that occurs involving sensitive personal information; and
- Would require that if the contractor fails to protect sensitive personal information, the contractor shall, in the event of a data breach, in place of actual damages, pay to the Government liquidated damages per affected individual in an amount to be specified and inserted by the contracting officer in accordance with current VA internal policy. The amount to be inserted by the contracting officer would represent an estimate of the cost per affected individual for VA to provide credit protection services (*e.g.,* notification, credit monitoring and related support) for individuals affected by a data breach.

VAAR Part 812—Acquisition of Commercial Items

We propose to amend 812.301, Solicitation provisions and contract clauses for the acquisition of commercial items, by removing a prescription for clause 852.212–70. This clause, which required contracting officers to review and check provisions and clauses that apply, has been removed as unnecessary and redundant to the normal selection process for provisions and clauses.

This section will also be amended by removing a prescription for clause 852.212–71, Gray Market Items, and to add prescriptions for two new clauses: 852.212–71, Gray Market and Counterfeit Items, and 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts. The new clauses were originally released as a VAAR Class Deviation and will be codified via this rule.

VAAR Part 824—Protection of Privacy and Freedom of Information

We propose to add the following authorities to part 824:

- 38 U.S.C. 5723, which requires all users of VA information and information systems to (1) Comply with all VA security policies, procedures, and practices; (2) Take security awareness training on at least an annual basis; (3) Report all actual or suspected security and privacy incidents immediately to the Information System Security Officer (ISSO) or Privacy Officer of the facility and to their immediate supervisor (in VA contracts contractors will be required to report security incidents to the contracting officer and the contractor officer's representative (COR)), as identified or directed in the contract, within one hour of discovery or suspicion); and (4) Sign and acknowledge VA's Information Security Rules of Behavior for Organizational Users (*i.e.,* ''VA National Rules of Behavior'') on an annual basis.
- 38 U.S.C. 5724, which requires VA, in the event the Secretary determines there exists a reasonable risk for the potential misuse of sensitive personal information involved in a data breach, to provide credit protection services, as well as notification to the affected individual.
- 38 U.S.C. 5725 (a)–(c), which requires the Secretary to ensure that if a contract is entered into for the performance of any Department function that requires access to sensitive personal information include, as a condition of the contract, that a contractor shall not, directly or through an affiliate of the contractor, disclose such information to any other person unless the disclosure is lawful and is expressly permitted under the contract. This statute also requires the contractor, or any subcontractors under the contract, to promptly notify VA (within one hour of discovery or suspicion) of any actual or suspected data breach that occurs with respect to sensitive personal information. It further requires that each such contract is subject to liquidated damages to be paid by the contractor to VA in the event of a data breach of any sensitive personal information processed or maintained by the contractor or any subcontractor under the contract. Such liquidated damages will be used for the purpose of VA providing credit protection services.

We propose to amend VAAR part 824 under subpart 824.1, Protection of Individual Privacy, by adding sections 824.103–70, Protection of privacy—general requirements and procedures related to Business Associate Agreements, and 824.103–71, Liquidated damages—protection of information.

We propose to add 824.103–70, Protection of privacy—general requirements and procedures related to Business Associate Agreements (BAAs), to establish policy. This would ensure compliance with unique responsibilities to protect protected health information, and require contractors performing under VA contracts subject to unique PHI and Health Insurance Portability and Accountability Act (HIPAA) to comply with requirements in this section. It describes the requirement for a Business Associate Agreement and when that applies. It describes that the Veterans Health Administration (VHA) is a HIPAA Covered Entity. VHA is the only administration of the Department of Veterans Affairs that is a HIPAA Covered Entity under the HIPAA Privacy Rule. It would further require that contractors or entities required to execute BAAs for contracts and other agreements become VHA business associates. It also describes those instances where other components within VA Administrations may also provide certain services and support to VHA and must receive PHI in order to do so. If these components award contracts or enter into other agreements, purchase/delivery orders, modifications and issue governmentwide purchase card transactions to help in the delivery of these services to VHA, they will also fall within the requirement to obtain a satisfactory assurance from these contractors by executing a BAA. Basically, it would require contractors, subcontractors, and their employees, where HIPAA protected health information (PHI) is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized in order to perform certain health care operations activities or functions on behalf of the Veterans Health Administration (VHA) as a covered entity, to execute a BAA.

In 824.103–71, Liquidated damages—protection of information, it reinforces the applicability of a liquidated damages clause as prescribed at 811.503–70 when performance under a contract requires a contractor to enter

into a business associate agreement with VHA because the contractor or its subcontractor is required to create, receive, maintain, or transmit VHA PHI or is required to store, generate, access, exchange, process, or utilize PHI, for certain services or functions, on behalf of VHA. The liquidated damages clause would be required to be added even in situations where the prime contractor never directly receives VA's sensitive personal information and the same flows directly to the prime contractor's subcontractor.

VAAR Part 839—Acquisition of Information Technology

We propose to add part 839, Acquisition of Information Technology, to implement and supplement FAR part 39, Acquisition of Information Technology, to incorporate, in consonance and together with the FAR, VA policies, procedures, and contract clauses necessary to control the relationship between VA and contractors or prospective contractors concerning unique aspects of the acquisition of information technology or service contracts related to information technology.

We propose to include the following authorities as the authority for the proposed policies and procedures under part 839: 38 U.S.C. 5723; 5724; 5725(a)–(c); 40 U.S.C. 121(c); 40 U.S.C. 11319(b)(1)(C); 41 U.S.C. 1121(c)(3); 1303 and 1702; and 48 CFR 1.301–1.304. The authorities are described as follows—

- 38 U.S.C. 5723, which requires all users of VA information and information systems to (1) Comply with all VA security policies, procedures, and practices; (2) Take security awareness training on at least an annual basis; (3) Report all actual or suspected security and privacy incidents to the Information System Security Officer (ISSO) or Privacy Officer of the facility and to their immediate supervisor (in VA contracts contractors will be required to report security incidents to the contracting officer and the contractor officer's representative (COR), as identified or directed in the contract, within one hour of discovery or suspicion); and (4) Sign and acknowledge VA's Information Security Rules of Behavior for Organizational Users (*i.e.,* ''VA National Rules of Behavior'') on an annual basis;
- 38 U.S.C. 5724, which requires VA, in the event the Secretary determines there exists a reasonable risk for the potential misuse of sensitive personal information involved in a data breach, to provide credit protection services, as well as notification to the affected individual;
- 38 U.S.C. 5725(a)–(c), which requires the Secretary to ensure that if a contract is entered into for the performance of any Department function that requires access to sensitive personal information include, as a condition of the contract, that a contractor shall not, directly or through an affiliate of the contractor, disclose such information to any other person unless the disclosure is lawful and is expressly permitted under the contract. This statute also requires the contractor, or any subcontractors under the contract, to promptly notify VA (within one hour of discovery or suspicion) of any actual or suspected data breach that occurs with respect to sensitive personal information. It further requires that each such contract is subject to liquidated damages to be paid by the contractor to VA in the event of a data breach of any sensitive personal information processed or maintained by the contractor or any subcontractor under the contract. Such liquidated damages will be used for the purpose of VA providing credit protection services;
- 40 U.S.C. 121(c), which authorizes the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the FAR;
- 40 U.S.C. 11319(b)(1)(C), which stipulates that a covered agency other than the Department of Defense may not enter into a contract or other agreement for information technology or information technology services, unless the contract or other agreement has been reviewed and approved by the Chief Information Officer (CIO) of the agency, and that permits VA to use the governance processes of the VA to approve such a contract or other agreement if the VA CIO is included as a full participant in the governance processes. It also further permits that for a contract or agreement for a non-major information technology investment under this authority, the CIO may delegate the approval of the contract or agreement to an individual who reports directly to the CIO;
- 41 U.S.C. 1121(c)(3), which speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement that are subject to the authority conferred to the Administrator of the Office of Federal Procurement Policy, as well as other sections of Title 41, Public contracts, as cited in (c)(3);
- 41 U.S.C. 1303, an updated positive law codification to reflect additional authority of the VA as an executive agency to issue regulations that are essential to implement Governmentwide policies and procedures in the agency, as well as to issue additional policies and procedures required to satisfy the specific needs of the VA;
- 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; and
- 48 CFR 1.301 through 1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to add 839.000, Scope of part, stating that the purpose of the part is to prescribe acquisition policies and procedures for use in acquiring information technology supplies, services and systems, and that it applies to both VA procured information technology systems as well as Interagency Acquisitions defined in FAR part 17 and VAAR part 817.

We propose to add subpart 839.1—General, with no text, and with the following sections within the subpart:

We propose to add 839.101, Policy, which identifies directives, security requirements, procedures and guidance that apply to all VA contracts and to VA contractors and subcontractors providing products, and contractors, subcontractors, and third-parties, in the performance of contractual obligations to VA when providing information technology related services.

We propose to add 839.105, Privacy, as a header only with no text.

We propose to add 839.105–70, Business Associate Agreements, information technology-related contracts and privacy, to address a key requirement that business associate agreements shall be executed whether for VHA directly as the only VA ''Covered Entity'' or for other contracts and agreements issued by other VA administrations and staff offices in support of VHA where contractors, subcontractors, business associates and their employees may have to access, receive or create VA sensitive information or sensitive personal information, on behalf of VHA, in order to provide certain health care operation services. (See 802.101 for the definition of information technology-related contracts.)

We propose to add 839.105–71, Liquidated damages—protection of information in information technology related contracts, in contracts for goods and services, to address the statutory requirement to include a liquidated damages clause as prescribed in

811.503–70(a) in contracts where access to sensitive personal information is provided by the VA or on its behalf.

We propose to add 839.106–70, Information technology security and privacy contract clauses, to prescribe the use of the following clauses:

In paragraph (a), contracting officers shall insert the clause at 852.239–70, Security Requirements for Information Technology Resources, and the clause 852.239–71, Information Technology Security Plan and Accreditation, in all solicitations, contracts and orders exceeding the micro-purchase threshold that include information technology services.

In paragraph (b), clause 852.239–72, Information System Design and Development, would be required to be inserted in solicitations, contracts, orders and agreements where services to perform information system design and development are required.

In paragraph (c), clause 852.239–73, Information System Hosting, Operation, Maintenance or Use, would be required to be inserted in solicitations, contracts, orders and agreements where services to perform information system hosting, operation, maintenance or use are required.

In paragraph (d), clause 852.239–74, Security Controls Compliance Testing, would be required to be inserted in solicitations, contracts, orders and agreements when the clauses at 852.239–72 or 852.239–73 are inserted.

We propose to add subpart 839.2—Information and Communication Technology, with no text, and the following sections within the subpart.

We propose to add 839.201, Scope of subpart, to state that the subpart applies to all procurement of information and communication technology (ICT) supplies, services, and information and to require compliance with Section 508 standards. Section 508 standards now refer to ICT in lieu of electronic and information technology, so VA is adopting the same terminology.

We propose to add 839.203, Applicability, to require submission of a VA Section 508 Checklist when required in VA solicitations, and to provide a website to help businesses ensure compliance with VA Section 508 Standards. This would assist VA in the evaluation of offeror's proposals when an acquisition involves the acquisition of information technology or the furnishing of services related to acquisition of information technology as defined in this part. The form will be available either in solicitations or via the website link identified.

We propose to add 839.203–70, Information and communication technology accessibility standards—contract clause and provisions, to prescribe new solicitation provision 852.239–75, Information and Communication Technology Accessibility Notice, and new contract clause 852.239–76, Information and Communication Technology Accessibility, which requires the use of the VA Section 508 Checklists.

VAAR Part 852—Solicitation Provisions and Contract Clauses

We propose to add clause 852.204–71, Information and Information Systems Security, that would require contractors, subcontractors, their employees, third-parties, and business associates with access to VA information, information systems, or information technology (IT) or providing and accessing IT-related contracts (see 802.101), shall adhere to VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and Handbook 0710, Personnel Security and Suitability Program, which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive Orders, policies, regulations, standards and guidance for protecting VA information, information systems (see 802.101, Definitions) security and privacy, and adhering to personnel security requirements when accessing VA information or information systems. It would describe in detail requirements for access to VA information and VA information systems and appropriate security and protection requirements; information on requirement for contractor operations in the United States; Contractor/subcontractor employee reassignment and termination notification requirements; VA information custodial requirements to include release, publication, and use of data, as well as media sanitization requirements; data retention, destruction and contractor self-certification requirements and use and copying of VA data and information; information with respect to violation of information custodial requirements, encryption, firewall and web services security controls, and disclosure of VA data and information. The clause also would cover compliance with privacy statutes and applicable regulations, as well as the requirement to report known or suspected security or privacy incidents. It further describes security incident investigation requirements and data breach notification requirements. It goes on to detail specific annual training requirements and the requirement to complete and such mandatory training requirements and complete acknowledgement of the VA Information Security Rules of Behavior for Organizational Users. A specific subcontract flow down requirement is also included.

We propose to add clause 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs, that provides that if the contractor fails to protect VA sensitive personal information which results in a data breach, the contractor shall, in place of actual damages, pay to the Government liquidated damages in an amount per affected individual, inserted by the contracting officer based on internal VA policy, in order to cover costs related to notification, data breach analysis and credit monitoring for such individuals. In the event the contractor provides payment of actual damages in an amount determined to be adequate by the contracting officer, the contracting officer may forgo collection of liquidated damages. The contracting officer would insert Alternate I in all solicitations or contracts, in commercial items acquisitions awarded under the procedures of FAR part 8 or FAR part 12, and would insert Alternate II in all solicitations, contracts, or orders, in simplified acquisitions exceeding the micro-purchase threshold that are for other than commercial items awarded under the procedures of FAR part 13 (see FAR 13.302–5(d)(1) and the clause at FAR 52.213–4).

We propose to remove clause 852.212–70, Provisions and Clauses Applicable to VA Acquisition of Commercial Items, as redundant to other FAR clauses.

We propose to remove clause 852.212–71, Gray Market Items, and to add a new clause in its place, 852.212–71, Gray Market and Counterfeit Items. This new clause would require that no used, refurbished, or remanufactured supplies or equipment/parts shall be provided. It would state that any procurement where the clause is inserted is for new Original Equipment Manufacturer (OEM) items only. No gray market items shall be permitted to be provided. The clause would also specify that no counterfeit supplies or equipment/parts shall be provided. Unlawful or unauthorized substitutions are set forth in the clause and include used items represented as new, or the

false identification of grade, serial number, lot number, date code, or performance characteristics. The clause would also require that all vendors under the solicitation or contract shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, and would be required to be verified by an authorization letter or other documents from the OEM.

We propose to add 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts. This new clause would permit used, refurbished, or remanufactured parts to be provided. However, no gray market supplies or equipment shall be permitted to be provided. The clause would also require that no counterfeit supplies or equipment shall be provided. The clause would also require that all vendors shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system and would be required to be verified by an authorization letter or other documents from the OEM. Both proposed clauses are VA clauses that were originally released via a Class Deviation that we propose for codification as a part of this rulemaking.

We propose to add clause 852.239–70, Security Requirements for Information Technology Resources, to specify that contractors shall be responsible for information technology security for all systems connected to a Department of Veterans Affairs (VA) network or operated by the contractor for VA, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the contractor has physical or electronic access to VA information that directly supports the mission of VA. Examples of tasks that require security provisions include—

(1) Hosting of VA e-Government sites or other information technology operations;

(2) Acquisition, transmission, or analysis of data owned by VA with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to VA general support systems/major applications at a level beyond that granted the general public, *e.g.,* bypassing a firewall.

The clause would also require the contractor to develop, provide, implement, and maintain an Information Technology Security Plan. This plan shall describe the processes and procedures that the contractor will follow to ensure appropriate security of information technology resources developed, processed, or used under this contract. The clause would require that within 30 days after contract award, the contractor shall submit the Information Technology Security Plan to the contracting officer for review. This plan shall detail the approach contained in the offeror's proposal, sealed bid or quotation. Upon acceptance by the contracting officer, the Plan will be incorporated into the contract by contract modification. As required by current VA policy, the contractor shall submit written proof of information technology security accreditation to the contracting officer. It also specifies specifically as pertains to information technology related contracts that its employees performing services under this contract complete VA security awareness training on an annual basis. This includes signing an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior for Organizational Users (VA National Rules of Behavior) as required by 38 U.S.C. 5723; FAR 39.105, Privacy; clause 852.204–71, Information and Information Systems Security, and this clause on an annual basis.

We propose to add provision 852.239–71, Information Technology Security Plan and Accreditation, that would require that all offers submitted in response to this solicitation or request for quotation shall address the approach for completing the security plan and accreditation requirements in clause 852.239–70, Security Requirements for Information Technology Resources.

We propose to add clause 852.239–72, Information System Design and Development, which would be required in all solicitations, contracts, purchase orders and agreements where services to perform information system design and development are required. The contractor/subcontractor shall comply with the Privacy Act of 1974 (the Act)) and VA rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an agency function when the contract specifically identifies— (1) the Systems of Records (SOR); and (2) the design, development, or operational work that the contractor/subcontractor is to perform. During the development cycle a Privacy Impact Assessment (PIA) must be completed, provided to the COR, and approved by the VA Privacy Service in accordance with VA Directive 6508, Implementation of Privacy Threshold Analysis and Privacy Impact Assessment.

We propose to add clause 852.239–73, Information System Hosting, Operation, Maintenance, or Use, which would be required in all solicitations, contracts, purchase orders and agreements where services to perform information system hosting, operation, maintenance or used are required. For information systems that are hosted, operated, maintained, or used on behalf of VA at non-VA facilities, contractors/subcontractors are fully responsible and accountable for ensuring compliance with all applicable Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations, the Privacy Act and other required VA confidentiality statutes included in VA's mandatory yearly training and privacy handbooks, Federal Information Security Management Act (FISMA), National Institute of Standards and Technology (NIST), Federal Information Processing Standards (FIPS), and VA security and privacy directives and handbooks. This includes conducting compliant risk assessments, routine vulnerability scanning, system patching and change management procedures, and the completion of an acceptable contingency plan for each system. The contractor's security control procedures must be equivalent to or exceed, to those procedures used to secure VA systems. A Privacy Impact Assessment (PIA) must also be provided to the contracting officer's representative (COR) and approved by VA Privacy Service prior to approval to operate. Adequate security controls for collecting, processing, transmitting, and storing of Personally Identifiable Information (PII), as determined by the VA Privacy Service, must be in place, tested, and approved by VA prior to hosting, operation, maintenance, or use of the information system, or systems by or on behalf of VA. These security controls are to be assessed and stated within the Privacy Impact Assessment and if these controls are determined not to be in place, or inadequate, a Plan of Action and Milestones (POA&M) must be submitted and approved prior to the collection of PII. The contractor/subcontractor must conduct an annual self-assessment on all systems and outsourced services as required. Electronic copies of the assessment must be provided to the COR. Media (*e.g.,* hard drives, optical disks, CDs, back-up tapes) used by the contractor/subcontractor that contain VA information must be returned to the VA for sanitization or destruction or the contractor/subcontractor must self-certify that the media has been disposed of per VA Directive 6500 requirements and as required by current VA policy.

This must be completed within 30 days of termination of the contract.

We propose to add clause 852.239–74, Security Controls Compliance Testing, which would be required in solicitations, contracts, orders and agreements, when the clauses at 852.239–72 or 852.239–73 are inserted. Clause 852.239–73 would provide notice that VA, including the Office of Inspector General, reserves the right to evaluate any or all of the security controls and privacy practices implemented by a contractor under the clauses contained within the contract. Clause 852.239–73 provides that with 10 working-days' notice, at the request of VA, the contractor must fully cooperate and assist in a government-sponsored security controls assessment at each location wherein VA information is processed or stored, or information systems are developed, operated, maintained, or used on behalf of VA, including those initiated by the Office of the Inspector General. VA may conduct a security control assessment on shorter notice, to include unannounced assessments, as determined by VA in the event of a security incident or at any other time.

We propose to add solicitation provision 852.239–75, Information Communication and Technology Accessibility Notice, and clause 852.239–76, Information and Communication Technology Accessibility, that require the use of the VA Section 508 Checklists to be submitted under solicitations and contracts, and that provide additional information regarding the VA Section 508 website.

Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct 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). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Paperwork Reduction Act

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for its review.

OMB assigns control numbers to collections of information it approves. VA 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. VA is describing four groups of new collections of information in this rule under the Paperwork Reduction Act of 1995 for four separate OMB Control Numbers related to—

VAAR Part 804 related information collection:

1. Proposed clause, 852.204–71, Information and Information Systems Security, and section 804.1970, Information security policy—contractor general responsibilities.

VAAR Part 811 related information collection:

2. Proposed section 811.503–70, Contract clause, and proposed clause 852.211–70, Liquidated Damages—Reimbursement for Data Breach Costs.

VAAR Part 812 related information collection:

3. Proposed section 812.301(f), Solicitation provisions and contract clauses for the acquisition of commercial items, and proposed clauses 852.212–71, Gray Market and Counterfeit Items, and 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts.

VAAR Part 839 related information collection:

4. Proposed section 839.106–70, Information technology security and privacy clauses, and proposed clauses 852.239–70, Security Requirements for Information Technology Resources; 852.239–72, Information System Design and Development; and 852.239–73, Information System Hosting, Operation, Maintenance or Use. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Written comments and recommendations for the proposed collections of information should be sent within 60 days of publication of this proposed rule through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Rafael Taylor, Office of Acquisition & Logistics, Procurement Policy & Warrant Management Services (003A2A), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *rafael.taylor@va.gov.*

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections 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.

The collections of information contained in this proposed rule at 48 CFR chapter 8 are described specifically and immediately following this paragraph, under their respective titles.

VAAR Part 804 related collections of information:

The collection of information contained in proposed clause, 852.204–71, Information and Information Systems Security and new section 804.1970, Information security policy—contractor general responsibilities, is described immediately following this paragraph.

Summary of collection of information:

We propose the use of clause 852.204–71, Information and Information Systems Security, as prescribed at 804.1903; and propose section 804.1970, Information security policy—contractor general responsibilities.

New proposed section 804.1970 and VAAR clause 852.204–71, Information

and Information System Security, would require contractors, subcontractors, their employees, third-parties, and business associates who perform under a contract with access to VA information, information systems, or information technology (IT) or providing and accessing IT-related goods and services, to be subject to the same Federal laws, regulations, standards, and VA Directives and Handbooks as VA and VA personnel regarding information and information system security. The clause and information collection requirement would be inserted in solicitations, contracts, purchase orders and agreements where VA information, VA sensitive information (including sensitive personal information or protected health information (PHI)), when the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, is required to be included in accordance with FAR 4.1903.

Description of need for information and proposed use of information:

This information collection requirement is needed to protect the safety and health of the nation's Veterans and to protect the security and integrity of VA information and VA sensitive information.

Clause 852.204–71 and section 804.1970 contain the following information collection requirements from the public:

Information collection requirement	Clause/section
Contractor/subcontractor employee reassignment and termination notification	852.204–71.
Report of known or suspected security/privacy incident and data breach	852.204–71, 804.1970.
Provide an annual training certificate	852.204–71.
Submission of data retention, destruction plan and contractor self-certification	852.204–71.
Maintain records and compliance reports regarding HIPAA security and privacy rule compliance	804.1970.
Submission of a detailed security plan	852.204–71.
Report of all requests for, demands for production of, or inquiries, including court orders, about VA information and information systems.	852.204–71.

Total Burden Hours: 4,069.

Total Number of Respondents: 8,223.

Average Number of Respondents: 1,175.

Total Annual Responses: 8,223.

Average Annual Responses: 1,175.

Total estimated annual cost to all respondents: $189,371 (4,069 hours at $46.54 per hour). This is based on the Bureau of Labor Statistics May 2020 Occupational Employment and Wages code ''15–1231 Computer Network Support Specialists'' mean hourly wage of $34.16 plus 36.25% fringe benefits per OMB Memo M–08–13 dated March 11, 2008.

VA gathered data for FY 2018, 2019 and 2020 across 11 North American Industry Classification System (NAICS) where such information collection requirements may be inserted into solicitations and contracts. Then VA looked at the types of information collection requirements or burden may be required by the clause. Of the potential pool of previously awarded contracts (to both large and small businesses) during the three fiscal years where the proposed clause would be required to be included in solicitations and resulting contracts, VA calculated the average number of contracts awarded during the three fiscal years. We then used the average number of awards and estimated that for the purpose of identifying any potential information collection burden for contractor/subcontractor employee reassignment and termination notification of information collection requirements, only 45% would contain potential information collection requirements. The remaining information collection requirement categories are estimated as follows:

- VA estimates that 30% of the average number of contracts awarded during the three fiscal years in the identified 6 of 11 NAICS codes would require the clause and potential information collection requirement for report of known or suspected security/privacy incident and data breach.
- VA estimates that 100% of the average number of contracts awarded during the three fiscal years in the identified NAICS codes would require the clause and potential information collection requirement for the contractor/subcontractor employee training and certificates, and would be applicable when employees are onboarded by contractors.
- VA estimates no more than 15% of the average number of contracts awarded during the three fiscal years in the identified NAICS codes would require the clause and potential information collection requirement for the submission of data retention, destruction plan and contractor self-certification.
- VA estimates that 100% of the average number of contracts awarded during the three fiscal years in the identified eight of 11 NAICS codes would require the clause and potential information collection requirement for maintain records and compliance reports regarding HIPAA security and Privacy Rule compliance.
- VA estimates that 100% of the average number of contracts awarded during the three fiscal years in the identified NAICS codes would require the clause and potential information collection requirement for the submission of a detailed security plan.
- VA estimates no more than 5% of the average number of contracts awarded during the three fiscal years in the identified NAICS codes that would require the clause and potential information collection requirement for the report of all requests for, demands for, production of, or inquiries, including court orders, about VA information and information systems, would be applicable.

Contractor/subcontractor employee reassignment and termination notification.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
1,357	1	5		113

Report of known or suspected security/privacy incident and data breach.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
807	1	180		2,421

Submission of contractor/subcontractor employee annual training certificate.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
3,016	1	2		101

Submission of data retention, destruction plan and contractor self-certification.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
452	1	5		38

Maintain records and compliance reports regarding HIPAA security and privacy rule compliance.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
2,138	1	30		1,069

Detailed security plan submission.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
302	1	60		302

Report of all requests for, demands for, production of, or inquiries, including court orders, about VA information and information systems.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
151	1	10		25

VAAR Part 811 related collections of information:

The collections of information contained in section 811.503–70, Contract clause and proposed clause 852.211–70, Liquidated Damages-Reimbursement for Data Breach Costs is described immediately following this paragraph.

Summary of collection of information:

We propose the use of clause 852.211–70, Liquidated Damages-Reimbursement for Data Breach Costs, as prescribed at 811.503–70, Contract clause, for sensitive personal information that will be created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized by a contractor, subcontractor, business associate, or an employee of one of these entities. This new proposed VAAR clause 852.211–70 requires the

contractor, subcontractor, their employees or business associates to notify the VA through the contracting officer and the contracting officer's representative (COR) of any security incident that occurs involving sensitive personal information.

Description of need for information and proposed use of information:

This information collection requirement is needed to protect the safety and health of the nation's Veterans and to protect the security and integrity of VA information and VA sensitive information.

Total Burden Hours: 6.5.

Average Number of Respondents: 13.

Average Annual Responses: 13.

Total estimated annual cost to all respondents: $308 (6.5 hours at $47.42 per hour). This is based on the Bureau of Labor Statistics May 2020 Occupational Employment and Wages code ''13–1020 Buyers and Purchasing Agents'' mean hourly wage of $34.80 plus 36.25% fringe benefits per OMB Memo M–08–13 dated March 11, 2008.

VA gathered data for FY 2018, 2019 and 2020 across six North American Industry Classification System (NAICS) where such information collection requirements may be inserted into solicitations and contracts. Then VA looked at the types of information collection requirements or burden (*i.e.,* notify the VA through the contracting officer and the contracting officer's representative of any security incident that occurs involving sensitive personal information.) Of the potential pool of previously awarded contracts during the average of the three fiscal years, VA calculated a rough estimate that 20% of six NAICS codes of past contract awards could be reasonably calculated as a rough estimate of a potential information collection requirement for any such contracts awarded to both large and small businesses.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
13	1	30		6.5

VAAR Part 812 related collections of information:

The collections of information contained in section 812.301(f), Solicitation provisions and contract clauses for the acquisition of commercial items, and proposed clauses 852.212–71, Gray Market and Counterfeit Items, and 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, are described immediately following this paragraph, under their respective titles.

Summary of collection of information:

We propose the use of clauses 852.212–71, Gray Market and Counterfeit Items, and 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, as prescribed at 812.301(f), Solicitation provisions and contract clauses for the acquisition of commercial items.

New proposed VAAR clause 852.212–71, Gray Market and Counterfeit Items, require that no used, refurbished, or remanufactured supplies or equipment/parts shall be provided. It would state that any procurement where the clause is inserted is for new Original Equipment Manufacturer (OEM) items only. No gray market items shall be permitted to be provided. The clause would also specify that no counterfeit supplies or equipment/parts shall be provided. Unlawful or unauthorized substitutions are set forth in the clause and include used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics. The clause would also require that all vendors shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system and would be required to be verified by an authorization letter or other documents from the OEM.

New proposed VAAR clause 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, would permit used, refurbished, or remanufactured parts to be provided under the solicitation and contract. However, no gray market supplies or equipment shall be permitted to be provided. The clause would also require that no counterfeit supplies or equipment shall be provided. The clause would also require that all vendors shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system and would be required to be verified by an authorization letter or other documents from the OEM.

Description of need for information and proposed use of information:

To prevent the inadvertent acquisition of gray market and counterfeit medical equipment, medical supplies, and IT equipment and to protect the VA supply chain.

The two clauses containing collections of information are described below:

Clause 852.212–71, Gray Market and Counterfeit Items, is required in solicitations and contracts for new medical supplies, new medical equipment, new information technology equipment, and maintenance of medical or information technology equipment that includes replacement parts if used, refurbished, or remanufactured parts are unacceptable, when the associated solicitation includes FAR provisions 52.212–1, Instruction to Offerors-Commercial Items, and 52.212–2, Evaluation-Commercial Items.

Clause 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, is required in solicitations and contracts for the maintenance of information technology equipment that includes replacement parts, if used, refurbished, or remanufactured parts are acceptable, when the associated solicitation includes FAR provisions 52.212–1, Instruction to Offerors-Commercial Items, and 52.212–2, Evaluation-Commercial Items.

Total estimated burden hours: 2,170.

Estimated average number of respondents: 4,342.

Total estimated annual responses: 13,026.

Total estimated annual cost to all respondents: $102,902 (2,170 hours at $47.42 per hour). This is based on the Bureau of Labor Statistics May 2020 Occupational Employment and Wages code ''13–1020 Buyers and Purchasing Agents'' mean hourly wage of $34.80 plus 36.25% fringe benefits per OMB Memo M–08–13 dated March 11, 2008.

VA gathered data for FY 2017, 2018 and 2019 across seven North American Industry Classification System (NAICS) where such information collection requirements may be inserted into solicitations and contracts. Then VA looked at the types of information collection requirements or burden (*i.e.,* submitting an authorization letter or other documents from the Original Equipment Manufacturer.) Of the

potential pool of previously awarded contracts during the average of the three fiscal years, VA calculated a rough estimate the seven NAICS codes as follows: Two at 10%, one at 15%, one at 20%, and three at 25% of the past contract awards that could be reasonably calculated as a rough estimate of a potential information collection requirement for any such contracts awarded to both large and small businesses. Additionally, VA estimated three proposals would be received for each awarded contract, with the presumption that in some cases VA may only have received one proposal, and in others, more than three.

Because both clauses require the same information collection, one if for new OEM items and the other for other-than-new-parts and assumes both clauses will not be included in one acquisition. Therefore, the number of respondents for each clause is 50% the total of all NAICS estimated respondents.

Clause 852.212–71, Gray Market and Counterfeit Items.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
2,171	3	10		1,085

Clause 852.212–72, Gray Market, and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
2,171	3	10		1,085

VAAR Part 839 related collections of information:

The collections of information contained in section 839.106–70 and part 852 at proposed clauses 852.239–70, 852.239–72, and 852.239–73, are described immediately following this paragraph, under their respective titles.

Summary of collection of information:

We propose the use of 852.239–70, Security Requirements for Information Technology Resources; 852.239–72, Information System Design and Development, and 852.239–73, Information System Hosting, Operation, Maintenance, or Use, as prescribed at 839.106–70, Information technology security and privacy clauses.

New proposed clause 852.239–70, Security Requirements for Information Technology Resources, would require contractors, subcontractors, business associates and their personnel, when accessing VA information and or information systems in order to perform under a contract, to be subject to the same Federal laws, regulations, standards, and VA Directives and Handbooks as VA and VA personnel regarding information and information system security. The clause and information collection requirement would be inserted in solicitations, contracts, purchase orders and agreements where VA information, VA sensitive information (including sensitive personal information or protected health information (PHI))—

(1) Is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized by a VA contractor, subcontractor or third-party servicers or associates, or on behalf of any of these entities, in the performance of their contractual obligations to VA;

(2) By or on behalf of any of the entities identified in this section, regardless of—

(i) Format; or

(ii) Whether it resides on a VA or a non-VA system, or with a contractor, subcontractor, or third-party system or electronic information system(s), including cloud services, operating for or on the VA's behalf or as required by contract.

New proposed clause 852.239–72, Information System Design and Development, is required in all solicitations, contracts, orders and agreements where services to perform information system design and development are required.

New proposed clause 852.239–73, Information System Hosting, Operation, Maintenance, or Use, is required in all solicitations, contracts, orders and agreements for contracts where information systems are hosted, operated, maintained, or used on behalf of VA at non-VA facilities.

Description of need for information and proposed use of information:

Under the Federal Information Security Management Act (FISMA) (2002), section 3544(a)(1)(A)(ii), and the Federal Information Security Modernization Act of 2014, each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. VA requires, based on Federal security requirements, that contractors and subcontractors, including business associates, and employees, that require access to VA information or information systems shall be subject to the same Federal laws, regulations, standards, policies and procedures as VA and VA personnel. This includes whenever it is accessed, maintained, processed, or utilized; or when VA information systems will be designed or developed at non-VA facilities. These three clauses would enable VA to comply with its responsibilities under the Federal Information Security Modernization Act of 2014. The three clauses containing collections of information are described below:

Clause 852.239–70, Security Requirements for Information Technology Resources, is required in all solicitations, contracts, purchase orders, and agreements where VA sensitive information, including sensitive personal information is accessed, maintained, processed, or utilized as set forth in VAAR part 839. Contractors (including subcontractors, employees, and business associates) would be required to adhere to VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of

work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and Handbook 0710, Personnel Security and Suitability Program, which establishes VA's procedures, responsibilities, and processes for complying with personnel security program management and contract security in VA.

Clause 852.239–72, Information System Design and Development, is required in all solicitations, contracts, purchase orders and agreements where services to perform information system design and development are required. The contractor/subcontractor shall comply with the Privacy Act of 1974 (the Act) and VA rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an agency function when the contract specifically identifies—

(1) The applicable and existing VA Privacy Act systems of records (SOR); and (2) the design, development, or operational work that the contractor/subcontractor is to perform. During the development cycle a Privacy Impact Assessment (PIA) must be completed, provided to the COR, and approved by the VA Privacy Service in accordance with VA Directive 6508, Implementation of Privacy Threshold Analysis and Privacy Impact Assessment.

Clause 852.239–73, Information System Hosting, Operation, Maintenance, or Use, is required in all solicitations, contracts, purchase orders and agreements where services to perform information system hosting, operation, or maintenance are required. For information systems that are hosted, operated, maintained, or used on behalf of VA at non-VA facilities, contractors/subcontractors are fully responsible and accountable for ensuring compliance with all applicable HIPAA regulations, the Privacy Act and other required VA confidentiality statutes included in VA's mandatory yearly training and privacy handbooks, FISMA, NIST, FIPS, and VA security and privacy directives and handbooks. This includes conducting compliant risk assessments, routine vulnerability scanning, system patching and change management procedures, and the completion of an acceptable contingency plan for each system. The contractor's security control procedures must be equivalent to or exceed those procedures used to secure VA systems. A Privacy Impact Assessment (PIA) must also be provided to the COR and approved by VA Privacy Service prior to approval to operate. Adequate security controls for collecting, processing, transmitting, and storing of Personally Identifiable Information (PII), as determined by the VA Privacy Service, must be in place, tested, and approved by VA prior to hosting, operation, maintenance, or use of the information system, or systems by or on behalf of VA. These security controls are to be assessed and stated within the Privacy Impact Assessment and if these controls are determined not to be in place, or inadequate, a Plan of Action and Milestones (POA&M) must be submitted and approved prior to the collection of PII.

The contractor/subcontractor must conduct an annual self-assessment on all systems and outsourced services as required. Both hard copy and electronic copies of the assessment must be provided to the COR. Media (*e.g.,* hard drives, optical disks, CDs, back-up tapes) used by the contractors/subcontractors that contain VA information must be returned to the VA for sanitization or destruction or the contractor/subcontractor must self-certify that the media has been disposed of per VA Handbook 6500.1 requirements. This must be completed within 30 days of termination of the contract.

Section 839.101–70 and these three clauses require the contractor/subcontractor to submit the following information collections:

Information collection requirement	Clause/section
Contractor/subcontractor employee reassignment and termination notification	852.239–70.
Privacy Impact Assessment Report & Plan of Action and Milestones	852.239–72, 852.239–73.
Maintain and provide information technology security plan	852.239–70.
Submission of proof of information technology security accreditation	852.239–70.
Verification of annual IT security plan validation	852.239–70.
Submission of annual self-assessment	852.239–73.
Report of any deficiencies on annual FISMA security controls assessment	852.239–73.

Overall Total estimated burden hours: 4,815.

Overall Estimated average number of respondents: 2,198.

Overall Total estimated annual responses: 2,198.

Total estimated annual cost to all respondents: $228,327 (4,815 hours at $47.42 per hour). This is based on the Bureau of Labor Statistics May 2020 Occupational Employment and Wages code ''13–1020 Buyers and Purchasing Agents'' mean hourly wage of $34.80 plus 36.25% fringe benefits per OMB Memo M–08–13 dated March 11, 2008.

VA gathered data for FY 2018, 2019 and 2020 across 11 North American Industry Classification System (NAICS) where such information collection requirements may be inserted into solicitations and contracts. Then VA looked at the types of information collection requirements or burden that may be required across the three VAAR part 839 clauses. Of the potential pool of previously awarded contracts (to both large and small businesses) during the three fiscal years where the proposed clauses would be required to be included in solicitations and resulting contracts, VA calculated the average number of contracts awarded during the three fiscal years. We then used the average number of awards and estimated that for the purpose of identifying any potential information collection burden for Contractor/Subcontractor Employee Reassignment and Termination Notification of information collection requirements, only 45% would contain a potential information collection requirements. VA estimates that 100% of the average number of contracts awarded during the three fiscal years in the identified 11 NAICS codes would require the clause and potential information collection requirement for maintain and provide Information Technology Security Plan. Submission of proof of information technology security accreditation, and verification of annual IT security plan validation: VA also estimates 5% of the average number of contracts awarded during the three fiscal years in the identified 11 NAICS codes would require the clause and potential information collection requirement for report of any deficiencies on annual FISMA security controls assessment. Moreover, VA estimates that 100% of the average number of contracts awarded during the three fiscal years in six of the identified 11 NAICS codes would require the clause and potential information collection requirement for

Privacy Impact Assessment report & Plan of Action and Milestones. Finally, VA estimates that 100% of the average number of contracts awarded during the three fiscal years in eight of the identified 11 NAICS codes would require the clause and potential information collection requirement for submission of annual self-assessment.

• *852.239–70, Security Requirements for Information Technology Resources.*

Total Burden Hours: 2,375.

Average Number of Respondents: 2,601.

Average Annual Responses: 2,601.

Contractor/subcontractor employee reassignment and termination notification.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
1,357	1	5		113

Maintain and provide Information technology security plan.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
3,016	1	30		1,508

Submission of proof of information technology security accreditation.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
3,016	1	10		503

Verification of annual IT Security Plan validation.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
3,016	1	5		251

• *852.239–72, Information System Design and Development:*

Privacy Impact Assessment Report & Plan of Action and Milestones.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
1,345	1	30		673

Total Burden Hours: 673.

Average Number of Respondents: 1,345.

Average Annual Responses: 1,345.

• *852.239–73, Information System Hosting, Operation, Maintenance, or Use:*

Total Burden Hours: 1,767.

Average Number of Respondents: 1,211.

Average Annual Responses: 1,211.

Privacy Impact Assessment Report & Plan of Action and Milestones.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
1,345	1	30		673

Submission of annual self-assessment.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
2,138	1	30		1,069

Report of any deficiencies on annual FISMA security controls assessment.

Number of respondents	× Number of responses per respondent	× Number of minutes	÷ by 60	Number of burden hours
151	1	10		25

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). 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.

This rulemaking does not change VA's policy regarding small businesses and does not have a significant economic impact to individual businesses. The overall impact of the proposed rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to provide needed guidance to ensure VA's contractors properly protect and safeguard VA sensitive information, which includes Veteran's sensitive personal information. This rulemaking adds a new VAAR part concerning Acquisition of Information Technology that codifies information collection burdens. VA's requirement to collect the information is the result of existing requirements to ensure compliance across the Federal government and specifically when VA contractors, subcontractors, business associates and their employees require access to VA information (including VA sensitive information) or information systems. VA is merely adding existing and current regulatory requirements to the VAAR and placing guidance that is applicable only to VA's internal operation processes or procedures into a VA Acquisition Manual. VA estimates no substantial cost impact to individual businesses will result from these rule updates already required to be considered by both large and small businesses to receive an award from VA or another Federal agency. There are costs associated with this rulemaking pertaining to the codification of an information collection request in order to comply with VA's responsibilities under the Federal Information Security Modernization Act of 2014. Each agency of the Federal Government must provide security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. By statute, VA is required to ensure that its contractors, subcontractors, business associates, and their employees operating under contracts at VA shall be subject to the same Federal laws, regulations, policies or procedures as VA and VA personnel. While this requirement adds some burden in annual costs and hours to firms already awarded and performing contracts at VA, the overall cost is considered *de minimis,* for either large or small contractors, in relation to the potential impact and harm to Veterans and VA information and information systems should a contractor not comply. Properly setting forth the requirements will provide clarity to the public and ensure appropriate safeguards are in place to ensure protection of VA's information (in particular VA sensitive personal information) and information systems. In total, this rulemaking does not change VA's policy regarding small businesses, does not have a substantial economic impact to individual businesses, and does not significantly increase or decrease costs small business were already required to bear when performing contracts which required the access, maintenance, process, or utilization of VA sensitive information or information systems.

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 proposed rule would have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 802, 804, 811, and 812

Government procurement.

48 CFR Part 824

Freedom of information, Government procurement, Privacy.

48 CFR Part 839

Computer technology, Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on October 12, 2021, 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.

Consuela Benjamin,

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

For the reasons set forth in the preamble, VA proposes to amend 48 CFR chapter 8 as follows:

PART 802—DEFINITIONS OF WORDS AND TERMS

■ 1. The authority citation for part 802 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 802.1—Definitions

■ 2. Section 802.101 is amended by adding definitions for ''Business associate'', ''Business Associate

Agreement'', ''Gray market items'', ''Information system'', ''Information technology'', ''Information technology-related contracts'', ''Privacy officer'', ''Security plan'', ''Sensitive personal information'', ''VA Information Security Rules of Behavior for Organizational Users/VA National Rules of Behavior'', and ''VA sensitive information'' in alphabetical order to read as follows:

802.101 Definitions.

* * * * *

Business associate (or associate) means an entity, including an individual (other than a member of the workforce of a covered entity), company, organization or another covered entity, as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191) Privacy Rule (45 CFR part 160), that performs or assists in the performance of a function or activity on behalf of the Veterans Health Administration (VHA) that involves the creating, receiving, maintaining, transmitting of, or having access to, protected health information (PHI), or that provides to or for VHA, certain services as specified in the HIPPA Privacy Rule (45 CFR part 160) that involve the disclosure of PHI to a contractor by VHA. The term also includes a subcontractor of a business associate that creates, receives, maintains, or transmits PHI or that stores, generates, accesses, exchanges, processes, or utilizes such PHI on behalf of the business associate.

Business Associate Agreement (BAA) means the agreement, as dictated by the HIPPA Privacy Rule (45 CFR part 160), between VHA and a business associate, which must be entered into in addition to the underlying contract for services and before any release of PHI can be made to the business associate, in order for the business associate to perform certain functions or activities on behalf of VHA.

* * * * *

Gray market items means original equipment manufacturer goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

* * * * *

Information system means, pursuant to 38 U.S.C. 5727, a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information whether automated or manual.

Information technology (*see* FAR 2.101), also means Information and Communication Technology (ICT).

Information technology-related contracts means those contracts which include services (including support services) and related resources for information technology as defined in this section.

* * * * *

Privacy officer means the VA official with responsibility for implementing and oversight of privacy related policies and practices that impact a given VA acquisition.

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

Sensitive personal information means, with respect to an individual, any information about the individual maintained by VA, including but not limited to the following:

(1) Education, financial transactions, medical history, and criminal or employment history.

(2) Information that can be used to distinguish or trace the individual's identity, including but not limited to name, social security number, date and place of birth, mother's maiden name, or biometric records.

* * * * *

VA Information Security Rules of Behavior for Organizational Users/VA National Rules of Behavior means a set of VA rules that describes the responsibilities and expected behavior of users of VA information or information systems.

VA sensitive information means all VA data, on any storage media or in any form or format, which requires protection due to the risk of harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the information and includes sensitive personal information. The term includes information where improper use or disclosure could adversely affect the ability of VA to accomplish its mission, proprietary information, records about individuals requiring protection under various confidentiality provisions such as the Privacy Act and the HIPAA Privacy Rule, and information that can be withheld under the Freedom of Information Act. Examples of VA sensitive information include the following: individually-identifiable medical, benefits, and personnel information; financial, budgetary, research, quality assurance, confidential commercial, critical infrastructure, investigatory, and law enforcement information; information that is confidential and privileged in litigation such as information protected by the deliberative process privilege, attorney work-product privilege, and the attorney-client privilege; and other information which, if released, could result in violation of law or harm or unfairness to any individual or group, or could adversely affect the national interest or the conduct of Federal programs.

* * * * *

PART 804—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. The authority citation for part 804 is revised to read as follows:

Authority: 38 U.S.C. 5723–5724; 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

■ 4. Subpart 804.19 is added to read as follows:

Subpart 804.19—Basic Safeguarding of Covered Contractor Information Systems

Sec.
804.1900–70 Scope of subpart.
804.1902 Applicability.
804.1970 Information security policy—contractor general responsibilities.
804.1903 Contract clause.

Subpart 804.19—Basic Safeguarding of Covered Contractor Information Systems 804.1900–70 Scope of this subpart.

This subpart prescribes policies and procedures for information security and protection of VA information, information systems, and VA sensitive information, including sensitive personal information.

804.1902 Applicability.

This subpart applies to all VA acquisitions, including acquisitions of commercial items other than commercially available off-the-shelf items, when a contractor's information system may contain VA information.

804.1970 Information security policy—contractor general responsibilities.

Contractors, subcontractors, business associates and their employees who are users of VA information or information systems, or have access to VA information and VA sensitive information shall—

(a) Comply with all VA information security and privacy program policies, procedures, practices and related contract requirements, specifications and clauses, this includes complying with VA privacy and confidentiality laws and implementing VA and VHA regulations (see 38 U.S.C. 5701, 5705, 5721–5728 and 7332; 38 CFR 1.460 through 1.496, 1.500 through 1.527, and

17.500 through 17.511), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Privacy Act of 1974 (as amended);

(b) Complete VA security awareness training on an annual basis;

(c) Complete VHA's Privacy and Health Insurance Portability and Accountability Act of 1996 (HIPAA) Training on an annual basis when access to protected health information (PHI) is required;

(d) Report all actual or suspected security/privacy incidents and report the information to the contracting officer and contracting officer's representative (COR), as identified in the contract or as directed in the contract, within one hour of discovery or suspicion;

(e) Comply with VA policy as it relates to personnel security and suitability program requirements for background screening of both employees and non-employees who have access to VA information systems and data;

(f) Comply with directions that may be issued by the contracting officer or COR, or from the VA Assistant Secretary for Information and Technology or a designated representative through the contracting officer or COR, directing specific activities when a security/privacy incident occurs;

(g) Sign an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior (VA National Rules of Behavior) as required by 38 U.S.C. 5723, FAR 39.105, Privacy, and clause 852.204–71, Information and Information Systems Security, on an annual basis. The VA Information Security Rules of Behavior describe the responsibilities and expected behavior of contractors, subcontractors, business associates and their employees who are users of VA information or information systems, information assets and resources, or have access to VA information;

(h) Maintain records and compliance reports regarding HIPAA Security and Privacy Rule compliance in order to provide such information to VA upon request to ascertain whether the business associate is complying with all applicable provisions under both rules' regulatory requirements; and

(i) Flow down requirements in all subcontracts and Business Associate Agreements (BAAs), at any level, as provided in the clause at 852.204–71, Information and Information Systems Security.

804.1903 Contract clause.

When the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems is required to be included in accordance with FAR 4.1903, the contracting officer shall insert clause 852.204–71, Information and Information Systems Security.

PART 811—DESCRIBING AGENCY NEEDS

■ 5. The authority citation for part 811 is revised to read as follows:

Authority: 38 U.S.C 5723–5724; 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1303; 1702 and 48 CFR 1.301 through 1.304.

■ 6. Subpart 811.5 is added to read as follows:

Subpart 811.5—Liquidated Damages

Sec.
811.500 Scope.
811.501–70 Policy—statutory requirement.
811.503–70 Contract clause.

Subpart 811.5—Liquidated Damages

811.500 Scope.

This subpart prescribes policies and procedures for using a liquidated damages clause in solicitations and contracts that involve VA sensitive personal information. This also pertains to any solicitations and contracts involving VA sensitive personal information issued by another agency for or on behalf of VA through an interagency acquisition in accordance with FAR subpart 17.5 and subpart 817.5.

811.501–70 Policy—statutory requirement.

(a) Contracting officers are required to include a liquidated damages clause in contracts for the performance of any Department function which requires access to VA sensitive personal information (see the definition in 802.101), in accordance with 38 U.S.C. 5725(b). The liquidated damages are to be paid by the contractor to the Department of Veterans Affairs in the event of a data breach involving sensitive personal information maintained, processed, or utilized by contractors or any subcontractors.

(b) The purpose of the liquidated damages to be paid for by the contractor in the event of a data breach of personal sensitive information is for VA to provide credit protection services to affected individuals pursuant to 38 U.S.C. 5724(a)–(b).

811.503–70 Contract clause.

(a) Insert the clause at 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs, in all solicitations, contracts, or orders, where VA requires access to sensitive personal information for the performance of a Department function where—

(1) Sensitive personal information (see 802.101, Definitions) will be created, received, maintained, or transmitted, or that will be stored, generated, accessed, or exchanged such as protected health information (PHI) or utilized by a contractor, subcontractor, business associate, or an employee of one of these entities; or,

(2) When VA information systems will be designed or developed at non-VA facilities where such sensitive personal information is required to be created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized.

(b) Insert the clause at 852.211–76 with its Alternate I in all solicitations, contracts, or orders, in commercial items acquisitions awarded under the procedures of FAR part 8 or 12.

(c) Insert the clause at 852.211–76 with its Alternate II, in all solicitations, contracts, or orders, in simplified acquisitions exceeding the micro-purchase threshold that are for other than commercial items awarded under the procedures of FAR part 13 (see FAR 13.302–5(d)(1) and the clause at FAR 52.213–4).

PART 812—ACQUISITION OF COMMERCIAL ITEMS

■ 7. The authority citation for part 812 continues to read as follows:

Authority: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

■ 8. Section 812.301 is revised to read as follows:

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(1) Contracting officers shall insert the clause 852.212–71, Gray Market and Counterfeit Items, in solicitations and contracts for new medical supplies, new medical equipment, new information technology equipment, and maintenance of medical or information technology equipment that includes replacement parts if used, refurbished, or remanufactured parts are unacceptable, when the associated solicitation includes FAR provisions 52.212–1 Instruction to Offerors-Commercial Items, and 52.212–2, Evaluation-Commercial Items.

(2) Contracting officers shall insert the clause 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, in solicitations and contracts for the maintenance of information technology equipment that includes replacement parts, if used, refurbished, or remanufactured parts are acceptable, when the associated solicitation includes FAR provisions 52.212–1, Instruction to Offerors-Commercial Items, and 52.212–2, Evaluation-Commercial Items.

PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 9. The authority citation for part 824 is revised to read as follows:

Authority: 5 U.S.C. 552a; 38 U.S.C. 5723–5724; 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550 through 1.562 and 1.575 through 1.584; and 48 CFR 1.301 through 1.304.

Subpart 824.1—Protection of Individual Privacy

■ 10. Sections 824.103–70 and 824.103–71 are added to read as follows:

824.103–70 Protection of privacy—general requirements and procedures related to Business Associate Agreements.

To ensure compliance with unique responsibilities to protect protected health information, contractors performing under VA contracts subject to unique protected health information (PHI) and Health Insurance Portability and Accountability Act of 1996 (HIPAA) shall comply with requirements and the clause prescribed at 804.1903, 852.204–71, Information and Information Systems Security.

(a) *HIPAA Business Associate Agreement requirement.* Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules, a Covered Entity (Veterans Health Administration (VHA)) must have a satisfactory assurance that its protected health information will be safeguarded from misuse. To do so, a Covered Entity enters into a Business Associate Agreement (BAA) with a contractor (now the business associate), which obligates the business associate to only use the Covered Entity's protected health information for the purposes for which it was engaged, provide the same protections and safeguards as is required from the Covered Entity, and agree to the same disclosure restrictions to PHI that is required of the Covered Entity in situations where a contractor—

(1) Creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain health care operations activities or functions on behalf of the Covered Entity; or

(2) Provides one or more of the services specified in the HIPPA Privacy Rule to or for the Covered Entity.

(b) *Veterans Health Administration (VHA)—a HIPAA Covered Entity.* VHA is the only administration of the Department of Veterans Affairs that is a HIPAA Covered Entity under the HIPAA Privacy Rule.

(c) *Contractors or entities required to execute BAAs for contracts and other agreements become VHA business associates.* BAAs are issued by VHA or may be issued by other VA programs in support of VHA. The HIPAA Privacy Rule requires VHA to execute compliant BAAs with persons or entities that create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain activities, functions or services to, for, or on behalf of VHA.

(1) There may be other VA components or staff offices which also provide certain services and support to VHA and must receive PHI in order to do so. If these components award contracts or enter into other agreements, purchase/delivery orders, modifications and issue governmentwide purchase card transactions to help in the delivery of these services to VHA, they will also fall within the requirement to obtain a satisfactory assurance from these contractors by executing a BAA.

(2) Contractors or other entities supporting VHA required to create, receive, maintain, or transmit VHA PHI shall be required to execute a BAA as mandated by the Privacy Rule and requested by the contracting officer, the contracting officer's representative (COR) or the cognizant privacy officer—

(i) Whether via a contract or agreement with VHA; or

(ii) Whether provided from or through another VA administration or staff activity contract for supplies, services or support that involves performing a certain activity, function or service to, for, or on behalf of VHA (*see* VA Directive 6066, Protected Health Information (PHI) and Business Associate Agreements Management).

(d) *BAA requirement flow down to subcontractors.* A prime contractor required to execute a BAA shall also obtain a satisfactory assurance, in the form of a BAA, that any of its subcontractors who will also create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI will comply with HIPAA requirements to the same degree as the contractor. A contractor employing a subcontractor who creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such VHA PHI under a contract or agreement is required to execute a BAA with each of its subcontractors which also obligates the subcontractor (*i.e.,* also a business associate) to provide the same protections and safeguards and agree to the same disclosure restrictions to VHA's PHI that is required of the Covered Entity and the prime contractor.

824.103–71 Liquidated damages—protection of information.

(a) *Purpose.* As required by 38 U.S.C. 5725 any contracts where sensitive personal information such as protected health information (PHI) must be disclosed to the contractor for the contractor to perform certain functions or services on behalf of VHA shall include a liquidated damages clause as prescribed at 811.503–70.

(b) *Applicability to contracts requiring Business Associate Agreements.* A liquidated damages clause is required (*see* 811.503–70) when performance under a contract requires a contractor to enter into a Business Associate Agreement with VHA because the contractor or its subcontractor is required to create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI, for certain services or functions, on behalf of VHA. The liquidated damages clause shall be added even in situations where the prime contractor never directly receives VA's sensitive personal information and the same flows directly to the prime contractor's subcontractor.

■ 11. Part 839 is added to read as follows:

PART 839—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.
839.000 Scope of part.

Subpart 839.1—General

839.101 Policy.
839.105 Privacy.
839.105–70 Business Associate Agreements, information technology-related contracts and privacy.
839.105–71 Liquidated damages—protection of information in information technology related contracts.
839.106–70 Information technology security and privacy contract clauses.

Subpart 839.2—Information and Communication Technology

839.201 Scope of subpart.

839.203 Applicability.
839.203–70 Information and communication technology accessibility standards—contract clause and provision.

Authority: 38 U.S.C. 5723–5724; 5725(a)–(c); 40 U.S.C. 121(c); 40 U.S.C. 11319(b)(1)(C); 41 U.S.C. 1121(c)(3); 1303 and 1702; and 48 CFR 1.301 through 1.304.

839.000 Scope of part.

This part prescribes acquisition policies and procedures for use in acquiring VA information technology and information technology-related contracts (see 802.101) and applies to both VA-procured information technology systems as well as Interagency Acquisitions defined in FAR part 17 and part 817.

Subpart 839.1—General

839.101 Policy.

(a)(1) In acquiring information technology, including information technology-related contracts which may involve services (including support services), and related resources (*see* the definition at FAR 2.101), contracting officers and requiring activities shall include in solicitations and contracts the requirement to comply with the following directives, policies, and procedures in order to protect VA information, information systems, and information technology—

(i) VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series, to include, but not limited to, VA Handbook 6500.6, Contract Security, which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive orders, policies, regulations, standards and guidance for protecting and controlling VA sensitive information and ensuring that security requirements are included in acquisitions, solicitations, contracts, purchase orders, and task or delivery orders.

(ii) The VA directives, security requirements, procedures, and guidance in paragraph (a)(1)(i) of this section apply to all VA contracts and to contractors, subcontractors, and their employees in the performance of contractual obligations to VA for information technology products purchased from vendors, as well as for services acquired from contractors and subcontractors or business associates, through contracts and service agreements, in which access to VA information, VA sensitive information or sensitive personal information (including protected health information (PHI))—

(A) That is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized by VA, a VA contractor, subcontractor or third-party servicers or associates, or on behalf of any of these entities, in the performance of their contractual obligations to VA; and

(B) By or on behalf of any of the entities identified in this section, regardless of—

(*1*) Format; or

(*2*) Whether it resides on a VA or a non-VA system, or with a contractor, subcontractor, or third-party system or electronic information system(s), including cloud services, operating for or on the VA's behalf or as required by contract.

(c) Contractors, subcontractors, and third-party servicers or associates providing support to or on behalf of these entities, shall employ adequate security controls and use appropriate common security configurations available from the National Institute of Standards and Technology (*see* FAR 39.101(c)) as appropriate in accordance with VA regulations, directives, handbooks and guidance, and established service level agreements and individual contracts, orders, and agreements. Contractors, subcontractors, and third-party servicers and associates will ensure that VA information or VA sensitive information that resides on a VA system or resides on a contractor/subcontractor/third-party entities/associates information and communication technology (ICT) system(s), operating for or on VA's behalf, or as required by contract, regardless of form or format, whether electronic or manual, and information systems, are protected from unauthorized access, use, disclosure, modification, or destruction to ensure information security (see FAR 2.101) is provided in order to ensure the integrity, confidentiality, and availability of such information and information systems.

839.105 Privacy.

839.105–70 Business Associate Agreements, information technology-related contracts and privacy.

In accordance with 824.103–70, Protection of privacy—general requirements and procedures related to Business Associate Agreements, contracting officers and contracting officer representatives (CORs) shall ensure that contractors, their employees, subcontractors and third-parties under the contract complete Business Associate Agreements for—

(a) Information technology or information technology-related service contracts subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) where HIPAA protected health information (PHI) is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized in order to perform certain health care operations activities or functions on behalf of the Veterans Health Administration (VHA) as a covered entity (see 802.101 for the definition of information technology-related contracts); or

(b) Contractors supporting other VA organizations which support VHA in this regard and which would therefore require Business Associate Agreements in accordance with 824.103–70.

839.105–71 Liquidated damages—protection of information in information technology related contracts.

Contracting officers shall insert in information technology related contracts the liquidated damages clause as prescribed at 811.503–70.

839.106–70 Information technology security and privacy clauses.

(a) Contracting officers shall insert the clause at 852.239–70, Security Requirements for Information Technology Resources, and the clause 852.239–71, Information Technology Security Plan and Accreditation, in all solicitations, contracts, and orders exceeding the micro-purchase threshold that include information technology services.

(b) Contracting officers shall insert the clause at 852.239–72, Information System Design and Development, in solicitations, contracts, orders, and agreements where services to perform information system design and development are required.

(c) Contracting officers shall insert the clause at 852.239–73, Information System Hosting, Operation, Maintenance or Use, in solicitations, contracts, orders, and agreements where services to perform information system hosting, operation, maintenance, or use are required.

(d) Contracting officers shall insert the clause at 852.239–74, Security Controls Compliance Testing, in solicitations, contracts, orders, and agreements, when the clauses at 852.239–72 or 852.239–73 are inserted.

Subpart 839.2—Information and Communication Technology

839.201 Scope of subpart.

This subpart applies to the acquisition of Information and Communication

Technology (ICT) supplies and services. It concerns the access to and use of information and data, by both Federal employees with disabilities, and members of the public with disabilities in accordance with FAR 39.201. This implements VA policy on Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) and 36 CFR parts 1193 and 1194 as it applies to contracts and acquisitions when developing, procuring, maintaining or using ICT.

839.203 Applicability.

(a) *General.* Solicitations for information technology (*i.e.,* information and communication technology (ICT)) or IT-related supplies and services shall require the contractor to submit a VA Section 508 Checklist (*see http://www.section508.va.gov/*).

839.203–70 Information and communication technology accessibility standards—contract clause and provision.

(a) The contracting officer shall insert the provision at 852.239–75, Information and Communication Technology Accessibility Notice, in all solicitations.

(b) The contracting officer shall insert the clause at 852.239–76, Information and Communication Technology Accessibility, in all contracts and orders.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. The authority citation for part 852 continues to read as follows:

Authority: 38 U.S.C. 8127–8128, and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 852.2—Texts of Provisions and Clauses

■ 13. Section 852.204–71 is added to read as follows:

852.204–71 Information and Information Systems Security.

As prescribed in 804.1903 insert the following clause:

Information and Information Systems Security (DATE)

(a) *Definitions.* As used in this clause—

Business Associate means an entity, including an individual (other than a member of the workforce of a covered entity), company, organization or another covered entity, as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, that performs or assists in the performance of a function or activity on behalf of the Veterans Health Administration (VHA) that involves the creating, receiving, maintaining, transmitting of, or having access to, protected health information (PHI). The term also includes a subcontractor of a business associate that creates, receives, maintains, or transmits PHI on behalf of the business associate.

Business Associate Agreement (BAA) means the agreement, as dictated by the Privacy Rule, between VHA and a business associate, which must be entered into in addition to the underlying contract for services and before any release of PHI can be made to the business associate, in order for the business associate to perform certain functions or activities on behalf of VHA.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information whether automated or manual.

Information technology (*see* FAR 2.101) also means Information and Communication Technology (ICT).

Information technology-related contracts means those contracts which include services (including support services), and related resources for information technology as defined in 802.101.

Privacy officer means the VA official with responsibility for implementing and oversight of privacy related policies and practices that impact a given VA acquisition.

Sensitive personal information means, with respect to an individual, any information about the individual maintained by VA, including but not limited to the following:

(1) Education, financial transactions, medical history, and criminal or employment history.

(2) Information that can be used to distinguish or trace the individual's identity, including but not limited to name, social security number, date and place of birth, mother's maiden name, or biometric records.

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

VA Information Security Rules of Behavior for Organizational Users (VA National Rules of Behavior) means a set of VA rules that describes the responsibilities and expected behavior of users of VA information or information systems.

VA sensitive information means all VA data, on any storage media or in any form or format, which requires protection due to the risk of harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the information and includes sensitive personal information. The term includes information where improper use or disclosure could adversely affect the ability of VA to accomplish its mission, proprietary information, records about individuals requiring protection under various confidentiality provisions such as the Privacy Act and the HIPAA Privacy Rule, and information that can be withheld under the Freedom of Information Act. Examples of VA sensitive information include the following: Individually-identifiable medical, benefits, and personnel information; financial, budgetary, research, quality assurance, confidential commercial, critical infrastructure, investigatory, and law enforcement information; information that is confidential and privileged in litigation such as information protected by the deliberative process privilege, attorney work-product privilege, and the attorney-client privilege; and other information which, if released, could result in violation of law or harm or unfairness to any individual or group, or could adversely affect the national interest or the conduct of Federal programs.

(b) *General.* Contractors, subcontractors, their employees, third-parties, and business associates with access to VA information, information systems, or information technology (IT) or providing and accessing IT-related goods and services, shall adhere to VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and Handbook 0710, *Personnel Security and Suitability Program,* which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive Orders, policies, regulations, standards and guidance for protecting VA information, information systems (*see* 802.101, Definitions) security and privacy, and adhering to personnel security requirements when accessing VA information or information systems.

(c) *Access to VA information and VA information systems.* (1) Contractors are limited in their request for logical or physical access to VA information or VA information systems for their employees, subcontractors, third parties and business associates to the extent necessary to perform the services or provide the goods as specified in the contracts, agreements, task, delivery or purchase orders.

(2) All Contractors, subcontractors, third parties, and business associates working with VA information are subject to the same investigative requirements as those of VA appointees or employees who have access to the same types of information. The level and process of background security investigations for contractors to access VA information and VA information systems shall be in accordance with VA Directive and Handbook 0710, *Personnel Security and Suitability Program.*

(3) Contractors, subcontractors, third parties, and business associates who require access to national security programs must have a valid security clearance.

(4) HIPAA Business Associate Agreement requirement. Contractors shall enter into a Business Associate Agreement with VHA, VA's Covered Entity, when contract requirements and access to protected health information is required and when requested by the Contracting Officer, or the Contracting Officer's Representative (COR) (see VAAR 824.103–70). Under the Health Insurance Portability and Accountability Act of 1996

(HIPAA) Privacy and Security Rules, a Covered Entity (Veterans Health Administration) must have a satisfactory assurance that its protected health information will be safeguarded from misuse. To do so, a Covered Entity enters into a Business Associate Agreement (BAA) with a contractor (now the business associate), which obligates the business associate to only use the Covered Entity's protected health information for the purposes for which it was engaged, provide the same protections and safeguards as is required from the Covered Entity, and agree to the same disclosure restrictions to protected health information (PHI) that is required of the Covered Entity in situations where a contractor—

(i) Creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain health care operations activities or functions on behalf of the Covered Entity; or

(ii) Provides one or more of the services specified in the Privacy Rule to or for the Covered Entity.

(A) *Contractors or entities required to execute BAAs for contracts and other agreements become VHA business associates.* BAAs are issued by VHA or may be issued by other VA programs in support of VHA. The HIPAA Privacy Rule requires VHA to execute compliant BAAs with persons or entities that create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain activities, functions or services to, for, or on behalf of VHA. There may be other VA components or staff offices which also provide certain services and support to VHA and must receive PHI in order to do so. If these components award contracts or enter into other agreements, purchase/delivery orders, modifications and issue governmentwide purchase card transactions to help in the delivery of these services to VHA, they will also fall within the requirement to obtain a satisfactory assurance from these contractors by executing a BAA.

(B) *BAA requirement flow down to subcontractors.* A prime Contractor required to execute a BAA shall also obtain a satisfactory assurance, in the form of a BAA, that any of its subcontractors who will also create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI will comply with HIPAA requirements to the same degree as the Contractor. Contractors employing a subcontractor who creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such VHA PHI under a contract or agreement is required to execute a BAA with each of its subcontractors which also obligates the subcontractor (*i.e.,* also a business associate) to provide the same protections and safeguards and agree to the same disclosure restrictions to VHA's PHI that is required of the Covered Entity and the prime Contractor.

(d) *Contractor operations required to be in United States.* Custom software development and outsourced operations must be located in the U.S. to the maximum extent practicable. If such services are proposed to be performed outside the continental United States, and are not otherwise disallowed by other Federal law, regulations or policy, or other VA policy or other mandates as stated in the contract, specifications, statement of work or performance work statement (including applicable Business Associate Agreements), the Contractor/subcontractor must state in its proposal where all non-U.S. services are provided. At a minimum, the Contractor/subcontractor must include a detailed Information Technology Security Plan, for review and approval by the Contracting Officer, specifically to address mitigation of the resulting problems of communication, control, and data protection.

(e) *Contractor/subcontractor employee reassignment and termination notification.* Contractors and subcontractors shall provide written notification to the Contracting Officer and Contracting Officer's Representative (COR) immediately, and not later than four (4) hours, when an employee working on a VA information system or with access to VA information is reassigned or leaves the Contractor or subcontractor's employment on the cognizant VA contract. The Contracting Officer and COR must also be notified immediately by the Contractor or subcontractor prior to an unfriendly termination.

(f) *VA information custodial requirements.* (1) *Release, publication, and use of data.* Information made available to a Contractor or subcontractor by VA for the performance or administration of a contract or information developed by the Contractor/subcontractor in performance or administration of a contract shall be used only for the stated contract purpose and shall not be used in any other way without VA's prior written approval. This clause expressly limits the Contractor's/subcontractor's rights to use data as described in Rights in Data—General, FAR 52.227–14(d).

(2) *Media sanitization.* VA information shall not be co-mingled with any other data on the Contractors/subcontractor's information systems or media storage systems in order to ensure federal and VA requirements related to data protection, information segregation, classification requirements, and media sanitization can be met (*see* VA Directive 6500, VA Cybersecurity Program). VA reserves the right to conduct scheduled or unscheduled on-site inspections, assessments, or audits of Contractor and subcontractor IT resources, information systems and assets to ensure data security and privacy controls, separation of data and job duties, and destruction/media sanitization procedures are in compliance with Federal and VA requirements. The Contractor and subcontractor will provide all necessary access and support to VA and/or GAO staff during periodic control assessments or audits.

(3) *Data retention, destruction and contractor self-certification.* The Contactor and its subcontractors are responsible for collecting and destroying any VA data provided, created, or stored under the terms of this contract, to a point where VA data or materials are no longer readable or reconstructable to any degree, in accordance with VA Directive 6371, Destruction of Temporary Paper Records, or subsequent issue. Prior to termination or completion of this contract, the Contractor/subcontractor must provide its plan for destruction of all VA data in its possession according to VA Handbook 6500, and VA Cybersecurity Program, including compliance with National Institute of Standards and Technology (NIST) 800–88, Guidelines for Media Sanitization, for the purposes of media sanitization on all IT equipment. The Contractor must certify in writing to the Contracting Officer within 30 days of termination of the contract that the data destruction requirements in this paragraph have been met.

(4) *Return of VA data and information.* When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to the VA (as stipulated by the Contracting Officer or the COR) or the Contractor/subcontractor must hold it until otherwise directed. Items returned will be hand carried, securely mailed, emailed, or securely electronically transmitted to the Contracting Officer or to the address as provided in the contract or by the assigned COR, and/or accompanying BAA. Depending on the method of return, Contractor/subcontractor must store, transport, or transmit VA sensitive information, when permitted by the contract using VA-approved encryption tools that are, at a minimum, validated under FIPS 140–3 (or its successor). If mailed, Contractor/subcontractor must send via a trackable method (USPS, UPS, Federal Express, etc.) and immediately provide the Contracting Officer with the tracking information. No information, data, documentary material, records or equipment will be destroyed unless done in accordance with the terms of this contract and the VHA Records Control Schedule 10–1.

(5) *Use of VA data and information.* The Contractor/subcontractor must receive, gather, store, back up, maintain, use, disclose and dispose of VA information only in compliance with the terms of the contract and applicable Federal and VA information confidentiality and security laws, regulations and policies. If Federal or VA information confidentiality and security laws, regulations and policies become applicable to the VA information or information systems after execution of the contract, or if the National Institute of Standards and Technology (NIST) issues or updates applicable Federal Information Processing Standards (FIPS) or Special Publications (SP) after execution of this contract, the parties agree to negotiate in good faith to implement the information confidentiality and security laws, regulations and policies for this contract as a result of any updates, if required.

(6) *Copying VA data or information.* The Contractor/subcontractor shall not make copies of VA information except as authorized and necessary to perform the terms of the contract or to preserve electronic information stored on Contractor/subcontractor electronic storage media for restoration in case any electronic equipment or data used by the Contractor/subcontractor

needs to be restored to an operating state. If copies are made for restoration purposes, after the restoration is complete, the copies must be appropriately destroyed.

(7) *Violation of information custodial requirements.* If VA determines that the Contractor has violated any of VA's information confidentiality, privacy, or security provisions, it shall be sufficient grounds for VA to withhold payment to the Contractor or third-party or terminate the contract for default in accordance with FAR part 49 or terminate for cause in accordance with FAR 12.403.

(8) *Encryption.* The Contractor/subcontractor must store, transport, or transmit VA sensitive information, when permitted by the contract, using cryptography, and VA-approved encryption tools that are, at a minimum, validated under FIPS 140–3 (or its successor).

(9) *Firewall and web services security controls.* The Contractor/subcontractor's firewall and Web services security controls, if applicable, shall meet or exceed VA's minimum requirements. VA Configuration Guidelines are available upon request.

(10) *Disclosure of VA data and information.* Except for uses and disclosures of VA information authorized in a cognizant contract for performance of the contract, the Contractor/subcontractor may use and disclose VA information only in two other situations: (i) Subject to paragraph 10 of this section, in response to a court order from a court of competent jurisdiction, or (ii) with VA's prior written approval. The Contractor/subcontractor must refer all requests for, demands for production of, or inquiries about, VA information and information systems to the Contracting Officer for response. If the Contractor/subcontractor is in receipt of a court order or other request or believes it has a legal requirement to disclose VA information, that Contractor/subcontractor shall immediately refer such court order or other request to the Contracting Officer for response. If the Contractor or subcontractor discloses information on behalf of VHA, the Contractor and/or subcontractor must maintain an accounting of disclosures. Accounting of Disclosures documentation maintained by the Contractor/subcontractor will include the name of the individual to whom the information pertains, the date of each disclosure, the nature or description of the information disclosed, a brief statement of the purpose of each disclosure or, in lieu of such statement, a copy of a written request for a disclosure, and the name and address of the person or agency to whom the disclosure was made. The Contractor/subcontractor will provide its Accounting of Disclosures upon request and within 15 calendar days to the assigned COR and Privacy Officer. Accounting of disclosures should be provided electronically via encrypted email to the COR and designated VA facility Privacy Officer as provided in the contract, BAA, or by the Contracting Officer. If providing the Accounting of disclosures electronically cannot be done securely, the Contractor/subcontractor will provide copies via trackable methods (UPS, USPS, Federal Express, etc.) immediately, providing the designated COR and Privacy Officer with the tracking information.

(11) *Compliance with privacy statutes and applicable regulations.* The Contractor/subcontractor shall not disclose VA information protected by any of VA's privacy statutes or applicable regulations including but not limited to: The Privacy Act of 1974, 38 U.S.C. 5701, confidential nature of claims, 38 U.S.C. 5705, confidentiality of medical quality assurance records and/or 38 U.S.C. 7332, confidentiality of certain health records pertaining to drug addiction, sickle cell anemia, alcoholism or alcohol abuse, or infection with human immunodeficiency virus or the HIPAA Privacy Rule. If the Contractor/subcontractor is in receipt of a court order or other requests for VA information or has questions if it can disclose information protected under the above-mentioned confidentiality statutes because it is required by law, that Contractor/subcontractor shall immediately refer such court order or other request to the Contracting Officer for response.

(g) *Report of known or suspected security/privacy incident.* The Contractor, subcontractor, third-party affiliate or business associate, and its employees shall notify VA immediately via the Contracting Officer and the COR or within one (1) hour of an incident which is an occurrence (including the discovery or disclosure of successful exploits of system vulnerability) that (A) actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or the availability of its data and operations, or of its information or information system(s); or (B) constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable use policies. The initial notification may first be made verbally but must be followed up in writing within one (1) hour. See VA Data Breach Response Service at *https://www.oprm.va.gov/dbrs/about_dbrs.aspx.* Report all actual or suspected security/privacy incidents and report the information to the Contracting Officer and the COR as identified in the contract or as directed in the contract, within one hour of discovery or suspicion.

(1) Such issues shall be remediated as quickly as is practical, but in no event longer than ____ days [*Fill in: Contracting Officer fills in the number of days*]. The Contractor shall notify the Contracting Officer in writing.

(2) When the security fixes involve installing third party patched (*e.g.,* Microsoft OS patches or Adobe Acrobat), the Contractor will provide written notice to VA that the patch has been validated as not affecting the systems within 10 working days. When the Contractor is responsible for operations or maintenance of the systems, they shall apply the security fixes within ____ [*Fill in: Contracting Officer fills in the number of days in consultation with requiring activity*].

(3) All other vulnerabilities shall be remediated in a timely manner based on risk, but within 60 days of discovery or disclosure. Contractors shall notify the Contracting Officer, and COR within 2 business days after remediation of the identified vulnerability. Exceptions to this paragraph (*e.g.,* for the convenience of VA) must be requested by the Contractor through the COR and shall only be granted with approval of the Contracting Officer and the VA Assistant Secretary for Office of Information and Technology. These exceptions will be tracked by the Contractor in concert with the Government in accordance with VA Directive 6500.6 and related VA Handbooks.

(h) *Security and privacy incident investigation.* (1) The term ''privacy incident'' means the unauthorized disclosure or use of VA information protected under a confidentiality statute or regulation. (2) The term ''security incident'' means an occurrence that (A) actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or availability of information systems; or (B) constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable policies. The Contractor/subcontractor shall immediately notify the Contracting Officer and COR for the contract of any known or suspected security or privacy incident, or any other unauthorized disclosure of sensitive information, including that contained in system(s) to which the Contractor/subcontractor has access.

(2) To the extent known by the Contractor/subcontractor, the Contractor/subcontractor's notice to VA shall identify the information involved, the circumstances surrounding the incident (including to whom, how, when, and where the VA information or assets were placed at risk or compromised), and any other information that the Contractor/subcontractor considers relevant.

(3) With respect to unsecured protected health information, the Business Associate is deemed to have discovered a security incident as defined above when the Business Associate either knew, or by exercising reasonable diligence should have been known to an employee of the Business Associate. Upon discovery, the Business Associate must notify VHA of the security incident immediately within one hour of discovery or suspicion as agreed to in the Business Associate Agreement (BAA).

(4) In instances of theft or break-in or other criminal activity, the Contractor/subcontractor must concurrently report the incident to the appropriate law enforcement entity (or entities) of jurisdiction, including the VA OIG and the VA Office of Security and Law Enforcement. The Contractor, its employees, and its subcontractors and their employees shall cooperate with VA and any law enforcement authority responsible for the investigation and prosecution of any possible criminal law violation(s) associated with any incident. The Contractor/subcontractor shall cooperate with VA in any civil litigation to recover VA information, obtain monetary or other compensation from a third party for damages arising from any incident, or obtain injunctive relief against any third party arising from, or related to, the incident.

(i) *Data breach notification requirements.* (A) This contract may require access to sensitive personal information. If so, the Contractor is liable to VA for liquidated damages in the event of a data breach involving any VA sensitive personal information the Contractor/Subcontractor

processes or maintains under the contract as set forth in clause 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs.

(B) The Contractor/subcontractor shall provide notice to VA of a privacy or security incident as set forth in the Security and Privacy Incident Investigation section of this clause. The term 'data breach' means the loss, theft, or other unauthorized access, or any access other than that incidental to the scope of employment, to data containing sensitive personal information, in electronic or printed form, that results in the potential compromise of the confidentiality or integrity of the data. The Contractor shall fully cooperate with VA or third-party entity performing an independent risk analysis on behalf of VA. Failure to cooperate may be deemed a material breach and grounds for contract termination.

(C) The Contractor/subcontractor shall fully cooperate with VA or any Government agency conducting an analysis regarding any notice of a data breach or potential data breach or security incident which may require the Contractor to provide information to the Government or third-party performing a risk analysis for VA, and shall address all relevant information concerning the data breach, including the following:

(*1*) Nature of the event (loss, theft, unauthorized access).

(*2*) Description of the event, including—

(*i*) Date of occurrence;

(*ii*) Date of incident detection;

(*iii*) Data elements involved, including any PII, such as full name, social security number, date of birth, home address, account number, disability code.

(*iv*) Number of individuals affected or potentially affected.

(*v*) Names of individuals or groups affected or potentially affected.

(*vi*) Ease of logical data access to the lost, stolen or improperly accessed data in light of the degree of protection for the data, *e.g.,* unencrypted, plain text.

(*vii*) Amount of time the data has been out of VA control.

(*viii*) The likelihood that the sensitive personal information will or has been compromised (made accessible to and usable by unauthorized persons).

(*ix*) Known misuses of data containing sensitive personal information, if any.

(*x*) Assessment of the potential harm to the affected individuals.

(*xi*) Data breach analysis as outlined in 6500.2 Handbook, Management of Breaches Involving Sensitive Personal Information, as appropriate.

(*xii*) Whether credit protection services may assist record subjects in avoiding or mitigating the results of identity theft based on the sensitive personal information that may have been compromised.

(*xiii*) Steps taken in response to mitigate or prevent a repetition of the incident.

(j) *Training.* (1) All Contractor employees and subcontractor employees requiring access to VA information or VA information systems shall complete the following before being granted access to VA information and its systems:

(i) On an annual basis, successfully complete the VA Privacy and Information Security Awareness and VA Information Security Rules of Behavior training.

(ii) On an annual basis, sign and acknowledge (either manually or electronically) understanding of and responsibilities for compliance with the VA Information Security Rules of Behavior for Organizational Users, relating to access to VA information and information systems.

(iii) Successfully complete any additional cyber security or privacy training, as required for VA personnel with equivalent information system access.

(2) The Contractor shall provide to the Contracting Officer and/or the COR a copy of the training certificates and affirmation that VA Information Security Rules of Behavior for Organizational Users signed by each applicable employee have been completed and submitted within five (5) days of the initiation of the contract and annually thereafter, as required.

(3) Failure to complete the mandatory annual training and acknowledgement of the VA Information Security Rules of Behavior, within the timeframe required, is grounds for suspension or termination of all physical or electronic access privileges and removal from work on the contract until such time as the training and documents are complete.

(k) *Subcontract flow down.* The Contractor shall include the substance of this clause, including this paragraph (k), in subcontracts, third-party agreements, and business associate agreements, of any amount and in which subcontractor employees, third-party servicers/employees, and business associates will perform functions where they will have access to VA information (including VA sensitive information, *i.e.,* sensitive personal information and protected health information), information systems, information technology (IT) or providing and accessing information technology-related contract services, support services, and related resources (see VAAR 802.101 definition of information technology-related contracts.)

(End of clause)

■ 14. Section 852.211–76 is added to read as follows:

852.211–76 Liquidated Damages—Reimbursement for Data Breach Costs.

As prescribed in 811.503–70, Contract clause, insert the following clause:

Liquidated Damages—Reimbursement for Data Breach Costs (DATE)

(a) *Definition.* As used in this clause, ''contract'' means any contract, agreement, order or other instrument and encompasses the definition set forth in FAR 2.101.

(b) *Non-disclosure requirements.* As a condition of performance under a contract, order, agreement, or other instrument that requires access to sensitive personal information as defined in VAAR 802.101, the following is expressly required—

(1) The Contractor, subcontractor, their employees or business associates shall not, directly or through an affiliate or employee of the Contractor, subcontractor, or business associate, disclose sensitive personal information to any other person unless the disclosure is lawful and is expressly permitted under the contract; and

(2) The Contractor, subcontractor, their employees or business associates shall immediately notify the Contracting Officer and the Contracting Officer's Representative (COR) of any security incident that occurs involving sensitive personal information.

(c) *Liquidated damages.* If the Contractor or any of its agents fails to protect VA sensitive personal information or otherwise engages in conduct which results in a data breach, the Contractor shall, in place of actual damages, pay to the Government liquidated damages of _____ [*Contracting Officer insert amount*] per affected individual in order to cover costs related to the notification, data breach analysis and credit monitoring. In the event the Contractor provides payment of actual damages in an amount determined to be adequate by the Contracting Officer, the Contracting Officer may forgo collection of liquidated damages.

(d) *Purpose of liquidated damages.* Based on the results from VA's determination that there was a data breach caused by Contractor's or any of its agents' failure to protect or otherwise engaging in conduct to cause a data breach of VA sensitive personal information, and as directed by the Contracting Officer, the Contractor shall be responsible for paying to the VA liquidated damages in the amount of _____ [*Contracting Officer insert amount*] per affected individual to cover the cost of the following:

(1) Notification related costs

(2) Credit monitoring reports.

(3) Data breach analysis and impact.

(4) Fraud alerts.

(5) Identity theft insurance.

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract, purchase order, or agreement, in whole or in part under clause 52.249–8, Default—Fixed-Price Supply and Service, or any other related FAR or VAAR clause included in the contract, in addition to the required liquidated damages for data breach-related expenses specified in paragraph (c) above, the Contractor is liable for excess costs for those supplies and services for repurchase as may be required under the Termination clause.

(End of clause)

Alternate I (DATE). In commercial items acquisitions awarded under the procedures of FAR part 8, or FAR part 12, substitute this paragraph (e) in lieu of paragraph (e) in the basic clause:

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract in whole or in part under the Termination for cause paragraph, FAR 52.212–4(m), Contract Terms and Conditions—Commercial Items, the Contractor is liable for damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These damages are in addition to costs of repurchase as may be required under the Termination clause.

Alternate II (DATE). In simplified acquisitions exceeding the micro-purchase threshold that are for other than commercial items awarded under the procedures of FAR part 13 (*see* FAR 13.302–5(d)(1) and the clause at FAR 52.213–4), substitute this paragraph (e) in lieu of paragraph (e) in the basic clause:

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract in whole or in part under the Termination for cause paragraph, FAR 52.213–4(g), Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items), or any other applicable FAR or VAAR clause, the Contractor is liable for damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These damages are in addition to costs of repurchase as may be required under the Termination clause.

852.212–70 [Removed and Reserved]

■ 15. Section 852.212–70 is removed and reserved.

■ 16. Section 852.212–71 is revised to read as follows:

852.212–71 Gray Market and Counterfeit Items.

As prescribed in 812.301(f), insert the following clause:

Gray Market and Counterfeit Items (DATE)

(a) No used, refurbished, or remanufactured supplies or equipment/parts shall be provided. This procurement is for new Original Equipment Manufacturer (OEM) items only. No gray market items shall be provided. Gray market items are OEM goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

(b) No counterfeit supplies or equipment/parts shall be provided. Counterfeit items include unlawful or unauthorized reproductions, substitutions, or alterations that have been mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitutions include used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

(c) Vendor shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM. All software licensing, warranty and service associated with the equipment/system shall be in accordance with the OEM terms and conditions.

(End of clause)

■ 17. Section 852.212–72 is added to read as follows:

852.212–72 Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts.

As prescribed in 812.301(f), insert the following clause:

Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-Than-New Parts (DATE)

(a) Used, refurbished, or remanufactured parts may be provided. No gray market supplies or equipment shall be provided. Gray market items are Original Equipment Manufacturer (OEM) goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

(b) No counterfeit supplies or equipment shall be provided. Counterfeit items include unlawful or unauthorized reproductions, substitutions, or alterations that have been mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitutions include used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

(c) Vendor shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM. All software licensing, warranty and service associated with the equipment/system shall be in accordance with the OEM terms and conditions.

(End of clause)

■ 18. Section 852.239–70 is added to read as follows:

852.239–70 Security Requirements for Information Technology Resources.

As prescribed in 839.106–70, insert the following clause:

Security Requirements for Information Technology Resources (DATE)

(a) *Definitions.* As used in this clause—

Information technology has the same meaning in FAR 2.101 and also *means* Information and Communication Technology (ICT).

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

(b) *Responsibilities.* The Contractor shall be responsible for information technology security for all systems connected to a Department of Veterans Affairs (VA) network or operated by the Contractor for VA, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or other system access to VA information that directly supports the mission of VA. Examples of tasks that require security provisions include—

(1) Hosting of VA e-Government sites or other information technology operations;

(2) Acquisition, transmission, or analysis of data owned by VA with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to VA general support systems/major applications at a level beyond that granted the general public, *e.g.,* bypassing a firewall.

(c) *Information technology security plan.* The Contractor shall develop, provide, implement, and maintain an Information Technology Security Plan. VA information system and platform information technology systems must have a security plan that provides an overview of the security requirements for the system and describes the security controls in place or the plan for meeting those requirements. Generally, this plan shall describe the processes and procedures that the Contractor will follow to ensure appropriate security of information technology resources developed, processed, or used under this contract. The security plan should include implementation status, responsible entities, resources, and estimated completion dates. Security plans may also include, but are not limited to, a compiled list of system characteristics or qualities required for system registration, and key security-related documents such as a risk assessment, PIA, system interconnection agreements, contingency plan, security configurations, configuration management plan, and incident response plan. The plan shall address the specific contract requirements regarding information technology and information technology-related support or services included in the contract, to include the PWS or SOW. The Contractor's Information Technology Security Plan shall comply with applicable Federal Laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Modernization Act (FISMA) of 2014 and the E-Government Act of 2002. The plan shall meet information technology security requirements in accordance with Federal and VA policies and procedures, and as amended during the term of this contract, and include, but are not limited to the following.

(1) OMB Circular A–130, Managing Information as a Strategic Resource;

(2) National Institute of Standards and Technology (NIST) Guidelines; and

(3) VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and

Handbook 0710, Personnel Security and Suitability Program, which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive Orders, policies, regulations, standards and guidance for protecting VA information, information systems (see 802.101, Definitions) security and privacy, and adhering to personnel security requirements when accessing VA information or information systems.

(d) *Submittal of plan.* Within 30 days after contract award, the Contractor shall submit the Information Technology Security Plan to the Contracting Officer for review and approval.

(e) *Security accreditation.* As required by current VA policy, the Contractor shall submit written proof of information technology security accreditation to the Contracting Officer. Such written proof may be furnished either by the Contractor or by a third party. Accreditation shall be in accordance with VA policy available from the Contracting Officer upon request. The Contractor shall submit for acceptance by the Contracting Officer along with this accreditation a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. The accreditation and accompanying documents, to include a final security plan, risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan.

(f) *Annual validation.* On an annual basis, the Contractor shall verify in writing to the Contracting Officer that the IT Security Plan remains valid.

(g) *Banners.* The Contractor shall ensure that the official VA banners are displayed on all VA systems (both public and private) operated by the Contractor that contain Privacy Act information before allowing anyone access to the system. The Office of Information Technology will make official VA banners available to the Contractor.

(h) *Screening and access.* The Contractor shall screen all personnel requiring privileged access or limited privileged access to systems operated by the Contractor for VA or interconnected to a VA network in accordance with VA Directives and Handbooks referenced in paragraph (c).

(i) *Training.* The Contractor shall ensure that its employees performing services under this contract complete VA security awareness training on an annual basis. This includes signing an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior (VA National Rules of Behavior) as required by 38 U.S.C. 5723; FAR 39.105, Privacy; clause 852.204–71, Information and Information Systems Security, and this clause on an annual basis.

(j) *Government access.* The Contractor shall provide the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases and personnel used in performance of the contract. The Contractor shall provide access to enable a program of information technology inspection (to include vulnerability testing), investigation and audit (to safeguard against threats and hazards to the integrity, availability and confidentiality of VA data or to the function of information technology systems operated on behalf of VA), and to preserve evidence of computer crime.

(k) *Notification of termination of employees.* The Contractor shall immediately notify the Contracting Officer when an employee who has access to VA information systems or data terminates employment.

(l) *Subcontractor flow down requirement.* The Contractor shall incorporate and flow down the substance of this clause to all subcontracts that meet the conditions in paragraph (a) of this clause.

(End of clause)

■ 19. Section 852.239–71 is added to read as follows:

852.239–71 Information Technology Security Plan and Accreditation.

As prescribed in 839.106–70, insert the following provision:

Information Technology Security Plan and Accreditation (DATE)

All offers submitted in response to this solicitation or request for quotation shall address the approach for completing the security plan and accreditation requirements in clause 852.239–70, Security Requirements for Information Technology Resources.

(End of provision)

■ 20. Section 852.239–72 is added to read as follows:

852.239–72 Information System Design and Development.

As prescribed in 839.106–70, insert the following clause:

Information System Design and Development (DATE)

(a) *Design or development at non-VA facilities.* Information systems that are designed or developed for or on behalf of VA at non-VA facilities shall comply with all VA directives developed in accordance with the Federal Information Security Modernization Act of 2014 and Federal Information Security Management Act (FISMA), Health Insurance Portability and Accountability Act (HIPAA) regulations, NIST, and related VA security and privacy control requirements for Federal information systems. This includes standards for the protection of electronic protected health information (PHI), outlined in 45 CFR part 164, subpart C, information and system security categorization level designations in accordance with FIPS 199 and FIPS 200 with implementation of all baseline security controls commensurate with the FIPS 199 system security categorization and the Trusted internet Connections (TIC) Reference Architecture).

(b) *Privacy Impact Assessment.* During the development cycle a Privacy Impact Assessment (PIA) must be completed, provided to the COR, and approved by the VA Privacy Service in accordance with VA Directive 6508, Implementation of Privacy Threshold Analysis and Privacy Impact Assessment.

(c) *Security of procured or developed systems and technologies.* The Contractor shall ensure the security of all procured or developed systems and technologies, including their subcomponents (hereinafter referred to as ''Systems''), throughout the life of the contract and any extension, warranty, or maintenance periods. This includes, but is not limited to, workarounds, patches, hotfixes, upgrades, and any physical components (hereafter referred to as Security Fixes) which may be necessary to fix all security vulnerabilities published or known to the Contractor anywhere in the Systems, including Operating Systems and firmware. The Contractor shall ensure that Security Fixes shall not negatively impact the Systems.

(d) *Subcontract flow down requirements.* (1) The Contractor shall include the clause at 52.224–1, Privacy Act Notification, in every solicitation and/or subcontract awarded by the Contractor when the clause FAR 52.224–1 is included in its contract.

(End of clause)

■ 21. Section 852.239–73 is added to read as follows:

852.239–73 Information System Hosting, Operation, Maintenance, or Use.

As prescribed in 839.106–70, insert the following clause:

Information System Hosting, Operation, Maintenance, or Use (DATE)

(a) Definitions. As used in this clause—

Assessment and Authorization (A&A) means the process used to ensure information systems including Major Applications and General Support Systems have effective security safeguards which have been implemented, planned for, and documented in an Information Technology Security Plan. The A&A process per applicable VA policies and procedures is the mechanism by which VA provides an Authorization to Operate (ATO), the official management decision given by the VA to authorize operation of an information system (see VA Handbook 6500 for additional details).

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

(b) *Hosting, operation, maintenance, or use at non-VA facilities.* For information systems that are hosted, operated, maintained, or used on behalf of VA at non-VA facilities, Contractors/subcontractors are fully responsible and accountable for ensuring compliance with all applicable Health Insurance Portability and Accountability (HIPAA) Act of 1996 (HIPAA) regulations, the Privacy Act and other required VA confidentiality statutes included in VA's mandatory yearly training and privacy handbooks, FISMA, NIST, FIPS, and VA security and privacy directives and handbooks. This includes conducting compliant risk assessments, routine vulnerability scanning, system patching and change management procedures, and the

completion of an acceptable contingency plan for each system. The Contractor's security control procedures must be equivalent to or exceed, those procedures used to secure VA systems. A Privacy Impact Assessment (PIA) must also be provided to the COR and approved by VA Privacy Service prior to approval to operate. All external internet connections to VA's network involving VA information must be in accordance with the Trusted internet Connections (TIC) Reference Architecture and reviewed and approved by VA prior to implementation. For Cloud Services hosting, the Contractor shall also ensure compliance with the Federal Risk and Authorization Management Program (FedRAMP).

(c) *Collecting, processing, transmitting, and storing of PII.* Adequate security controls for collecting, processing, transmitting, and storing of Personally Identifiable Information (PII), as determined by the VA Privacy Service, must be in place, tested, and approved by VA prior to hosting, operation, maintenance, or use of the information system, or systems by or on behalf of VA. These security controls are to be assessed and stated within the Privacy Impact Assessment and if these controls are determined not to be in place, or inadequate, a Plan of Action and Milestones (POA&M) must be submitted and approved prior to the collection of PII.

(d) *Annual FISMA security controls assessment.* The Contractor/subcontractor's system must adhere to all FISMA, FIPS, and NIST standards related to the annual FISMA security controls assessment and review and update the Privacy Impact Assessment. Any deficiencies noted during this assessment must be provided to the Contracting Officer for entry into VA's POA&M management process. The Contractor/subcontractor must use VA's POA&M process to document planned remedial actions to address any deficiencies in information security policies, procedures, and practices, and the completion of those activities. Security deficiencies must be corrected within the timeframes specified by the VA in the performance work statement or statement of work, or in the approved remediation plan through the VA POA&M process. Contractor/subcontractor procedures are subject to periodic, unannounced assessments by VA officials, including the VA Office of Inspector General. The physical security aspects associated with Contractor/subcontractor activities must also be subject to such assessments. The results of an annual review or a major change in the cybersecurity posture at any time may indicate the need for reassessment and reauthorization of the system. If major changes to the system occur that may affect the privacy or security of the data or the system, the A&A of the system may need to be reviewed, retested and re-authorized per VA Handbook 6500. This may require reviewing and updating all of the documentation as described in VA Handbook 6500.6 (*e.g.,* System Security Plan, Contingency Plan). See VA Handbook 6500.6 for a list of documentation. The VA Information System Risk Management (ISRM) office can provide guidance on whether a new A&A would be necessary.

(e) *Annual self-assessment.* The Contractor/subcontractor must conduct an annual self-assessment on all systems and outsourced services as required. Both hard copy and electronic copies of the assessment must be provided to the COR. VA reserves the right to conduct such an assessment using government personnel or another Contractor/subcontractor. The Contractor/subcontractor must take appropriate and timely action, as may be specifically addressed in the contract, to correct or mitigate any weaknesses discovered during such testing, at no additional cost to the Government to correct Contractor/subcontractor systems and outsourced services.

(f) *Prohibition of installation and use of personally-owned or Contractor-owned equipment or software on VA networks.* VA prohibits the installation and use of personally-owned or Contractor/subcontractor-owned equipment or software on VA networks. If non-VA owned equipment must be used to fulfill the requirements of a contract, it must be stated in the service agreement, PWS, SOW or contract. All of the security controls required for government furnished equipment (GFE) must also be utilized in approved other equipment (OE) at the Contractor's expense. All remote systems must be equipped with, and use, a VA-approved antivirus (AV) software and a personal (host-based or enclave based) firewall that is configured with a VA-approved configuration. Software must be kept current, including all critical updates and patches. Owners of approved OE are responsible for providing and maintaining the anti-viral software and the firewall on the non-VA owned OE.

(g) *Disposal or return of electronic storage media on non-VA leased or non-VA owned IT equipment.* All electronic storage media used on non-VA leased or non-VA owned IT equipment that is used to store, process, or access VA information must be handled in adherence with VA directives and handbooks upon—

(1) Completion or termination of the contract; or

(2) Disposal or return of the IT equipment by the Contractor/subcontractor or any person acting on behalf of the Contractor/subcontractor, whichever is earlier. Media (*e.g.,* hard drives, optical disks, CDs, back-up tapes) used by the Contractors/subcontractors that contain VA information must be returned to the VA for sanitization or destruction or the Contractor/subcontractor must self-certify that the media has been disposed of per VA Handbook 6500.1 requirements. This must be completed within 30 days of termination of the contract.

(h) *Bio-Medical devices and other equipment or systems.* Bio-Medical devices and other equipment or systems containing media (*e.g.,* hard drives, optical disks) with VA sensitive information will not be returned to the Contractor at the end of lease, for trade-in, or other purposes. For purposes of these devices and protection of VA sensitive information the devices may be provided back to the Contractor under one of three scenarios—

(1) The Contractor must accept the system without the drive;

(2) A spare drive must be installed in place of the original drive at time of turn-in if VA's initial medical device purchase included a spare drive; or

(3) The Contractor may request reimbursement for the drive at a reasonable open market replacement cost to be separately negotiated by the Contracting Officer and the Contractor at time of contract closeout.

(End of clause)

■ 22. Section 852.239–74 is added to read as follows:

852.239–74 Security Controls Compliance Testing.

As prescribed in 839.106–70(d), insert the following clause:

Security Controls Compliance Testing (DATE)

On a periodic basis, VA, including the Office of Inspector General, reserves the right to evaluate any or all of the security controls and privacy practices implemented by the Contractor under the clauses contained within the contract. With 10 working-days' notice, at the request of the government, the Contractor must fully cooperate and assist in a government-sponsored security controls assessment at each location wherein VA information is processed or stored, or information systems are developed, operated, maintained, or used on behalf of VA, including those initiated by the Office of Inspector General. The government may conduct a security control assessment on shorter notice, to include unannounced assessments, as determined by VA in the event of a security incident or at any other time.

(End of clause)

■ 23. Section 852.239–75 is added to read as follows:

852.239–75 Information and Communication Technology Accessibility Notice.

As prescribed in 839.203–70(a), insert the following provision:

Information and Communication Technology Accessibility Notice (DATE)

(a) Any offeror responding to this solicitation must comply with established VA Information and Communication Technology (ICT) (formerly Electronic and Information (EIT)) accessibility standards. Information about Section 508 is available at *http://www.section508.va.gov/.*

(b) The Section 508 accessibility standards applicable to this solicitation are stated in the clause at 852.239–75, Information and Communication Technology Accessibility. In order to facilitate the Government's determination whether proposed ICT supplies meet applicable Section 508 accessibility standards, offerors must submit appropriate VA Section 508 Checklists, in accordance with the checklist completion instructions. The purpose of the checklists is to assist VA acquisition and program officials in determining whether proposed ICT supplies, or information, documentation and services conform to applicable Section 508

accessibility standards. The checklists allow offerors or developers to self-evaluate their supplies and document—in detail—whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues.

(c) Respondents to this solicitation must identify any exception to Section 508 requirements. If an offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, *i.e.,* after award of a contract or order, that supplies or services delivered do not conform to the described accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

(End of provision)

■ 24. Section 852.239–76 is added to read as follows:

852.239–76 Information and Communication Technology Accessibility.

As prescribed in 839.203–70(b), insert the following clause:

Information and Communication Technology Accessibility (DATE)

(a) All information and communication technology (ICT) (formerly referred to as electronic and information technology (EIT)) supplies, information, documentation and services support developed, acquired, maintained or delivered under this contract or order must comply with the ''Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards'' (*see* 36 CFR part 1194). Information about Section 508 is available at *http://www.section508.va.gov/.*

(b) The Section 508 accessibility standards applicable to this contract or order are identified in the specification, statement of work, or performance work statement. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(c) The Section 508 accessibility standards applicable to this contract are: _____ [*Contracting Officer: Insert the applicable Section 508 accessibility standards*].

(d) In the event of a modification(s) to this contract or order, which adds new EIT supplies or services or revises the type of, or specifications for, supplies or services, the Contracting Officer may require that the Contractor submit a completed VA Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(e) If this is an Indefinite-Delivery type contract, a Blanket Purchase Agreement or a Basic Ordering Agreement, the task/delivery order requests that include ICT supplies or services will define the specifications and accessibility standards for the order. In those cases, the Contractor may be required to provide a completed VA Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the provided documentation, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(End of clause)

[FR Doc. 2021–24299 Filed 11–16–21; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2021–0036; FF09E22000 FXES11130900000 212]

RIN 1018–BE57

Endangered and Threatened Wildlife and Plants; Removal of the Okaloosa Darter From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft post-delisting monitoring plan.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to remove the Okaloosa darter (*Etheostoma okaloosae*) from the Federal List of Endangered and Threatened Wildlife (List) due to recovery. Our review of the best available scientific and commercial data indicates that the threats to the species have been eliminated or reduced to the point that the species no longer meets the definition of a threatened or endangered species under the Endangered Species Act of 1973, as amended (Act). We request information and comments from the public regarding this proposed rule and the draft post-delisting monitoring (PDM) plan for Okaloosa darters. If this proposal is finalized, Okaloosa darters will be removed from the List and the prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, would no longer apply to the species.

DATES: We will accept comments received or postmarked on or before January 18, 2022. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 3, 2022.

ADDRESSES:

Submitting Comments: You may submit comments on this proposed rule and draft PDM plan by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R4–ES–2021–0036; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments by only one of the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see **INFORMATION REQUESTED,** below, for more information).

Accessing Supporting Materials: This proposed rule, draft PDM plan, and supporting documents (including the Species Status Assessment (SSA) and references cited and the 5-year review) are available at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0036.

FOR FURTHER INFORMATION CONTACT: Lourdes Mena, Florida Chief of Classification and Recovery, U.S. Fish and Wildlife Service, Florida Ecological Services Field Office, 7915 Baymeadows Way, Jacksonville, FL 32256–7517; telephone 904–731–3134. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. In the case of any proposed rule to list, reclassify, or delist a species, we must publish a notice of such proposal in the **Federal Register**. Therefore, in order to remove Okaloosa darters from the List, we must publish a proposed rule.

What this document does. This action proposes to remove Okaloosa darters from the List of Endangered and Threatened Wildlife (*i.e.,* ''delist'' the species) based on its recovery.

The basis for our action. Under the Act, we may determine that a species is an endangered species or a threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

The determination to delist a species must be based on an analysis of the same factors. Under the Act and our implementing regulations at 50 CFR 424.11, we may delist a species if the best available scientific and commercial data indicate that: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species when considering the five factors listed above; or (3) the listed entity does not meet the statutory definition of a species. Here, we have determined that Okaloosa darters should be proposed for delisting under the Act because, based on an analysis of the five listing factors, it has recovered and no longer meets the definition of an endangered or threatened species.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments and information from the public, other concerned governmental agencies (including but not limited to State and Federal agencies and city or county governments), Native American Tribes, the scientific community, industry, or any other interested party concerning this proposed rule.

We particularly seek comments on:

(1) Information concerning the biology and ecology of the Okaloosa darter;

(2) Relevant data concerning presence or absence of current or future threats to the Okaloosa darter and its habitat;

(3) Information regarding management plans or other mechanisms that provide protection to the Okaloosa darter and its habitat;

(4) Information on the potential for changes in precipitation levels and air and water temperatures to affect the Okaloosa darter due to changes in the climate or other reasons; and

(5) The draft PDM plan and the methods and approach described.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species should remain listed as threatened.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On June 4, 1973, we published a final rule in the **Federal Register** (38 FR 14678) listing Okaloosa darters as endangered under the Endangered Species Conservation Act (Pub. L. 91–135) due to its extremely limited range, habitat degradation, and apparent competition from a possibly introduced related species, the brown darter *(Etheostoma edwini).* A 5-year status review was conducted in 2007 (USFWS 2007, entire), and we recommended downgrading the species' classification to threatened as a result of substantial reduction in threats to the species, significant habitat restoration in most of the species' range, and a stable or increasing trend of Okaloosa darters in all stream systems. We reclassified Okaloosa darters as threatened under the Act on April 1, 2011, and established a rule under section 4(d) to further provide for its conservation (76 FR 18087); the section 4(d) rule is at 50 CFR 17.44(bb). On August 6, 2018, we initiated a 5-year review for Okaloosa darters (83 FR 38320). This proposed rule also serves as our 5-year review.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for Okaloosa darters (USFWS, 2019, entire). The SSA team was composed of Service biologists, in consultation with other species experts. The 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. 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 actions under the Act, we sought the expert opinions of six appropriate specialists regarding the SSA. The Service received two responses.

Background

The Okaloosa darter is a small (maximum size 49 millimeters (mm), 1.93 inches (in)) percid fish. General body coloration varies from red-brown to green-yellow dorsally, and lighter ventrally, although breeding males have a bright orange submarginal stripe on the first dorsal fin (Burkhead et al. 1992, p. 23). The Okaloosa darter is a member of Order Perciformes, Family Percidae and is a distinct species within the genus *Etheostoma* (Burkhead et al. 1992, p. 23), although it remains uncertain as to which subgenus this species belongs (*e.g.,* Song et al. 1998 pp. 348–351; Smith et al. 2014 pp. 259–260).

The Okaloosa darter is a narrow endemic, known to occur in only the tributaries and main channels of six clear stream systems that drain into three Choctawhatchee Bay bayous (Toms, Boggy, and Rocky) in Walton and Okaloosa Counties in northwest Florida: Toms, Turkey, Mill, Swift, Deer Moss (formerly known as East Turkey or Turkey Bolton), and Rocky Creeks. Approximately 90 percent of the 457-square-kilometer (176-square-mile) watershed drainage area that historically supported Okaloosa darters is Federal property under the management of Eglin Air Force Base (Eglin AFB), including about 98.7 percent of the stream length in the current range of the Okaloosa darter. Eglin AFB encompasses the headwaters of all six of these drainages, and the remainder of these streams flow out of Eglin AFB into the urban complex of the cities of Niceville and Valparaiso (USAF 2017c, p. 3–1; 76 FR 18088, April 1, 2011).

The Okaloosa darter's breeding season extends from late March through October, although it usually peaks in April. Spawning pairs attach small numbers of eggs to vegetation, woody debris, and root mats (Collete and Yerger 1962, p. 226; Burkhead et al. 1994, p. 81); however, little is known about larval development (Burkhead et al. 1992, p. 26). Okaloosa darter spawn in the morning hours (Burkhead et al. 1992, p. 26), although courtship displays have also been observed late in the afternoon (Jelks 2018, pers. comm.). During courtship, a male will follow a single female and fertilize eggs as she deposits them singly among vegetation, roots, or woody detritus. Males will spawn with several females. As with most darters, fecundity is low (Burkhead et al. 1992, p. 26). A mean of 76 total ova (eggs) and 29 mature ova were found in 201 female Okaloosa darters, although these numbers may underrepresent annual fecundity as their prolonged spawning season is an indication of fractional spawning (eggs develop and mature throughout the spawning season) (Ogilvie 1980, p. 4; 76 FR 18088, April 1, 2011).

Longleaf pine–wiregrass–red oak sandhill communities dominate the vegetation landscape in Okaloosa darter watersheds. These areas are characterized by high sand ridges where soil nutrients are low and woodland fire is a regular occurrence. Where water seeps from these hills, acid bog communities develop, consisting of sphagnum moss (*Sphagnum* sp.), pitcher plants (*Sarracenia* sp.), and other plants adapted to low-nutrient soils. In other areas, the water emerges from seepage springs directly into clear flowing streams where variation of both temperature and flow is moderated by the deep layers of sand. The streams support a mixture of bog moss *(Mayaca fluviatilis),* bulrush *(Schoenoplectus etuberculatus),* golden club *(Orontium aquaticum),* bur-reed *(Sparganium americanum),* pondweed *(Potamogeton diversifolius),* spikerush (*Eleocharis* sp.), and other aquatic and emergent plants. Okaloosa darters typically inhabit the margins of moderate- to fast-flowing streams where detritus (organic matter, including leaves, twigs, and sticks), root mats, and vegetation are present (Burkhead et al. 1992, p. 25; 76 FR 18088, April 1, 2011). They are rarely found in areas with no current or in open sandy areas in the middle of the stream channel. Creeks with Okaloosa darters have temperatures ranging from 7 to 22 degrees Celsius (°C) (44 to 72 degrees Fahrenheit (°F)) in the winter to 22 to 29 °C (72 to 84 °F) in the summer (Mettee and Crittenden 1977, p. 5; Tate 2018, pers. comm.; Jelks 2018, pers. comm). Overhead canopies range from open to fully closed depending on stream width and fire history (Jordan 2018, pers. comm.). Okaloosa darter thrive in reaches with relatively open canopies, likely due to either increased abundance of submerged vegetation that is used preferentially for spawning or increased secondary production of insect prey (Ingram 2018, p. 11).

Okaloosa darter abundance has been quantified by visual census at multiple sites annually since 1995. Densities in 1995 averaged 1.2 (± 0.8; ± 1 standard deviation) Okaloosa darter per meter (3.28 feet) of stream length. In 2005, a rangewide survey estimated the species' population size at 822,500 (95 percent Confidence Interval 662,916 to 1,058,009). A repeat rangewide survey in 2014 indicated that overall abundance declined by about 24 percent from 2005 (Jordan and Jelks 2018, pp. 10–11). However, 2005 was an unusually good year for Okaloosa darter, and the 2014 estimates reflect some declines associated with dense canopy cover.

A thorough review of the taxonomy, life history, ecology, and overall viability of Okaloosa darters is presented in the SSA report (USFWS 2019, entire; available at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0036).

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the List.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species, is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having

finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all of the guidance provided in a recovery plan.

The objective of the Okaloosa darter recovery plan is to restore and protect habitat and stream ecosystems so that Okaloosa darters may be initially downlisted (which occurred in 2011) and eventually delisted. The Okaloosa darter is a narrow endemic that occupies the unique habitats of only six stream systems. Recovery objectives are focused on habitats within their historical range. The recovery plan states that Okaloosa darters will be considered for delisting when:

1. (a) All downlisting criteria have been met; (b) historical habitat of all six streams has been restored to support viable populations of Okaloosa darters (including degraded sections of Mill, Swift, and Tom Creeks); (c) erosion at clay pits, road crossings, and steep slopes has been minimized to the extent that resembles historical predisturbance condition; (d) longleaf restoration and watershed management practices on Eglin AFB are in effect; (e) natural, historical flow regimes are maintained; and (f) water quality and riparian habitat have been significantly improved and maintained.

2. (a) Cooperative and enforceable agreements are in place to protect habitat and water quality and quantity for the historical range outside of Eglin AFB; and (b) management plans that protect and restore habitat and water quality and quantity have been effective and are still in place for the 90 percent of the historical range currently managed by Eglin AFB.

3. Okaloosa darter populations at monitoring sites consist of two or more age-classes and remain stable or increasing in all six streams over a period of 20 consecutive years.

4. No foreseeable threats exist that would impact the survival of this species (assumes military mission is compatible).

Recovery Plan Implementation

The following discussion summarizes the recovery criteria and information on recovery actions that have been implemented under each delisting criterion.

Recovery Criteria

Delisting Criterion #1: All reclassification criteria have been met. (This criterion has been met.)

Delisting Criterion #2: Restore and protect habitat in the six Okaloosa darter stream watersheds.

The Okaloosa darter is naturally restricted in distribution to six streams, of which about 90 percent of the basins are on Eglin AFB and the remaining 10 percent in the Niceville and Valparaiso municipal area. Because of the specific habitat requirements and limited distribution of the darter, habitat that is essential for spawning, rearing, feeding, and cover needs to be restored and protected to prevent the species from declining irreversibly and to recover the species.

Much progress has been made towards actions identified for Okaloosa darters under this criterion since the species was downlisted from endangered to threatened. Erosion into the streams has been reduced to background levels, nearly all fish passage barriers on Eglin AFB have been removed, several projects have been completed to restore and reconnect stream habitat, and conservation agreements with local landowners have been put in place on private lands to protect stream and floodplain habitat. The Eglin AFB erosion control program, habitat restoration programs, and habitat protections agreed to by private landowners have improved habitat for Okaloosa darters sufficient to partially meet this criterion.

Delisting Criterion #3: Erosion at clay pits, road crossings, and steep slopes has been minimized to the extent that resemble historical pre-disturbance condition. (This criterion is partially fulfilled and progress is ongoing.)

Delisting Criterion #4: Longleaf restoration and watershed management practices on the Eglin AFB are in effect. (This criterion is largely fulfilled. Both longleaf and watershed management practices are in effect on Eglin AFB.)

Delisting Criterion #5: Natural, historical flow regimes are maintained. (This criterion has been met.)

Delisting Criterion #6: Water quality and riparian habitat have been significantly improved and maintained. (This criterion is partially fulfilled, and progress is ongoing.)

Delisting Criterion #7: Cooperative and enforceable agreements are in place to protect habitat and water quality and quantity for the historical range outside of Eglin AFB ((2)(a), above), and management plans that protect and restore habitat and water quality and quantity have been effective and are still in place for the 90 percent of the historical range currently managed by Eglin AFB ((2)(b), above).

About 90 percent of the 51,397 hectares (127,000 acres) that represent the drainage basins of darter streams are managed by Eglin AFB. Eglin AFB will continue to include management for Okaloosa darters in the Eglin AFB's Integrated Natural Resources Management Plan (INRMP), changes to which are reviewed and approved by both the Service and the Florida Fish and Wildlife Conservation Commission (FWC) as specified under the Sikes Act. Eglin AFB has no plans to remove management from the INRMP or limit management within Okaloosa darter watersheds (Tate 2020, pers. comm.). In fact, Eglin AFB is working with the Service to shift prescribed fire management to reduce canopy cover in Okaloosa darter streams to further bolster darter numbers and stabilize monitoring sites with observed declines. Additionally, Eglin AFB has placed protective buffers on Okaloosa darter streams to prevent land use changes and management actions that might adversely affect Okaloosa darters or their habitat, thus protecting 90 percent of the darter's watershed area from impacts (Felix 2020, pers. comm.).

Outside the Eglin AFB boundary, the remaining 485.6 hectares (1,200 acres) of Okaloosa darter habitat are situated in the Niceville–Valparaiso urban complex. Okaloosa darters are found at reduced levels or absent from much of this area. Current stream impacts include erosion, non-point discharge of nutrients and pollutants, impoundment, alteration of flow, and culverting. Conservation agreements and habitat buffering on private property further prevent adverse impacts to an additional 3–4 percent of the potential range (Ruckel Properties 2018, entire). In total, 90–95 percent of the watershed area has established protections, and monitoring will ensure this criterion continues to be met.

Delisting Criterion #8: Management plans that protect and restore habitat and water quality and quantity have been effective and are still in place for the 90 percent of the historical range currently managed by Eglin AFB. (This criterion is largely fulfilled through Eglin's 2007 INRMP.)

Delisting Criterion #9: Okaloosa darter populations at monitoring sites consist of two or more age-classes and remain stable or increasing in all six streams over a period of 20 consecutive years.

Monitoring for Okaloosa darters has been conducted annually at 21 core sites distributed throughout the range since 1995. In 2005, 2014, and 2020,

expanded monitoring efforts of 58 sites were conducted to estimate the population size and inform the status review and species status assessment. Additional monitoring has been conducted to support specific research projects. In general, Okaloosa darter numbers increased in the late 1990's through early 2000's, at which time declines were observed at a subset of sites (Jordan and Jelks 2020). Multiple year classes have been recorded in each of the six watersheds in all years of study, regardless of declines (Jordan and Jelks 2020). Although declines have been identified in portions of the range, the majority of the declines could be associated with dense canopy cover limiting vegetation and primary productivity in the stream (Jordan and Jelks 2020). Eglin AFB natural resource managers are working to shift habitat management activities like prescribed fire, vegetative spraying, or mechanical timber stand improvement to limit excessive riparian growth along Okaloosa darter streams. Monitoring data will continue to be collected and used to assess and inform management actions in Okaloosa darter watersheds.

Regardless of declines, the overall population estimate for Okaloosa darters was greater than 500,000 individuals in 2020 (Jordan and Jelks 2020) and range-wide densities generally remain above 2 darters per meter of inhabited stream (Jordan and Jelks 2020), which is approximately 90% of the species' historic range. Maintaining multiple viable populations substantially reduces the risk of species extinction, and future scenario modelling suggests that resiliency and redundancy will persist into the foreseeable future (USFWS 2019). This criterion has been fully met.

Delisting Criterion #10: No foreseeable threats exist that would impact the survival of this species.

Potential future threats to the Okaloosa darter are to its habitat, particularly in three of the smaller basins: Mill Creek, Swift Creek, and Deer Moss Creek. Human activity has degraded physical and chemical habitat quality in these basins, though only the Deer Moss Creek population exhibits declines. Mill Creek is almost entirely within the Eglin AFB golf course, who sponsored a major stream restoration in 2007 that nearly doubled the inhabited stream in this watershed. The golf course has also implemented best management practices (BMPs) for herbicide and pesticide application that limit impacts to Mill Creek. The lower portions of Swift Creek are nearly completely urbanized, but our models show that the planned restoration of College Pond would nearly double the population size. Stream restoration at College Pond would not only add substantial habitat to the watershed, it would also remove a fish passage barrier to multiple tributaries that are currently unoccupied by Okaloosa darters. Eglin AFB is currently working with USFWS, FWC, and community partners to begin engineering designs for this project.

The portions of Deer Moss Creek outside Eglin AFB are currently subject to development pressure; however, during the FWC endangered species permit process, developments and other actions must show a net benefit to the species before approval by the State. In the case of Deer Moss Creek, a conservation plan was developed that prevents construction in all wetlands and an upland buffer, requires bridges that completely span all wetlands, and requires the removal of two fish passage barriers within the watershed, among other provisions (Ruckel Properties, 2014). In addition to protections from urbanization in lower Deer Moss Creek, the Niceville wastewater treatment facility was upgraded in 2010 to reduce nutrients in sprayfield effluent. Recent studies at Eglin AFB have found that groundwater transport in the Deer Moss Creek watershed is approximately 12–18 years (Landmeyer 2020, unpublished data), so the water quality in the stream should improve over time.

Because the range of the Okaloosa darter is almost entirely on Federal lands, nearly all actions in this area were subject to the interagency cooperation requirements of section 7. Following delisting, the protections under section 7 will no longer apply; however, Eglin AFB plans to maintain protections for the Okaloosa darter by maintaining a buffer around Okaloosa darter streams during infrastructure and mission planning, developing enhanced BMPs to limit erosion during construction projects and continue monitoring stream health (Felix 2020, pers. comm.). Additionally, any action on Federal or private lands that impact wetlands would require permits under the Clean Water Act. Eglin protection and restoration of Okaloosa darter streams is a substantial component of natural resources management on Eglin AFB. Approximately 90 percent of the species' range is under the management of Eglin AFB; urbanization will have little to no future effect. Because Okaloosa darters occur in multiple stream systems, which provides redundancy, and no long-term threats are presently impacting Okaloosa darters at the species level in the foreseeable future, this criterion has been met.

Regulatory and Analytical Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an endangered species or a threatened species. The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species

level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors. In the discussion of threats and the species' response to those threats that follows, we include, where possible, either a qualitative or quantitative assessment of the timing of the threats and species' responses to those threats.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential stressors to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for delisting. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. In this section, we summarize the key conclusions from the SSA report; the full SSA report can be found on the Southeast Region website at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0036.

To assess the Okaloosa darter's viability, we used the three conservation biology principles of resiliency, representation, and redundancy (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency describes the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more redundant and resilient a species is, and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Threats and Conservation Measures That Affect the Species

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Stressors to Okaloosa darter stem from two main sources: Land use and management practices on Eglin AFB and urbanization around the lower reaches of streams outside of Eglin AFB. Urbanization is the greatest threat to Okaloosa darter, as development leads to pollution, erosion, and sedimentation, altered water flows, and dispersal barriers through multiple pathways. Land use and management practices such as road building, timber harvesting, and fire suppression can affect abundance of Okaloosa darter on Eglin AFB. The effects of a changing climate, such as increasing stream temperatures, could become a threat to Okaloosa darters throughout their geographic range in the future; however, the degree and magnitude of any impacts are uncertain at this time. Impending development along Deer Moss Creek would likely be completed in 20 years; however, a conservation plan is in place to minimize impacts to Deer Moss Creek.

Sedimentation and Erosion

Sediment loading is perhaps the primary factor continuing to impact Okaloosa darter. The primary sources of sediment to aquatic ecosystems on Eglin AFB are: accelerated streamside erosion, borrow pits (areas where clay, sand, or gravel are removed for use at other locations), developed areas, weapon test ranges, silviculture, and roads (Rainer et al. 2005, p. 1–1). Sedimentation can result from unpaved roads, road crossings, road or development projects (*e.g.,* solar power grids), and can also result from poor stormwater control or runoff during heavy, localized rains. Even though the species has been impacted by these threats, the current population estimate is approximately 1.2 million darters across its range.

Management for Okaloosa darters is outlined in Eglin AFB's INRMP, which includes specific goals and objectives to improve Okaloosa darter habitat, and Eglin AFB has demonstrated a commitment to recovery of the species. Therefore, management and other conservation actions are much more likely to occur on Eglin AFB than surrounding properties (USFWS 2007, p. 5). These streams on Eglin AFB flow mostly through forested, natural settings, whereas off-installation, they interface mostly with urban and suburban areas. Eglin AFB personnel have implemented this effective habitat restoration program to control erosion from roads, borrow pits, and cleared test ranges. Since 1995, Eglin AFB personnel have restored 317 sites covering 196.2

hectares (484.8 acres) that were eroding into Okaloosa darter streams, including borrow pits and other non-point sources (pollution created from larger processes and not from one concentrated point source, like excess sediment from a construction site washing into a stream after a rain) of stream sedimentation (76 FR 18090, April 1, 2011). Erosion into the streams has been reduced to background levels, nearly all fish passage barriers on Eglin AFB have been removed, several restoration projects have been completed to restore and reconnect stream habitat, and conservation agreements with local landowners (on 3–4 percent of potential Okaloosa darter range) have been put in place on private lands to protect stream and floodplain habitat (Wetland Sciences 2011, entire).

Eglin AFB personnel estimate that these and other restoration efforts have reduced soil loss from roughly 69,000 tons/year in Okaloosa darter watersheds in 1994 to approximately 2,500 tons/year in 2010 (Pizzolato 2017, pers. comm.). While soils will always be highly susceptible to disturbance and sedimentation and erosion could impact the species, habitat restoration work has improved Okaloosa darter habitat within the base. Improvements like bottomless culverts, bridges over streams, and bank restoration and revegetation have resulted in increased clarity of the water, stability of the channel and its banks, and expansion of Okaloosa darters into new areas within drainages (76 FR 18090, April 1, 2011). Poorly designed silviculture programs can result in accelerated soil erosion and stream sedimentation, but Eglin AFB personnel have designed their program within Okaloosa darter habitat to avoid and minimize impacts to the aquatic ecosystems such that the program is not likely to adversely affect Okaloosa darters (USAF 2017, pp. 4–23; USFWS 2017, pp. 11–12).

Forest and timber management in Okaloosa darter drainages is generally directed toward habitat management for the red-cockaded woodpecker or fuel reduction near military test ranges and in the urban interface, which involve the use of prescribed fire, mechanical or chemical timber stand improvement as well as traditional forestry practices for timber harvest and fuel-wood. Recently timbered areas may leave exposed sandy patches, which can be susceptible to wind erosion. However, erosion has been reduced to background levels; all of these habitat management programs are coordinated through Eglin AFB and are conducted in accordance with State and Federal best management practices (USAF 2017, p. 77, INRMP forestry component plan).

Road Development Projects

Unpaved roads, their low-water stream crossings, and subsequent bank erosion probably have the greatest impact because of their distribution on Eglin AFB, relative permanence as base infrastructure, and long-term soil disturbance characteristics. The largest remaining source of sediment input to Okaloosa darter streams is the unpaved road network, which allows sediment to be washed off the road and into nearby streams, especially where they cross the stream itself. As of 2005, 87 percent (4,348 km) of the roads in Eglin AFB's road network were unpaved, and remain so currently (Felix 2018, pers. comm.).

Road crossings can be detrimental to Okaloosa darter depending on their design. Pipe culverts alter stream flow and impede movement of Okaloosa darter, whereas bridges and bottomless culverts do not. Of the 153 road crossings that previously existed in Okaloosa darter drainages, 57 have been eliminated—28 in Boggy Bayou streams and 29 in Rocky Bayou streams. Although many road crossings have been removed and restored through road closures and restoration efforts over the last few years, others remain and pose a threat to Okaloosa darter and their habitat. For example, five road crossings in the Turkey Creek drainage have repeatedly exceeded State water quality standards for turbidity (USFWS 2017, p. 11).

Road development projects also present potential threats that may negatively impact Okaloosa darter. The Mid-Bay Bridge Authority's Mid-Bay Connector Road (Connector Road), a road constructed from the terminus of the Mid-Bay Bridge to SR 85 north of Niceville, was completed in February 2014 (USFWS 2017, p. 13). Although the Connector Road crosses Okaloosa darter drainages, conservation measures included 19 stipulations to minimize impacts to darter drainages. For example, the project used environmentally sensitive bridge construction techniques and measures to minimize erosion and ground disturbance at each stream crossing and to maintain channel stability. Because the bridges were designed to maintain natural stream geomorphology and were built using appropriate methods to stabilize stream banks and provide erosion control along the stream, long-term erosion and degradation of Okaloosa darter habitat is not anticipated. Monitoring before, during, and after construction detected no significant project-related changes in abundance of Okaloosa darter above or below any of the new stream crossings (Jordan and Jelks, unpublished data). However, the project impacted multiple areas of Okaloosa darter streams via erosion associated with large storm events, and in 2012 violated erosion controls. One of the stream crossings required a full stream restoration within the project limits and downstream from the project area. Erosion-related issues were also reported in 2013 (USFWS 2017, p. 13). As part of further mitigation of the Connector Road's accumulated negative impacts on Okaloosa darters, to date the Mid-Bay Bridge Authority has improved road crossings of Okaloosa darter streams at seven sites on Eglin AFB and at one site off of Eglin AFB. As of February 2019, the Mid-Bay Bridge Authority has no plans for future corridors; however, the existing corridor could be widened to four lanes if future traffic projections justify the need (USFWS 2017, p. 13).

The construction of the Connector Road created several relatively small ''orphaned'' parcels of Eglin AFB-owned property, whereby the road effectively separated those parcels from the natural resources management practices employed elsewhere over the contiguous Eglin AFB reservation properties. Three of these orphan parcels lie within the Okaloosa darter geographic range (approximately 740, 170, and 260 acres) and surround segments of four occupied streams (Mill, Swift, Turkey, and Deer Moss Creeks). Eglin AFB has historically considered orphan parcels candidates both for leasing through enhanced use agreements and for real property transaction or exchange to public and private entities in order to maximize the effectiveness of its real property in supporting the United States Air Force (USAF) mission. Eglin AFB may consider the three parcels mentioned above for such transactions. However, the Eglin AFB has indicated its intent to coordinate with the Service on the impacts of any environmental impact analysis for such transactions (Felix 2018, pers. comm.).

In 2012, the Service issued a biological opinion for widening SR 123 from a two-lane undivided roadway to a four-lane divided roadway from SR 85 South to SR 85 North to the Federal Highway Administration (FHWA) (USFWS 2017, p. 13). The widening included new two-lane bridges at Toms Creek and Turkey Creek, and replacement of the culvert at the unnamed tributary to Turkey Creek with two single-span bridges. The biological opinion concluded that, while the effects of the project included

displacement, injury, and mortality to Okaloosa darter resulting from construction debris, equipment movement, dredge and fill activities, sedimentation, introduction of contaminants, and habitat alteration, it would not jeopardize the continued existence of the threatened Okaloosa darter if certain measures were implemented.

In 2015 and 2016, multiple erosion control failures resulted in sediment from the project site discharging into streams occupied by Okaloosa darter: Toms Creek, Shaw Still Branch, Turkey Creek, and an unnamed tributary to Turkey Creek following storm events. The Service worked with the U.S. Army Corps of Engineers, FHWA, and the Florida Department of Transportation to develop a restoration and compensation plan; implementation began in 2018. The plan was designed to fully offset all impacts and provide a net conservation benefit to the species due to unforeseen, but preventable, impacts. In summer 2017, the Service identified additional impacts of this highway project to steepheads (deep ravines) outside of the initial defined Action Area for this project (Tate 2018, pers. comm.; USFWS 2017, pp. 13–14). Additionally, a working group including the Service and Eglin AFB was formed to develop BMPs that would prevent erosion events and that would be applied to base projects during site preparation and construction (Tate 2018, pers. comm.). The goal of this effort is to prepare BMPs and language/requirements to be included in the real estate leasing agreements, which may help ensure the species' conservation if the Act's protections are removed.

Stormwater Control

Development and construction activity in residential areas outside of Eglin AFB and primarily in the downstream-most portion of the Okaloosa darter range pose a threat due to poor stormwater runoff control and pollution prevention measures that degrade habitat and sometimes create barriers to movement between basins. Although this threat is greater in urban areas, recent failures in erosion control and stormwater management on Eglin AFB highlight the importance of thoroughly understanding how proposed activities contribute to erosion and stormwater management problems and implementing practices to minimize those effects (USFWS 2017, p. 11).

For example, in June 2017, a significant stormwater retention pond failure occurred on Eglin AFB property leased to Gulf Power and run by Gulf Coast Solar Center I, LLC (Coronal Energy), for a solar energy project. This failure caused extensive soil loss both on the leased site and offsite on Eglin AFB property. Okaloosa darter habitat in an unnamed tributary to Toms Creek was completely lost to sedimentation, and additional sediment is still located throughout the floodplain. However, this event impacted less than 0.1 percent of the estimated populations involved, and design changes have been made that are expected to fully offset all impacts and provide a net conservation benefit to the species due to unforeseen, but preventable, impacts (USFWS 2017, p. 14).

Borrow Pits

Borrow pits were a major source of sediment loading to Okaloosa darter streams cited in the 1998 darter recovery plan. At that time, 29 of 39 borrow pits located within or immediately adjacent to Okaloosa darter drainages had been restored. As of 2004, all borrow pits within Okaloosa darter drainages had been restored (59.3 ha; 146.5 ac) (USAF 2017b, pp. 3–18; USFWS 2017, p. 11).

Pollution

Pollution, other than sedimentation, poses a potential threat to darters. One stream in the darter's range, lower Turkey Creek (WBID 495A), is on the Florida Department of Environmental Protection's (2018) Verified List as impaired, listing iron from a closed landfill as the pollutant (USFWS 2018, entire). Using aquatic insect sampling methods, the Service (Thom and Herod 2005, entire) found 12 sites out of 42 sampled within the darter's range to be impaired. One notable source of pollution in Shaw Still Branch and Deer Moss Creek results from wastewater treatment sprayfields (the Niceville–Valparaiso Regional Effluent Land Application Sprayfield) (USFWS 2017, pp. 12–13). Abundance declines from about 45 Okaloosa darter per 20 m in the headwaters just above the sprayfield down to 1 or fewer Okaloosa darter per 20 m in the remaining 4 km or so of stream downstream from the sprayfield (Jordan 2017, pp. 5–7; Jordan, unpublished data, Figure 8). The actual pollutant has yet to be determined, but impacted streams have high conductivity compared to the relatively sterile, ion-poor, and slightly acidic streams that are typical of the area and likely similar to streams where Okaloosa darter evolved. Contaminants found in the portions of Deer Moss Creek exposed to sprayfield effluent were shown to affect the biological processes of other species of fish in those streams (Weil et al. 2012, p. 185). Municipal wastewater with increased conductivity has been shown to negatively affect other species of darters (Hitt et al. 2016, entire; Fuzzen et al. 2016, entire).

Water Withdrawals

Water withdrawals for human consumption in and around the range of Okaloosa darters are presently served by wells that tap the Floridan Aquifer, which is declining in the most populated areas near the coast (Pascale 1974, pp. 12). At this time, there is no evidence that pumping from that aquifer has reduced flows in darter streams (USFWS 2017, p. 13). To the extent that the darter drainages are spring fed (by and large they are fed by seepage), the springs are from the shallow sand and gravel aquifer that is not currently used for human consumption. Additionally, the low permeability of the Pensacola Clay confining bed likely severely limits hydraulic connectivity between the two aquifers (Schumm et al. 1995, p. 288). As long as withdrawals from the sand and gravel aquifer are minimal, local human population growth should not adversely affect water flows in the darter drainages (USFWS 2017, p. 13).

Effects of Climate Change

The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is unequivocal (IPCC 2014, entire). Numerous long-term changes have been observed including changes in arctic temperatures and ice, and widespread changes in precipitation amounts, ocean salinity, wind patterns, and aspects of extreme weather including droughts, heavy precipitation, heat waves, and the intensity of tropical cyclones (IPCC 2014, entire). While continued change is certain, the magnitude and rate of change is unknown in many cases (USFWS 2017, p. 14).

The current occupied range of the darter is restricted to approximately 402 km of streams in Walton and Okaloosa Counties, Florida. While science shows that global-scale increases in stream temperatures have occurred (Kaushal et al. 2010, entire; Song et al. 2018, entire), streams within the Okaloosa darter range are seepage and spring-fed, and thus thought to be thermally moderated (USFWS 2017, p. 14). However, thermal mediation varies among nearby Okaloosa darter streams, and streams that support Okaloosa darter are strongly affected by increases in air temperature (Jordan 2018, unpublished data). Information required to evaluate whether increased temperatures in streams will adversely affect Okaloosa darter is lacking; however, declines in abundance following the impoundment

of small stream reaches are likely due in part to increased temperatures, and the loss of darters below larger impoundments, such as Brandt Pond and Swift Creek, are generally assumed to be due to temperature change (Jordan 2018, pers. comm.). Because the distribution of Okaloosa darters is limited, and they cannot expand northward, stream temperature increases or sea level rise that would cause stream inundation could pose a threat to Okaloosa darter by isolating the populations. The National Oceanographic and Atmospheric Administration (NOAA) (2017, entire; NOAA Sea Level Rise Viewer 2018) projects sea level rise will be around 1.84 feet by year 2050 (Sweet et al. 2017, Intermediate High scenario). While this increase will not inundate much of the darter stream systems due to topography, it could isolate the stream systems from each other, limiting genetic exchange (Tate 2018, pers. comm., NOAA Sea Level Rise Viewer 2018). However, the species has maintained genetic exchange among populations despite current and historic saltwater isolation (Austin et al. 2011).

Impoundments

Many streams within the range of Okaloosa darters have a history of impoundment. These impoundments were either deliberately created to produce recreational ponds or unintentionally formed following installation of a poorly designed road crossing. Culverts and other installations can also facilitate the creation of permanent impoundments by North American beavers *(Castor canadensis),* which take advantage of human-made alterations (Nicholson 2009, p. 5; Reeves et al. 2016, p. 1376). Okaloosa darter do not occupy impounded stream reaches (Mettee et al. 1976, p. 2; Nicholson 2009, p. 6) due to their depth and low flow rates, variable water temperatures, more accumulation of organic substrates, and higher numbers of predatory fishes than free-flowing stream reaches (Nicholson 2009, pp. 34; Reeves et al. 2016, p. 1376). Okaloosa darter living downstream of impoundments are also negatively affected, sometimes for a considerable distance. For instance, the roughly 3 km (60 percent) of Swift Creek below College Pond and roughly 2 km (100 percent) of Foxhead Branch below Brandt Pond currently lack Okaloosa darter (Jordan 2018, pers. comm.). In the absence of predators, beaver populations can become overpopulated (Nicholson 2009, p. 5). Eglin AFB currently traps and relocates nuisance beavers and removes beaver impoundments in order to improve stream habitats for Okaloosa darter and plans to continue this work indefinitely (USAF 2017, pp. 512).

Barriers to Dispersal

All of the aforementioned threats could pose barriers to dispersal. Road crossings and impoundments, however, create the most obvious barriers, and many of these barriers have been removed. In 2011, when Okaloosa darters were downlisted to threatened status, 4 of the 153 road crossings and 25 impoundments that were barriers to fish passage remained. A few of these road crossings were culverts with the downstream end perched above the stream bed, precluding the upstream movement of fish during normal and low-flow conditions. However, some of these barriers were determined to have little to no adverse consequence to darter habitat connectivity because they occurred on the outskirts of the current range or were immediately adjacent to another barrier or impoundment.

To date, all but three of the problematic road crossings have been removed. One of these, located at the headwaters of Rocky Creek, is scheduled for removal in coming years. Additionally, 19 impoundments still exist, 11 of which are caused by beaver activity. Nine of these impoundments are scheduled for removal in the next 3 years. Beavers that remain are primarily in the headwater reaches where Okaloosa darters are either not present or would be in very low density. Thus, since the time of listing, most of the barriers to dispersal have been removed, and most of the problematic ones that remain are scheduled to be removed, contributing to improved habitat and reduced population fragmentation.

Canopy Closure

Overhead canopies range from open to fully closed depending on stream width and fire history (Jordan 2018, pers. comm.). Okaloosa darters thrive in reaches with relatively open canopies, likely due to either increased abundance of submerged vegetation that is used preferentially for spawning or increased secondary production of insect prey (Ingram 2018, p. 11). During the past 25 years, several monitored stream sections have changed from open with submerged vegetation to closed canopies with no vegetation. Closed canopy may reduce densities of Okaloosa darters. Once canopy is removed, Okaloosa darter densities increase quickly and dramatically (USFWS 2019, p. 30). In addition to increased riparian density along the streams, the use of low-intensity fire for forest management as opposed to historically high-intensity wildfires could have cascading effects on the watershed through changes in nutrient cycling, hydrology (evapotranspiration), or simply charcoal buffering (changes in pH levels) of water chemistry in the creeks. The Eglin AFB fire management program may shift toward the use of higher intensity prescribed fires in the growing season along stream margins to control growth of canopy trees.

Invasive Species

The introduction and colonization by nonnative invasive species that could compete with or prey on Okaloosa darters is a potential threat. The Okaloosa darter recovery plan lists competitive exclusion by the then-thought-to-be invasive brown darter *(Etheostoma edwini)* to be a threat to Okaloosa darters. The brown darter is native to Okaloosa darter watersheds (Austin, unpublished data) and is not altering the distribution or abundance of Okaloosa darters where they coexist (USFWS 2019, p. 23). Flathead catfish *(Pylodictus olivaris)* are already present in the surrounding river systems, and conditions could become suitable for several cichlid species to successfully reproduce in Okaloosa darter habitat (Jelks 2018, pers. comm.). Tilapia *(Oreochromis niloticus),* for instance, are highly invasive and are well documented to cause local extinctions of native species through resource competition, predation, and habitat alteration (Canonico et al. 2005, pp. 467–474; Zambrano et al. 2006, pp. 1906–1909). Release of aquarium species also remains a possibility. While this threat is speculative and dependent on an intentional release of an unknown invasive species, introduction of a highly competitive predator could lead to severe population depression or potential extirpation of Okaloosa darters. Dispersal of an invasive species among Okaloosa darter's watersheds, however, would likely be limited by saltwater, giving managers time to take control measures within a single population. Eglin AFB and Service personnel have long-established invasive species monitoring programs, and both agencies are committed to routine monitoring, early detection, and control of aquatic invasive species. Early detection and targeted management of invasive species will minimize or eliminate this threat to Okaloosa darters in the future (Tate 2019, pers. comm.).

Summary of Factors Influencing Viability

The vast majority of the range of Okaloosa darters is located on Eglin AFB, where many conservation and restoration actions have been successful in restoring Okaloosa darters to regions it had previously been extirpated from and increasing darters densities since the time of listing. Much progress has been made in implementing conservation actions since the Okaloosa darter was downlisted to threatened. For example, Eglin AFB has restored more than 534 acres of erosional sites and completed multiple stream restoration projects to reconnect fragmented populations. Stream erosion levels have been reduced, and most of the fish passage barriers have been removed. Many restoration projects have been completed, and conservation agreements have been implemented. Collectively, the habitat restoration programs have restored Okaloosa darter habitat, and management agreements will secure the habitat into the future (USAF 2017, p. 94 Wetland Sciences 2011, entire).

However, portions of the Okaloosa darter's range still face threats, mostly from urbanization. The sedimentation, pollution and water quality impacts, and changes to water flow from impoundments that can result from urbanization can lead to a decrease in Okaloosa darters. In areas where there is development, either on Eglin AFB main base or the surrounding cities, darters decrease in abundance or disappear (USFWS 2019, p. 23). Darters also still face threats from canopy closure, accidental spills, or other severe events. However, the vast majority of the Okaloosa darter's range is expected to remain under the management of the Air Force, limiting the impacts from urbanization to less than 10 percent of the historical range for the species.

Okaloosa darters react quickly to restoration activities. For instance, erosion control and other restoration activities began earlier in the Boggy Bayou drainages, progressing to the Rocky Bayou drainages (Pizzalato 2018, pers. comm.). Accordingly, darter numbers increased in the Boggy Bayou drainages earlier than in the Rocky Bayou drainages (Jordan and Jelks 2018, p. 9). Okaloosa darters have also been shown to quickly recolonize restored streams (Reeves et al. 2016, entire) and reclaimed beaver impoundments (Nicholson 2009, entire).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Current Condition

Resiliency

For Okaloosa darters to maintain viability and withstand stochastic disturbance events, its populations must be sufficiently resilient, which is associated with population size, growth rate, and habitat quality. Stochastic events that have the potential to affect Okaloosa darter include temperature changes, drought, localized pollutants/contaminants or other disturbances, or severe weather events such as hurricanes, which can impact individuals or the habitat they require for critical life functions such as breeding, feeding, and sheltering.

Sufficiently resilient Okaloosa darter populations need quality habitat. Okaloosa darters require clear, clean, flowing water provided by deep layers of sand that regulate temperature and flow, with aquatic vegetation, root mats, leaf snags, and other substrates that provide cover. This habitat is maintained by land management practices on adjacent land that limit sedimentation and pollution. Streams that support Okaloosa darter should be free of impoundments created as human-made retention ponds, by poorly designed road crossings that impede flow and genetic exchange, or by beaver dams. Okaloosa darter also benefit from open riparian canopies that allow sunlight to reach the stream below (Ingram 2018, p. 11).

For analysis purposes, we delineated resiliency units for Okaloosa darters based on genetic analysis and obvious barriers to dispersal. Genetic variation exists between the six stream systems (Austin et al. 2011, p. 987). Because limited genetic exchange occurs between streams, the population in each stream is likely to be demographically independent; therefore, we used abundance data for each of the six stream systems to assess resiliency.

Additionally, we assessed barriers to dispersal within each stream system that would indicate a further breakdown into additional populations. However, Eglin AFB has been effective in removing impoundments and poorly designed road crossings that served as barriers to dispersal, so that the remaining impoundments occur at the headwaters or the lower reaches of each stream, leaving each stream's population mostly intact, allowing genetic exchange to occur within each stream system. Outside of Eglin AFB, Shaw Still Branch has Okaloosa darter that are isolated from other Okaloosa darter in the upper reaches of Swift Creek by College Pond; however, the numbers of darters in this small stream are likely fewer than 150. Therefore, we considered this population separately. The watersheds of each of the bayous (Toms, Boggy, and Rocky) where the species has been historically found constitute the three resiliency units for the purposes of this analysis. The Toms representative unit consists only of the Toms population; the Boggy unit consists of the Turkey and Mill populations; and the Rocky unit consists of the Swift, Deer, and Rocky populations.

Habitat metrics, such as conductivity, other water quality metrics, and management, influence darter presence and abundance, but due to a lack of explained variation within the data, no quantitative predictive model has been successfully used. However, numerous data exist that draw causal relationships between habitat metrics and darter presence and abundance, such that we can draw some conclusions. First, it is clear that Okaloosa darter does not inhabit impounded stream reaches. Further, when an impounded stream is restored, Okaloosa darter will quickly colonize the restored habitat, often at higher densities than initially found (Jordan and Jelks 2018, p. 29). When water conductivity gets too high, Okaloosa darter abundance drops (Service 2019, p. 33).

We assess current resiliency for Okaloosa darters in terms of population factors, including the species' presence and density. To estimate a population size, we multiplied the estimated average abundance per meter by the estimated meters occupied (USFWS 2019, Table 5). The average abundance was derived from annual sampling at each of the 21 core monitoring sites over the past 20 years. In populations with multiple core sites, a grand mean was

calculated for the entire population by averaging the long-term means within the population. Due to statistical constraints, population estimates using the expanded monitoring data from 2005 and 2014 only estimate the population of darters present in stream reaches between monitoring sites (USFWS 2019, p. 23) and do not include headwaters and tributary systems known to be inhabited. The calculations made during the SSA and used for this assessment apply the average abundance to all known inhabited stream reaches, generally producing a larger but more complete population estimate.

Using this method, the total rangewide population estimate of Okaloosa darter is approximately 1,249,499 (1,010,0171,488,982) (see Table 1, below). The Rocky Creek population is the largest, comprising 713,458 darters, or 57 percent of this total, followed by the Turkey Creek population, comprising 490,456 darters, or 39 percent. The other four resiliency units (Toms, Mill, Swift, and Deer Moss) together total only four percent of the estimate: Toms Creek has an estimated 23,099 darters; Mill Creek, 1,317; Swift Creek, 18,810; and Deer Moss Creek, 2,353.

These numbers reflect a significant (40 percent) decline between 2005 and 2014. However, the population is still significantly greater than when the species was originally listed. Our professional judgment is that the reduction was caused by an increase in the canopy cover and that more aggressive clearing of the canopy cover will result in rebounding population numbers. This conclusion is consistent with experimental data, in which darter populations increased within months after canopy removal.

TABLE 1—RESILIENCY SCORES FOR OKALOOSA DARTER BASED ON ESTIMATED POPULATION SIZE

[Population sizes <10,000 Okaloosa darters are ranked as ''low,'' populations of 10,000 to 50,000 are ''moderate,'' and values >50,000 are considered to have ''high'' resiliency. Population trends and vulnerability are also provided.]

Population	Estimated population	Population trend slope (avg. count/year)	Population trend	Resiliency	Population vulnerability (%)
Toms	23,099 (±7,610)	0.96	Increasing	Moderate	100
Turkey	490,456 (±90,045)	−1.9	Decreasing	High	36
Mill	1,317 (±288)	−0.47	Decreasing	Low	100
Swift	18,810 (±9,875)	6.05	Increasing	Moderate	75
Deer Moss	2,353 (±1,658)	−0.89	Decreasing	Low	100
Rocky	713,458 (±130,006)	1.12	Increasing	High	41

The results of the resilience analysis are as follows: Two of the populations (Turkey and Rocky) currently have high resiliency, two (Toms and Swift) are considered moderately resilient, and two (Deer Moss and Mill) are considered to have low resiliency.

We classified resiliency by species' presence, density, and population sizes. Population sizes of <10,000 Okaloosa darters are considered ''low,'' 10,000 to 50,000 are ''moderate,'' and >50,000 are ''high.'' Based on the population numbers presented above, the results of the resiliency analysis are as follows: Two of the populations (Turkey and Rocky) currently have high resiliency, two (Toms and Swift) have moderate resiliency, and two (Deer Moss and Mill) are considered to have low resiliency.

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. Measured by the number of populations, their resiliency, and their distribution (and connectivity), redundancy gauges the probability that the species has a margin of safety to withstand or to bounce back from catastrophic local events such as collapse of a restored borrow pit, infestation by beavers, or spill of toxic chemicals that affect part or all of one population. We report redundancy for Okaloosa darters as the total number of populations and the resiliency of population segments and their distribution within and among representative units. Also, there are multiple populations in two of the stream systems.

Six populations comprise the vast majority of the historical range of Okaloosa darters within the three representative units. Redundancy is demonstrated through the darter's presence in multiple tributaries within most watersheds, and representation is demonstrated through the genetic structure of the populations. All six extant populations exhibit genetic differentiation, and the species is extant across all three representation units. Adequate redundancy is demonstrated through the darter's presence in multiple tributaries within most watersheds encompassing its historical range.

Representation

Representation can be characterized by genetic variability within the range of the species. These three representative units, each identified as containing unique and significant historical variation (Austin et al. 2011, pp. 983, 987), have not been reduced over time. The Toms Bayou representative unit comprises just the Toms population, which is currently considered moderately resilient. However, the Toms population is vulnerable to upstream impacts, which could affect the representation of this unit were a major impact to occur. The Boggy Bayou representative unit comprises the Turkey and Mill populations, of which Turkey is considered highly resilient and has low vulnerability. The Rocky Bayou unit comprises the Swift, Deer Moss, and Rocky populations, of which Swift is considered moderately resilient and Rocky is considered highly resilient, with low vulnerability. Given that each unit still contains at least one population that is moderately or highly resilient (≤10,000 individuals), Okaloosa darters have sufficient genetic variability. Representation is demonstrated through the genetic structure of the populations.

Future Condition

The biggest potential threat to Okaloosa darter in the future is development on and off Eglin AFB. Neighborhoods, roads, commercial structures, and associated utilities such as sprayfields are potential sources of sedimentation, pollution, and altered stream flow throughout the range of this species. Natural factors resulting from long-term forest management practices (*e.g.,* prescribed fire) could also have potentially negative impacts on Okaloosa darters. For instance,

excessive canopy closure over streams might limit Okaloosa darter abundance by shading out aquatic vegetation preferred for spawning, refuge, or foraging (USFWS 2019, p. 23). The effects of canopy closure were built into all the future scenarios through general population increases or declines. For instance, in the ''Ideal Management'' scenario, we would expect that prescribed fire or other management limits excessive canopy cover and contributes to increases in darter numbers. The opposite would be expected in the ''Poor'' and ''Worst'' scenarios. Because we have not established a quantitative relationship between darter numbers and canopy closure, we decided to incorporate this factor into a general increase or decrease in populations over time.

While there are several restoration activities, developments, or other proposed activities that have anticipated locations and quantifiable outcomes, specific information on the location, and therefore effects to Okaloosa darters, of other potential threats are unknown. Therefore, because it is impossible to predict the specific locations or impacts of future developments or other management decisions that could impact Okaloosa darter streams, we assess the future resiliency of each population based on general management and development scenarios. Accordingly, to assess the future viability of Okaloosa darters, we considered four future scenarios that account for some degree of future development and restoration activities, considering effects of whether these activities are implemented or not, and also considered general impacts from unknown future management or land use changes or impacts, at varying levels with positive or negative impacts to each population. For each population, we consider its current condition, including the length of each stream that is unimpounded, the length considered occupied, and the average abundance per meter, to assess the future viability under each of these scenarios.

Please see the SSA report (USFWS 2019, entire) for a more detailed discussion of these considerations.

We projected these future scenarios both over 20 years and 50 years. Any planned restoration efforts, should they be realized, as well as the impending development along Deer Moss Creek, would likely be completed in 20 years. Okaloosa darters respond very quickly to habitat changes, both good and bad. Improved conditions would result in an increase in Okaloosa darters, possibly within the same year (Reeves et al. 2016, pp. 1379–1382), but areas can also lose Okaloosa darters equally quickly if habitat conditions worsen. In some cases where habitat is restored in areas without nearby Okaloosa darters, 20 years would be sufficient to ensure that they would recolonize that area. Not only would 20 years encompass several generations of Okaloosa darter, but it is the time period outlined in the recovery plan for delisting. We projected to 50 years as it is considered the outer limit that projections of base realignment, hydrologic cycles, or climate alteration may be relied upon, based on expert opinion, and will encompass a timeframe in which projected sea level rise as a result of climate change could have realized impacts.

To account for the uncertainty in the management implications of some proposed actions (Deer Moss Creek development and cleanup of the sprayfields) and other unforeseen/unknown future conditions (future land management/development and accidents), we generalize the future stream conditions/management in four categories: status quo (current conditions continue), ideal, poor, and worst. The ''ideal,'' or ''best-case,'' scenario assumes that all potential stream habitat is colonized at normal densities. ''Poor'' management assumes that accidents stemming from errors in management may occur but are unlikely to affect the population in the worst possible place or are unlikely to have a high-magnitude impact; however, over time, these accidents add up and eventually have a larger impact. ''Worst'' management assumes that accidents stemming from errors in management occur and affect the population in a location that will affect the largest portion of the stream or will be of such a magnitude to have a similar effect. In all long-term scenarios, we anticipate the potential negative impacts of climate change by applying reductions in population estimates of 0.5 standard deviations from the current population mean abundance.

Below we assess the future resiliency of Okaloosa darter populations both in the short (20-year) and long term (50-year) for the four different scenarios. Of the four scenarios, the status quo and the ideal scenario are the most likely to occur. The poor and worst management are the least likely to occur. Because these four scenarios encompass the broad changes to management, which would encompass water quality and render land ownership irrelevant, we model future resiliency based on how each scenario would affect the amount of occupied habitat and average abundance estimates within each population. Please see the SSA report for further description of the methodologies we used to model these scenarios and their impacts to Okaloosa darter.

Scenario 1: Status Quo

In this scenario, we modeled current management coupled with both no restoration efforts (1a) and with restoration of the beaver dams on Toms Creek and College Pond on Swift Creek (1b). Under scenario 1a, nothing changed by way of management or restoration, meaning the impounded stream and abundance estimates stayed the same as is current. The development of Deer Moss Creek did not affect the resiliency of this population because the section of stream that would be developed is currently, and remains, unoccupied. For the species as a whole, population estimates did not change much in the short term but decreased in the long term due to a loss of potential habitat (due to sea level rise resulting in stream inundation) and other possible climate-related threats, which we modeled as a 0.5 standard deviation reduction for each population. Not surprisingly, the smallest and most fragmented populations, Mill, Deer Moss, Toms, and Swift Creeks, are potentially susceptible to climate change impacts alone. Habitat restoration in Toms and Swift Creeks would offset our modelled impacts from climate change. Even though saltwater inundation will fragment about 5 percent of the two large populations in Turkey and Rocky Creeks, our models exhibited minimal loss of resiliency as a result of climate change under this scenario.

For the species as a whole, our modelling suggested that, under current management conditions, there are likely to be nearly 1 million Okaloosa darters beyond the 50-year timeframe. In the long term under this scenario, Mill Creek would lose over 30 percent of its population (dropping below 1,000), as would Deer Moss, and Toms Creek too, unless restoration occurs. Swift Creek would lose almost 60 percent of its population unless habitat restoration occurs, but if restoration occurs, the population would more than double in the short term and still increase by nearly 60 percent in the long term. Saltwater inundation in the long term would cause the Rocky, Turkey, and Swift populations to split into three streams each. While Rocky and Turkey would see about 5 percent of their populations cut off from the main segment, the inundation of Swift Creek would also cut off that population from the current location in the absence of restoration efforts. With no restoration,

we can expect that 70 percent of the population in Swift Creek will be above College Pond in Swift Creek, with fewer than 100 in Shaw Still Branch, although neither of these populations are unlikely to remain at all in 50 years. With restoration, about 83 percent of the population would remain in the Swift Creek population and about 17 percent in a Shaw Still Branch population, with likely no dispersal between them (see Table 2, below). Due to the continued impacts of the urbanization in the watershed within the city of Niceville, we estimated population sizes as if inhabited under moderate management conditions (long-term average minus one standard deviation). Sanders Branch would remain unoccupied.

TABLE 2—SCENARIO 1 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size, both with and without restoration efforts on Toms and Swift Creeks, in both the short term and long term. Scenario 1b shown for Toms (r) and Swift (r) assume restoration of uninhabited portions of the watershed.]

	Total unimpounded streams (m)	Occupied (m)	Abundance/m	Population size
Short Term:				
Toms	14,936	11,300	2.0	23,011
Turkey	150,040	147,911	3.3	486,243
Mill	1,993	846	1.6	1,317
Swift	21,130	5,292	3.5	18,631
Deer Moss	8,396	5,780	0.4	2,354
Rocky	282,068	276,683	2.6	707,791
Toms (r)	16,336	12,360	2.0	25,167
Swift (r)	22,276	14,767	3.5	46,622
Long Term:				
Toms	14,111	9,265	1.7	15,759
Turkey	149,063	132,041	3.0	394,227
Mill	1,993	647	1.4	896
Swift	19,533	2,939	2.6	7,631
Deer Moss	7,981	4,696	0.3	1,239
Rocky	280,096	246,739	2.3	573,683
Toms (r)	15,511	11,736	1.7	19,960
Swift (r)	20,679	11,031	2.6	20,509

Scenario 2: Ideal Restoration, Good Management

This scenario represented the highest population size that the species could attain. Under this scenario, all impoundments were removed, and management removed most existing threats, increasing the occupied lengths of each stream to almost all of the inhabitable area. In other words, we modelled the potential population for all streams as if they were completely free-flowing by applying our current population estimates to the entire potential length of stream habitat in the watershed. This scenario represented the ''best case scenario'' for the species. Because of this, we modelled an expected population expansion of 1.0 standard deviation from the current mean abundance for each population. As expected, short-term estimates increased for all populations, with the highest relative increases in fragmented populations (Swift and Toms) or those impaired by urbanization (Deer Moss and Mill). Because we apply the same negative influence of climate change to the long-term models in this scenario, the long-term population estimates are dampened but still increasing in the four smaller populations with a very slight (<1 percent) reduction in Turkey and Rocky Creeks due to fragmentation and saltwater inundation. Under this scenario, our model indicated there will be more than 1.3 million Okaloosa darters and increased resiliency in all of the smaller populations, even when negative impacts of climate change are applied in the long term.

In the short term, the population would increase for all stream systems, although by a much higher percent in Mill and Swift than in Rocky and Turkey Creeks. In the long term, all populations except Turkey and Rocky still see an increase from current conditions, though not quite as large. Turkey and Rocky would decrease slightly from the current situation (see Table 3, below). Saltwater inundation in the long term would cause the Rocky, Turkey, and Swift stream systems to split into three streams each. While Rocky and Turkey would see about 5 percent of their populations cut off from the main segment, the inundation of Swift Creek in the long term, given ideal restoration and management, would split the population such that about 15 percent would be cut off into a Shaw Still Branch population, and about 11 percent would be cut off into a Sanders Branch population.

TABLE 3—SCENARIO 2 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size in both the short term and long term. Saltwater inundation in the long term causes the Swift stream systems to split into three streams.]

	Total unimpounded streams (m)	Occupied (m)	Abundance/m	Population size
Short Term:				

TABLE 3—SCENARIO 2 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY—Continued

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size in both the short term and long term. Saltwater inundation in the long term causes the Swift stream systems to split into three streams.]

	Total unimpounded streams (m)	Occupied (m)	Abundance/m	Population size
Toms	18,510	18,247	2.7	49,397
Turkey	152,692	150,525	3.9	585,687
Mill	4,555	4,490	1.9	8,520
Swift	24,510	24,162	5.4	129,717
Deer Moss	8,396	8,277	0.7	5,746
Rocky	282,731	278,719	3.0	842,921
Long Term:				
Toms	17,685	15,666	2.4	37,153
Turkey	151,715	134,390	3.6	482,352
Mill	4,555	4,035	1.7	6,968
Swift	22,913	14,816	4.4	65,852
		3,146	4.4	13,982
		2,334	4.4	10,374
Deer Moss	7,981	7,070	0.6	3,894
Rocky	280,759	248,699	2.8	694,169

Scenario 3: Poor Management

To model what the future effect of poor management decisions, developments, or other habitat impacts would be in terms of a decrease in average Okaloosa darter abundance per meter, we considered the configuration (or geography) of each stream system for each population. In streams that are complex (have many branching tributaries) or are generally large, a severe negative impact (such as a chemical spill or source of chronic sedimentation) at any of the headwaters would be more likely to impact a smaller percentage of the population compared to a similar impact in the headwaters of a low-complexity (few tributaries) or small stream system. For scenarios 3 and 4, we first assessed the effects of an impact that might occur at the worst possible placement within each watershed by finding the longest length of stream that could be affected by a major impact at the headwaters; in other words, the longest possible downstream distance that could be affected by a single upstream impact. We calculated this distance for each stream (USFWS 2019, Figure 14) and then took that distance and calculated the percent of the total unimpounded streams it would affect (USFWS 2019, Table 7). This percent represents the maximum percent of the stream system that could be affected by one management decision or development. In real-world terms, if one of the outlying airfields that are located in the upper reaches of these stream systems (USFWS 2019, Figure 14) were to be reactivated for military or other uses, the amount of stream impacted could come close to or meet these estimates of ''largest percent affected.''

For both the ''Poor'' and ''Worst'' management scenarios, we used this ''largest percent affected'' to model declines in Okaloosa darter abundances based on whether management was considered ''poor'' or ''worst,'' and whether we were assessing the scenario in the long or short term (USFWS 2019, Table 8).

For management that was ''poor,'' looking at the short term, we considered a management decision or set of decisions or impacts that would decrease the average abundance by 1 standard deviation across this ''largest percent affected'' (this percent of the occupied meters). The remainder of the occupied stream length stayed at current Okaloosa darter abundances. In the long term, we proposed that management impacts could continue to affect these streams either in unfortunate locations or in great magnitude and, coupled with unknown impacts of climate change and the associated warming over that time span, will decrease all abundance estimates an additional 0.5 standard deviation (USFWS 2019, Table 8). As with ''Status Quo,'' we modeled poor management coupled with either no restoration efforts or removal of beaver dams on Toms Creek and restoration of College Pond on Swift Creek.

Under this scenario (see Table 4, below), all population sizes decreased. In the long term, the Swift population dropped below 10,000 individuals unless College Pond is restored, in which case the population almost doubled in the short term and still maintained 15 percent more than current in the long term. In the long term, the Swift Creek population dropped below 10,000 individuals without restoration, and the populations in both Deer Moss and Mill Creeks dropped below 1,000 individuals. Even so, long-term resiliency in Toms, Turkey, Swift, and Rocky Creeks remained relatively unchanged from the ''Status Quo'' models.

TABLE 4—SCENARIO 3 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size, both with and without restoration efforts on Toms and Swift Creeks, in both the short term and long term.]

	Total unimpounded streams (m)	Occupied (m)	Avg. Abundance/m	Population size
Short Term:				
Toms	14,936	11,300	1.8	20,333

TABLE 4—SCENARIO 3 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY—Continued

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size, both with and without restoration efforts on Toms and Swift Creeks, in both the short term and long term.]

	Total unimpounded streams (m)	Occupied (m)	Avg. Abundance/m	Population size
Turkey	150,040	147,911	3.2	474,298
Mill	1,993	846	1.3	1,057
Swift	21,130	5,292	3.1	16,321
Deer Moss	8,396	5,780	0.2	1,075
Rocky	282,068	276,683	2.5	692,277
Toms (r)	16,336	12,360	1.8	21,913
Swift (r)	22,276	14,767	2.8	41,688
Long Term:				
Toms	14,111	9,265	1.5	13,563
Turkey	149,063	132,041	2.9	383,564
Mill	1,993	647	1.1	698
Swift	19,533	2,939	2.2	6,348
Deer Moss	7,981	4,696	0.1	284
Rocky	280,096	246,739	2.3	559,848
Toms (r)	15,511	10,184	1.4	14,640
Swift (r)	20,679	13,290	1.9	25,238

Scenario 4: Worst Management

This scenario is very pessimistic. We considered a management decision or set of decisions or impacts that would decrease the average abundance by 2 standard deviations across the ''largest percent affected,'' described above. The remainder of the occupied stream length in Scenario 4 was then considered to be occupied at the ''poor'' Okaloosa darter abundances (a reduction of 1 standard deviation). As with other scenarios, we modeled climate change impacts as an additional reduction of 0.5 standard deviations from the long-term mean and considered the impact of restoration in Toms and Swift Creeks in a separate model.

This is the only scenario where we modelled an extirpation. All populations were reduced by at least 20 percent, even in the short term (see Table 5, below). Under this scenario, Mill and Deer Moss Creek dropped below 1,000 individuals in the short term, and Deer Moss Creek became extirpated in the long term. We estimated a population decline in Toms Creek to approximately half the population estimate of the ''Status Quo'' scenario. Our model projected that Swift Creek could drop to approximately one quarter the population anticipated under the ''Status Quo''; however, the restoration of College Pond would prevent this population from dropping below 10,000 individuals in the short term and more than quadruple the population estimate in the long term. The Turkey and Rocky populations would maintain high resiliency, above 300,000 individuals, even in the long term.

TABLE 5—SCENARIO 4 OF MANAGEMENT FOR OKALOOSA DARTER RECOVERY

[Total stream lengths that would be unimpounded, the occupied meters and the percent that represents, abundance estimates per meter, and the projected population size, both with and without restoration efforts on Toms and Swift Creeks, in both the short term and long term.]

	Total unimpounded streams (m)	Occupied (m)	Avg. Abundance/m	Population size
Short Term:				
Toms	14,936	11,300	1.1	12,752
Turkey	150,040	147,911	2.6	385,027
Mill	1,993	846	0.9	769
Swift	21,130	5,292	1.3	6,760
Deer Moss	8,396	5,780	0.0	159
Rocky	282,068	276,683	2.0	563,304
Toms (r)	16,336	12,360	1.1	13,622
Swift (r)	22,276	14,767	1.0	15,377
Long Term:				
Toms	14,111	9,265	0.8	7,348
Turkey	149,063	132,041	2.3	303,870
Mill	1,993	647	0.7	478
Swift	19,533	2,939	0.6	1,680
Deer Moss	7,981	4,696	0.0	0
Rocky	280,096	246,739	1.8	444,833
Toms (r)	15,511	11,736	0.8	8,998
Swift (r)	20,679	13,290	0.5	6,192

Future Resiliency

Our projections of how resiliency will change in the future are based on the completion or success of specific restoration efforts, nonspecific changes to the management of Okaloosa darter streams or other unforeseen impacts, and the effects of climate change, including unknown effects to the streams from temperature increases, drought, frequent or heavy rainfalls, or invasive species. Our models showed population increases only under ''ideal restoration—good management,'' with the exception of restoration efforts on Swift Creek, which increase the population even under the ''poor'' management scenario. We also took a pessimistic approach to climate change impacts by applying population reductions to all populations in the long-term models. Accordingly, population numbers declined in the long-term models across all stream systems in the absence of future management efforts. Both Mill Creek and Deer Moss Creek remained at low resiliency and decreased to fewer than 1,000 individuals or became extirpated in the long term under the ''poor'' and ''worst'' scenarios. Toms Creek maintained a moderate resiliency in all but the ''worst'' scenario. Swift Creek would see a huge benefit from the removal of beaver impoundments in College Pond, which even under ''poor'' management conditions, would almost double its population size in the short term. In the long term, restoring College Pond resulted in the most robust population gains, roughly quadrupling population estimates under ''poor'' and ''worst'' scenarios. Even under the worst projected management or impact scenario, the estimated sizes of Rocky and Turkey populations did not drop below 300,000, and resiliency in these populations remained exceptionally high.

In general, in our scenarios, the larger populations were more resilient and were more likely than small populations to maintain resiliency in the future. The Deer Moss population is considered to have a low resiliency in comparison to the other populations; however, even under ideal conditions, our models suggested that this population can increase to only about 4,000 individuals, which remains below our designation of moderate resiliency. So, even under ''ideal'' conditions, this population will always have low resiliency. Regardless, the Deer Moss Creek population has persisted over time, even with a much lower resiliency than the other populations. When comparing model outcomes to the most likely future scenario, ''status quo,'' we do not see shifts in resiliency categorization for any of the populations. Only under the ''worst'' scenario were the resiliency for Toms and Swift Creeks depressed, indicating that the two large populations, Turkey and Rocky, should maintain high to very high resiliency in perpetuity. From a population standpoint, a reduction of 2.5 standard deviations from the long-term mean is massive and highly unlikely, indicating the ''worst'' scenario is a depiction of a truly catastrophic decline. Even under this scenario, five of the six populations remain. At the species level, Okaloosa darters exhibit moderate to high resiliency even under the worst-case scenario.

Future Redundancy

Determined by the number of populations, their resiliency, and their distribution (and connectivity), redundancy describes the probability the species has a margin of safety to withstand or recover from catastrophic events (such as a rare destructive natural event or episode involving many populations). Okaloosa darters have a constrained range, limited to just six populations in six streams, and redundancy is naturally low. However, the Okaloosa darter inhabits its historical range almost completely, exhibiting documented resiliency to natural phenomena such as hurricanes and drought (USFWS 2019, p. 23).

Four of the populations, the ones with the lowest current resiliency, are considered highly vulnerable to catastrophic events due to their stream configuration. We determined the ''largest percent affected'' in Mill Creek to be 90 percent (USFWS 2019, Table 7). Thus, a major impact like a toxic chemical spill in the upper watershed could result in drastic population declines. Further, climate change could have consequences that make the streams uninhabitable to Okaloosa darters; temperature rise is one potential threat, but other impacts are possible. Invasive species could also extirpate an entire population were a highly competitive predator to be introduced; tilapia, for instance, are highly invasive and are well documented to cause local extinctions of native species through resource competition, predation, and habitat alteration (Canonico et al. 2005, pp. 467–474; Zambrano et al. 2006, pp. 1906–1909). Given the species' limited range, catastrophic events or the invasion of a nonnative species or steady changes such as increased stream temperatures due to climate change could impact one or more populations. Even so, our modeling resulted in only one population completely failing in the long term under our ''worst'' management scenario, and that scenario assumed drastic declines across all six populations. Thus, loss of redundancy is unlikely in all but the most extreme circumstances. Accordingly, we do not expect Okaloosa darter viability to be characterized by a loss in redundancy unless management fails dramatically in the coming years or a major impact occurs.

Future Representation

All representative units are predicted to retain the same number of populations at least 50 years into the future, except in the scenario where management is particularly bad (Worst scenario). In the Worst scenario, the Deer Moss population becomes extirpated and the Mill population would experience heavy declines. In both the Poor and Worst scenarios, each representative unit will have populations with decreased resiliency, both within the next 20 years (short term) and next 50 years (long term); however, even under the Worst scenario, the two large populations (Turkey Creek and Rocky Creek) will ensure continued resiliency for those populations. The Toms Creek population, being the only population in its representative unit, will see decreased resiliency in the short term in all scenarios except those with current or ideal management and in the long term, all scenarios except those with ideal management.

Determination of Species Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' For a more detailed discussion on the factors considered when determining whether a species meets the definition of an endangered species or a threatened species and our analysis on how we determine the foreseeable future in making these decisions, please see Regulatory and Analytical Framework.

Okaloosa darter is a narrow endemic, occurring only in six stream systems in Walton and Okaloosa Counties, Florida. The darter currently occurs within all

six historical watersheds. Populations in two of those watersheds are currently highly resilient, two are moderately resilient, and two have low resiliency. While the populations have been affected by impoundments, urbanization (on the lower ends of the streams), and land use impacts (*e.g.,* sedimentation), current population estimates show approximately one million darters across its range. Redundancy is demonstrated through the darters' presence in multiple tributaries within most watersheds, and representation is demonstrated through the genetic structure of the populations. All six extant populations exhibit genetic differentiation, and the species is extant across all three representative units. Overall, the populations are robust. Because approximately 90 percent of the species' range is under the management of Eglin AFB, urbanization will have little to no future effect. Okaloosa darters occur in multiple stream systems, which provides redundancy, and no long-term threats are presently impacting Okaloosa darters at the species level. Accordingly, we conclude that the species is not currently in danger of extinction, and thus does not meet the definition of an endangered species, throughout its range.

In considering whether the species continues to meet the definition of a threatened species (likely to become an endangered species within the foreseeable future) throughout its range, we identified the foreseeable future for Okaloosa darters to be 20–50 years based on our ability to reliably predict the species' response to current and future threats. Over 90 percent of the darter's range is located on Eglin AFB and will continue to benefit from the conservation protections resulting from the Eglin AFB INRMP. Overall, while there may be some loss of resiliency due to climate change, in all but the worst-case scenario, all extant populations will remain. Redundancy will remain the same except under the worst-case scenario, as will representation. Under all four management scenarios, two darter populations (Turkey Creek and Rocky Creek) are expected to continue to be highly resilient. Toms Creek will continue to be moderately resilient in all but the worst-case scenario, in which case its resilience will fall to low. The currently uninhabited tributaries in the Swift Creek watershed will continue to be isolated due to sea level rise, and without restoration, Swift Creek itself will be the only occupied tributary in this population; however, the upper Swift Creek population will continue to serve as a source for recolonization if restoration occurs. Deer Moss Creek is the only population with potential for extirpation, and then only under the worst-case scenario. Further, this population exhibits low resiliency even under ''ideal'' conditions, and its extirpation would not compromise the resiliency of the Rocky Creek representative unit. In other words, while some populations may decline or even become extirpated under the two negative scenarios, under all scenarios Okaloosa darters will exhibit sufficient resiliency, redundancy, and representation to maintain viability for the foreseeable future. Accordingly, we conclude that the species is not likely to become in danger of extinction in the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that the Okaloosa darter is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for Okaloosa darters, we chose to address the status question first—we considered information pertaining to the geographic distribution of both the species and the threats that the species faces, to identify any portions of the range where the species is endangered or threatened. We examined whether any threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. It is important to note at the outset that this is a narrow endemic with a naturally limited range. We examined the following threats: Land use and management practices on Eglin AFB and urbanization around the lower reaches of streams outside of Eglin AFB. Urbanization is the greatest threat to Okaloosa darter, as development leads to pollution, erosion, and sedimentation, altered water flows, and dispersal barriers through multiple pathways. The threats of sea level rise and urbanization are present in the southern portion of each population, so they are not concentrated on any one population.

As described above, no threats are concentrated in any portion of that range. Although the main threat, urbanization, is present only in the downstream portion of the watersheds—five of the six watersheds pass through the cities of Niceville and Valparaiso before emptying into Choctawhatchee Bay—these urban impacts are not concentrated on any one population. Because the majority of the watersheds are forested and geology is consistent throughout the Okaloosa darter's range, the effects of canopy closure and erosion should be similar across all six watersheds.

We found no concentration of threats in any portion of the Okaloosa darter's range at a biologically meaningful scale. Therefore, no portion of the species' range can provide a basis for determining that the species is in danger of extinction now or likely to become so in the foreseeable future in a significant portion of its range, and we find that the species is not in danger of extinction now or likely to become so within the foreseeable future in any significant portion of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the Okaloosa darter does not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. Therefore, we propose to delist the Okaloosa darter from the Federal List of Endangered and Threatened Wildlife.

Effects of This Proposed Rule

This proposal, if finalized, would revise 50 CFR 17.11(h) and 17.44(bb) by removing Okaloosa darter from the Federal List of Endangered and Threatened Wildlife and removing the section 4(d) rule for this species. The prohibitions and conservation measures

provided by the Act, particularly through sections 7 and 9, would no longer apply to this species. Federal agencies would no longer be required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect Okaloosa darter. However, approximately 90 percent of the 457-square-kilometer (176-square-mile) watershed drainage area that historically supported Okaloosa darters is Federal property under the management of Eglin AFB, and about 98.7 percent of the stream length in the current range of Okaloosa darters is within the boundaries of Eglin AFB.

As discussed above, Eglin AFB encompasses the headwaters of all six of these drainages. Benefits from the conservation protections will continue because the Air Force will maintain its INRMP for the benefit of other listed species, such as the red-cockaded woodpecker (USAF 2017c, p. 3–1; (76 FR 18088, April 1, 2011). Thus, the INRMP will continue to provide for the conservation of Okaloosa darters even if the species is delisted. Because the Service is required to approve INRMPs every 5 years, we will be able to ensure that this INRMP continues to protect Okaloosa darters into the future. There is no critical habitat designated for this species, so there would be no effect to 50 CFR 17.95.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been delisted due to recovery. Post-delisting monitoring (PDM) refers to activities undertaken to verify that a species delisted remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of PDM is to monitor the species to ensure that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as a threatened or endangered species is not again needed. If at any time during the monitoring period data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

Section 4(g) of the Act explicitly requires that we cooperate with the States in development and implementation of PDM programs. However, we remain ultimately responsible for compliance with section 4(g) and, therefore, must remain actively engaged in all phases of PDM. We also seek active participation of other entities that are expected to assume responsibilities for the species' conservation after delisting.

We will coordinate with other Federal agencies, State resource agencies, interested scientific organizations, and others as appropriate to develop and implement an effective PDM plan for the Okaloosa darter. The PDM plan will build upon current research and effective management practices that have improved the status of the species since listing. Ensuring continued implementation of proven management strategies that have been developed to sustain the species will be a fundamental goal for the PDM plan. The PDM plan will identify measurable management thresholds and responses for detecting and reacting to significant changes in Okaloosa darter numbers, distribution, and persistence. If declines are detected equaling of exceeding these thresholds, the Service, in combination with other PDM participants, will investigate causes of the declines. The investigation will be to determine if the Okaloosa darter warrants expanded monitoring, additional protection under the Act.

We are proposing to delist Okaloosa darters based on all six extant populations exhibiting genetic differentiation and the species is extant across all three representation units. Overall, the populations are robust. Because approximately 90 percent of the species' range is under the management of Eglin AFB, urbanization will have little to no future effect. The Okaloosa darter occurs in multiple stream systems, and no long-term threats are presently impacting the Okaloosa darter at the species level. Since delisting would be, in part, due to conservation actions taken by stakeholders, we have prepared a draft PDM plan for Okaloosa darters. The draft PDM plan discusses the current status of the taxon and describes the methods proposed for monitoring if we delist the taxon. The draft PDM plan: (1) Summarizes the status of Okaloosa darters at the time of proposed delisting; (2) describes frequency and duration of monitoring; (3) discusses monitoring methods and potential sampling regimes; (4) defines what potential triggers will be evaluated to address the need for additional monitoring; (5) outlines reporting requirements and procedures; (6) proposes a schedule for implementing the PDM plan; and (7) defines responsibilities. It is our intent to work with our partners towards maintaining the recovered status of Okaloosa darters. We will seek public and peer reviewer comments on the draft PDM plan, including its objectives and procedures (see **FOR FURTHER INFORMATION CONTACT** and Information Requested, above), with the publication of this proposed rule.

Concurrent with this proposed delisting rule, we announce the draft PDM plan's availability for public review at *http://www.regulations.gov* under Docket Number FWS–R4–ES–2021–0036. The Service prepared this draft PDM plan in coordination with Eglin AFB, based largely on monitoring methods developed by the U.S. Geological Survey and Loyola University New Orleans (USFWS 2021, p. 5). The Service designed the PDM plan to detect substantial changes in habitat occupied by Okaloosa darter and declines in Okaloosa darter occurrences with reasonable certainty and precision. It meets the minimum requirement set forth by the Act because it monitors the status of Okaloosa darter using a structured sampling regime over a 10-year period.

Copies can also be obtained from the Service's Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). We anticipate finalizing this plan, considering all public comments, prior to making a final determination on the proposed delisting rule.

Required Determinations

Clarity of the Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

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

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

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

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined in the National Environmental Policy Act (42 U.S.C.

4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3207 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. There are no Tribes or Tribal lands associated with this proposed regulation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2021–0036 and upon request from the Field Supervisor, Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are staff members of the Fish and Wildlife Service's Species Assessment Team and the Panama City Ecological Services Field Office.

Signing Authority

The Principal Deputy Director, Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife Service, approved this document 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 U.S. Fish and Wildlife Service. Martha Williams, Principal Deputy Director, U.S. Fish and Wildlife Service, approved this document on October 21, 2021, for publication.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to 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.

§ 17.11 [Amended]

■ 2. Amend § 17.11 in paragraph (h) by removing the entry for ''Darter, Okaloosa *(Etheostoma okaloosae)*'' under ''Fishes'' from the List of Endangered and Threatened Wildlife.

§ 17.44 [Amended]

■ 3. Amend § 17.44 by removing and reserving paragraph (bb).

Krista Bibb,

Acting Chief, Branch of Policy and Regulations, U.S. Fish and Wildlife Service.

[FR Doc. 2021–25092 Filed 11–16–21; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 86, No. 219

Wednesday, November 17, 2021

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

El Dorado County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The El Dorado County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or telephone conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/eldorado/workingtogether/advisorycommittees.*

DATES: The meeting will be held on December 1, 2021, 3:30 p.m.–5:30 p.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. For virtual meeting information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at: Eldorado National Forest Supervisor's Office, 100 Forni Road, Placerville, CA 95667. Please call ahead at 530–303–2412 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Jennifer Chapman, RAC Coordinator, by phone at 530–957–9660 or via email to *jennifer.chapman@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (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 purpose of the meeting is to review new project proposals and to get an update on other projects in progress.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing seven days before the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Jennifer Chapman, Eldorado National Forest, 100 Forni Road, Placerville, CA 95667, by email to *jennifer.chapman@usda.gov,* or via facsimile to 530–621–5297.

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 10, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25024 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Trinity County Resource Advisory Committee; Meeting

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Trinity County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as to make recommendations on recreation fee proposals for sites on the Shasta-Trinity National Forest within Trinity County, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/stnf/workingtogether/advisorycommittees.*

DATES: The meeting will be held on December 13, 2021, 4:30 p.m.–6:30 p.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meetings prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendence only. Details for how to join the meeting is listed in the above website link under **SUMMARY**.

Written comments may be submitted as described under **SUPPLEMENTARY**

INFORMATION. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Weaverville Ranger Station. Please call ahead at 530–623–2121 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lejon Hamann, RAC Coordinator, by phone at 530–410–1935 or via email at *lejon.hamann@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours per day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to cover the following:

1. Roll call;
2. Comments from the Designated Federal Officer (DFO);
3. Approve minutes from last meeting;
4. Discuss, recommend, approve projects;
5. Public comment period; and
6. Closing comments from the DFO.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by the Thursday before the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Lejon Hamann, RAC Coordinator, 3644 Avtech Parkway, Redding, California 96002 or by email to *lejon.hamann@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25088 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Siskiyou County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Siskiyou County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act as well as to make recommendations on recreation fee proposals for sites on the Klamath National Forest wthin Siskiyou County/Counties, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/klamath/workingtogether/advisorycommittees.*

DATES: The virtual meeting will be held on December 9, 2021, 11:00 a.m.–1:00 p.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. Details on how to join the meeting are listed in the above website link under **SUMMARY**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Mt. Shasta Ranger Station. Please call ahead at 530–926–4511 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lejon Hamann, RAC Coordinator, by phone at 530–410–1935 or via email at *lejon.hamann@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours per day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to cover the following:

1. Roll call;
2. Comments from the Designated Federal Officer (DFO);
3. Approve minutes from last meeting;
4. Discuss, recommend, approve projects;
5. Public comment period; and
6. Closing comments from the DFO.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by the Tuesday before the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Lejon Hamann, RAC Coordinator, 3644 Avtech Parkway, Redding, California 96002 or by email to *lejon.hamann@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent

minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25087 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Huron-Manistee Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Huron-Manistee Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as to make recommendations on recreation fee proposals for sites on the Huron-Manistee National Forests within Occoda and Wexford Counties, consistent with the Federal Lands Recreation Enhancement Act. General information can be found at the following website: *https://www.fs.usda.gov/working-with-us/secure-rural-schools.*

DATES: The meeting will be held on December 1, 2021, 2:00 p.m.–4:00 p.m., Eastern Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held with virtual attendence only. Members of the public may participate in the meeting by calling 1–888–844–9904 and using access code 5081045#.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Greyling Brandt, Designated Federal Officer (DFO), by phone at 989–826–3252 or email at *greyling.brandt@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (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 purpose of the meeting is to:

1. Introduce RAC members and Forest Service personnel;
2. Elect a chairperson;
3. Review processess for recommending and considering Title II projects;
4. Public comments; and
5. Schedule the next meeting.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing by November 24, 2021, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Greyling Brandt, 107 McKinley Road, Mio, Michigan 48647 or by email to *greyling.brandt@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 10, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25023 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Sabine-Angelina Resource Advisory Committee; Meeting

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Sabine-Angelina Resource Advisory Committee (RAC) will hold two virtual meetings by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act as well as to make recommendations on recreation fee proposals for sites on the Sabine National Forest within Sabine and Shelby Counties, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/pts/specialprojects/racs.*

DATES: The meetings will be held on December 2, 2021 and December 7, 2021, both taking place from 3:00 p.m. to 6:00 p.m., Central Standard Time.

All RAC meetings are subject to cancellation. For status of the meetings prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meetings will be held with virtual attendence only. To join by telephone (audio only), call 1–888–844–9904, Access Code: 3659463#.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Becky Nix, RAC Coordinator, by phone at 409–625–1940 or email at *becky.nix@usda.gov* or Logan Gallant by phone at 936–897–1068 or email at *daniel.l.gallant@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meetings is to:

1. Hear from Title II project proponents and discuss project proposals;
2. Make funding reccomendations on Title II projects;
3. Approve meeting minutes; and
4. Schedule the next meeting.

The meetings are open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement at either of the meetings should request in writing by Friday, November 26, 2021, to be scheduled on the agenda for that particular meeting. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Logan Gallant, 111 Walnut Ridge Rd., Zavalla, TX 75980 or by email to *daniel.l.gallant@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25086 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Siuslaw Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Siuslaw Resource Advisory Committee (RAC) will hold three virtual meetings by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as to make recommendations on recreation fee proposals for sites on the Siuslaw National Forest, consistent with the Federal Lands Recreation Enhancement Act, within Tillamook, Lincoln, Yamhill, Benton, Lane, Coos, and Douglas counties. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/siuslaw/workingtogether/advisorycommittees.*

DATES: The meetings will be held on December 6, 2021, December 10, 2021, and December 15, 2021, from 9:00 a.m.–5:00 p.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meetings prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meetings will be held with virtual attendence only. Details on how members of the public can join a meeting are listed in the above website link under **SUMMARY**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Robert Sanchez, Designated Federal Officer (DFO), by phone at 541–750–7008 or email at *robert.f.sanchez@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (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 purpose of the meetings are to:

1. Review and discuss Title II project proposals; and
2. Make funding recommendations on Title II projects.

The meetings are open to the public. The agendas will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement at any of the meetings should make a request in writing by November 22, 2021, to be scheduled on the agenda for that particular meeting. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meetings. Written comments and requests for time for oral comments must be sent to Lisa Romano, RAC Coordinator, 3200 SW Jefferson Way, Corvallis, Oregon 97331 or by email to *lisa.romano@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the

basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25093 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Shasta County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act, as well as make recommendations on recreation fee proposals for sites on the Shasta-Trinity National Forest within Shasta County. RAC information can be found at the following website: *https://www.fs.usda.gov/main/stnf/workingtogether/advisorycommittees.*

DATES: The meeting will be held on December 8, 2021, 9:30 a.m.–11:30 a.m., Pacific Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. Details on how to join the meeting is listed in the above website link under **SUMMARY**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Shasta Lake Ranger Station. Please call ahead at 530–275–1587 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lejon Hamann, RAC Coordinator, by phone at 530–410–1935 or via email at *lejon.hamann@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours per day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to cover the following:

1. Roll call;
2. Comments from the Designated Federal Office (DFO);
3. Approve minutes from last meeting;
4. Discuss, recommend, and approve projects;
5. Public comment period; and
6. Closing comments from the DFO.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by the Friday before the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Lejon Hamann, RAC Coordinator, 3644 Avtech Parkway, Redding, California 96002; or by email to *lejon.hamann@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25095 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Chippewa National Forest Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Chippewa Natonal Forest Resource Advisory Committee (RAC) will hold two virtual meetings by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act as well as make recommendations on recreation fee proposals for sites on the Chippewa National Forest within Beltrami, Cass, and Itasca Counties, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/chippewa/workingtogether/advisorycommittees.*

DATES: The meetings will be held on December 14, 2021 and December 16, 2021, from 6:00 p.m.–9:00 p.m., Central Standard Time.

All RAC meetings are subject to cancellation. For the status of a meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meetings will be held with virtual attendance only. Call in number: (audio only) +1 202–650–0123, Phone ID: 634 773 244#.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided,

are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Todd Tisler, RAC Coordinator, by phone at 218–335–8629 or email to *todd.tisler@usda.gov.*

Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meetings are to:

1. Hear from Title II project applicants and discuss project proposals;
2. Make funding reccomendations on Title II projects;
3. Approve meeting minutes; and
4. Schedule the next meeting.

The meetings are open to the public. The agendas will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement at any meeting should request in writing by December 1, 2021, to be scheduled on the agenda for that particular meeting. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Todd Tisler, Chippewa National Forest, 200 Ash Avenue NW, Cass Lake, MN 56633; or by email to *todd.tisler@usda.gov.*

Meeting Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodation. For access to proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Equal opportunity practices, in line with USDA policies, will be followed in all membership appointments to the RAC. To help ensure that recommendations of the RAC have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, political beliefs, income derived from a public assistance program, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Dated: November 12, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–25089 Filed 11–16–21; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Iowa Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Iowa Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a meeting on Friday, December 10, 2021 at 1:00 p.m.–2:30 p.m. Central time. The purpose is to review potential civil rights topic for study.

DATES: The meeting will take place on Friday, December 10, 2021, from 1:00 p.m.–2:30 p.m. Central time.

Online Regisration (Audio/Visual): https://civilrights.webex.com/meet/afortes.

Telephone (Audio Only): Dial 800–360–9505 USA Toll Free; Access code: 199 167 8181.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, DFO, at *afortes@usccr.gov* or 202–681–0857.

SUPPLEMENTARY INFORMATION: Members of the public can listen to these discussions. Committee meetings are available to the public through the above call in number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Corrine Sanders at *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Pennsylvania Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Review Proposed Civil Rights Topics
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: November 10, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–25034 Filed 11–16–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–73–2021]

Foreign-Trade Zone (FTZ) 262—Southaven, Mississippi; Notification of Proposed Production Activity; Avaya, Inc. (Kitting of Audio/Video Conferencing Equipment); Olive Branch, Mississippi

Avaya, Inc. (Avaya) submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Olive Branch, Mississippi within FTZ 262. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on November 5, 2021.

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: Wireless telephone sets (including telephone wi-fi card, and adapter); video phone sets (including telephone, power cords and cables, video cameras, paper inserts, and retail packaging); conference phone sets (including conference phone and phone base); telephone switching and routing sets (including phone, power cords and cables, connection hub or control units, extension ports, memory cards, paper inserts and retail packaging) with or without a camera; telephone system sets (including conference phone, connection hub, power cords, control units, memory cards, multiple port combination cards, modules, extension ports, printed paper informational insert) with or without cameras; and, digital camera sets (including camera, power cord, retail packaging, paper inserts, cables, hubs or combination) (duty rate is duty-free).

The proposed foreign-status materials and components include: Corrugated cartons; printed paper informational inserts; connection hubs; power adapters; conference phones; multi-line telephones; videophones; telephone base stations; telephone switches; control units; multiple port combination cards; memory cards for data storage; digital cameras; communication cables; and, power cords (duty rate ranges from duty-free to 2.6%). 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 December 27, 2021.

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 Juanita Chen at *juanita.chen@trade.gov.*

Dated: November 12, 2021.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2021–25100 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2120]

Reorganization of Foreign-Trade Zone 83 Under Alternative Site Framework, Huntsville, Alabama

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR Sec. 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Huntsville-Madison County Airport Authority, grantee of Foreign-Trade Zone 83, submitted an application to the Board (FTZ Docket B–49–2021, docketed June 29, 2021) for authority to reorganize under the ASF with a service area of Cherokee, Colbert, Cullman, DeKalb, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marshall, Marion, Morgan and Winston Counties, Alabama, in and adjacent to the Huntsville U.S. Customs and Border Protection port of entry, and FTZ 83's existing Sites 1 and 2 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (86 FR 35473, July 6, 2021) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiners' report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 83 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, and to an ASF sunset provision for magnet sites that would terminate authority for Site 2 if not activated within five years from the month of approval.

Dated: November 10, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2021–25068 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–983]

Drawn Stainless Steel Sinks From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2020–2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that certain companies made sales of subject merchandise from the People's Republic of China (China) at less than normal value during the period of review (POR) April 1, 2020, through March 31, 2021.

DATES: Applicable November 17, 2021.

FOR FURTHER INFORMATION CONTACT: Adam Simons, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6172.

SUPPLEMENTARY INFORMATION: On August 31, 2021, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] We received no comments from interested parties on the *Preliminary Results.* Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[2]

The products covered by the *Order* include drawn stainless steel sinks. Imports of subject merchandise are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7324.10.0000 and 7324.10.0010.

[1] *See Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2020–2021,* 86 FR 48666 (August 31, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 78 FR 21592 (April 11, 2013) (*Order*).

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.[3]

Final Results of Review

We received no comments and are making no changes from the *Preliminary Results.* Therefore, as a result of this review, we continue to determine that Jiangmen New Star Hi-Tech Enterprise Ltd. (New Star) and KaiPing Dawn Plumbing Products, Inc. (KaiPing) have not established their eligibility for a separate rate and are part of the China-wide entity.

Assessment Rates

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b). Because we determined that KaiPing and New Star were not eligible for a separate rate and are part of the China-wide entity, we will instruct CBP to apply the China-wide entity rate, an *ad valorem* assessment rate of 76.45 percent,[4] to all entries of subject merchandise during the POR that were produced and/or exported by KaiPing and New Star.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) For previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be equal to the exporter-specific weighted-average dumping margin published of the most recently-completed segment of this proceeding; (2) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for China-wide entity, 76.45 percent;[5] and (3) for all exporters of subject merchandise which are not located in China and which are not eligible for a separate rate, the cash deposit rate will be the rate applicable to Chinese exporter(s) that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/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 sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: November 10, 2021.

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. 2021–25070 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–DS–P

[3] For a complete description of the scope of the *Order, see Preliminary Results* PDM at 3.

[4] The China-wide rate determined in the investigation was 76.53 percent. *See Order.* This rate was adjusted for export subsidies and estimated domestic subsidy pass through to determine the cash deposit rate (76.45 percent) collected for companies in the China-wide entity. *See* explanation in *Drawn Stainless Steel Sinks from the People's Republic of China: Investigation, Final Determination,* 78 FR 13019, 13025 (February 26, 2013).

[5] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–904]

Certain Activated Carbon From the People's Republic of China: Notice of Final Results of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On October 8, 2021, the Department of Commerce (Commerce) published the initiation and preliminary results of a changed circumstances review (CCR) of the antidumping duty (AD) order on certain activated carbon (activated carbon) from the People's Republic of China (China). For these final results, Commerce continues to find that Ningxia Huahui Environmental Technology Co., Ltd. (Huahui Environmental) is the successor in-interest to Ningxia Huahui Activated Carbon Co., Ltd. (Ningxia Huahui) and should be assigned the same AD cash deposit rate assigned to Ningxia Huahui for purposes of determining AD liability in this proceeding.

DATES: Applicable November 17, 2021.

FOR FURTHER INFORMATION CONTACT: Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339.

SUPPLEMENTARY INFORMATION:

Background

On October 8, 2021, Commerce published the *Initiation and Preliminary Results,*[1] finding that Huahui Environmental is the successor-in-interest to Ningxia Huahui and should be assigned the same AD cash deposit rate assigned to Ningxia Huahui for purposes of determining AD liability in this proceeding.[2] In the *Initiation and Preliminary Results,* we provided all interested parties with an opportunity to comment and request a public hearing regarding our preliminary finding.[3] We received no comments or requests for a public hearing from interested parties.

[1] *See Certain Activated Carbon from the People's Republic of China: Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 86 FR 56248 (October 8, 2021) (*Initiation and Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See Initiation and Preliminary Results,* 86 FR at 56248.

[3] *Id.*

Scope of the Order [4]

The merchandise covered by the scope of the *Order* is activated carbon. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Final Results of Changed Circumstances Review

For the reasons stated in the *Initiation and Preliminary Results,* and because we received no comments from interested parties to the contrary, Commerce continues to find that Huahui Environmental is the successor-in-interest to Ningxia Huahui and should be assigned the same AD cash deposit rate assigned to Ningxia Huahui for purposes of determining AD liability in this proceeding.[5] As a result of this determination and consistent with established practice, we find that Huahui Environmental should receive the cash deposit rate previously assigned to Ningxia Huahui in the most recently completed review of the *Order.* The cash deposit rate assigned to Ningxia Huahui in the most recently completed review was $0.65 per kilogram.[6] Consequently, Commerce will instruct U.S. Customs and Border Protection to suspend liquidation of all shipments of subject merchandise exported by Huahui Environmental and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at $0.65 per kilogram, which is the current AD cash deposit rate for Ningxia Huahui. This cash deposit requirement shall remain in effect until further notice.

Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/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 sanctionable violation.

[4] *See Notice of Antidumping Duty Order: Certain Activated Carbon from the People's Republic of China,* 72 FR 20988 (April 27, 2007) (*Order*).

[5] *See Initiation and Preliminary Results,* 86 FR at 56248.

[6] *See Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Rescission of Administrative Review, in Part; 2018–2019,* 86 FR 10539 (February 22, 2021).

Notification to Interested Parties

We are issuing this determination and publishing these final results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Tariff Act of 1930, as amended, and 19 CFR 351.216 and 351.221(c)(3).

Dated: November 10, 2021.

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. 2021–25099 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–832; A–201–855; A–580–912]

Acrylonitrile-Butadiene Rubber From France, the Republic of Korea, and Mexico: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable November 17, 2021.

FOR FURTHER INFORMATION CONTACT: Patrick Barton at (202) 482–0012 (France); Dennis McClure at (202) 482–5973 (Mexico); and Andre Gziryan at (202) 482–2201 (Republic of Korea); AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On July 20, 2021, the Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of acrylonitrile-butadiene rubber (AB rubber) from France, the Republic of Korea, and Mexico.[1] Currently, the preliminary determinations are due no later than December 7, 2021.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1)(A) and (B) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On November 1, 2021, the petitioner [2] submitted a timely request that Commerce postpone the preliminary determinations in these LTFV investigations.[3] The petitioner states that a postponement is necessary so that Commerce may have adequate time to issue clarifying supplemental questionnaires that address deficiencies in the respondents' antidumping questionnaire responses.

For the reasons stated above, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determinations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations no later than January 26, 2022. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: November 10, 2021.

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. 2021–25069 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Acrylonitrile-Butadiene Rubber from France, the Republic of Korea, and Mexico: Initiation of Less-Than-Fair-Value Investigations,* 86 FR 40192 (July 27, 2021).

[2] The petitioner is Zeon Chemicals L.P. and Zeon GP, LLC (collectively, Zeon or the petitioner).

[3] *See* Petitioner's Letter, ''Acrylonitrile-Butadiene Rubber from France, Mexico, and South Korea: Petitioner's Request to Extend the Preliminary Determination,'' dated November 1, 2021.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB541]

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Northeast Skate Complex; Withdrawal of the Notice of Intent To Prepare an Environmental Impact Statement for Amendment 5

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

ACTION: Notice of withdrawal.

SUMMARY: The New England Fishery Management Council initiated development of Amendment 5 to the Northeast Skate Complex Fishery Management Plan in 2016. A notice of intent to develop an environmental impact statement for this action was published in January 2017, followed by a second notice and round of scoping in late December 2020. However, in September 2021, the Council voted to discontinue work on Amendment 5 and pursue the remaining alternatives through newly initiated Framework Adjustment 9. The remaining alternatives in this framework are largely administrative and not expected to have significant impacts on the fishery or human environment. Therefore, NMFS is withdrawing the notice of intent and no longer intends to prepare an environmental impact statement.

FOR FURTHER INFORMATION CONTACT: Cynthia Ferrio, Fishery Policy Analyst, (978) 281–9180.

SUPPLEMENTARY INFORMATION: In 2016, the New England Fishery Management Council initiated development of Amendment 5 to the Northeast Skate Complex Fishery Management Plan (FMP) to consider limited access in the skate fishery. The Council published a notice of intent (NOI) to develop an environmental impact statement (EIS) for this amendment, in accordance with the National Environmental Policy Act, to analyze the impacts of any proposed management measures (82 FR 825; January 4, 2017). Throughout this initial development and scoping process, the range of proposed alternatives changed. A second NOI was published (85 FR 84304; December 28, 2020), and additional scoping hearings were held in 2021.

The comments received throughout the development process during both rounds of scoping hearings, and at multiple Skate Advisory Panel, Skate Committee, and Council meetings, were mixed in support of, and opposition to, limiting access to the skate fishery. Ultimately, after careful consideration of the public comments received and extensive examination of the alternatives analyzed, the Council voted to no longer develop limited access alternatives in Amendment 5 at its April 2021 meeting. Further, at its meeting in September 2021, the Council voted to discontinue work on Amendment 5 completely and to pursue the remaining alternatives addressing changes to permit provisions and clarifying the FMP goals and objectives through the newly initiated Framework Adjustment 9. Framework 9 is expected to be implemented in mid-2022.

These remaining alternatives that will be considered in Framework 9 are largely administrative and are not expected to have significant impacts on the fishery or affected environment. Consequently, the Council and NMFS have determined that it is not necessary to prepare an EIS for Framework 9 and will instead continue development of the remaining framework alternatives with an appropriate NEPA document. Therefore, NMFS is informing the public that work on Amendment 5 is complete, and that we are withdrawing the NOI and draft EIS from further consideration.

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

Dated: November 12, 2021.

Michael Ruccio,

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

[FR Doc. 2021–25094 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB512

Atlantic Highly Migratory Species; Advisory Panel

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

ACTION: Notice; solicitation of nominations.

SUMMARY: NMFS solicits nominations for the Atlantic Highly Migratory Species (HMS) Advisory Panel (AP). NMFS consults with and considers the comments and views of the HMS AP when preparing and implementing Fishery Management Plans (FMPs) or FMP amendments for Atlantic tunas, swordfish, sharks, and billfish. Nominations are being sought to fill approximately one-third (12) of the seats on the HMS AP for 3-year appointments. Individuals with definable interests in the recreational and commercial fishing and related industries, environmental community, academia, and non-governmental organizations are considered for membership on the HMS AP. NMFS also intends to fill an additional vacancy on the HMS AP for the remainder of a term that expires on December 31, 2023.

DATES: Nominations must be received on or before December 17, 2021.

ADDRESSES: You may submit nominations and requests for the Advisory Panel Statement of Organization, Practices, and Procedures by email to *HMSAP.Nominations@noaa.gov.* Include in the subject line the following identifier: ''HMS AP Nominations.''

FOR FURTHER INFORMATION CONTACT: Peter Cooper at (301) 427–8503.

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries are managed under the dual authority of both the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (2006 Consolidated HMS FMP) and its amendments are implemented by regulations at 50 CFR part 635.

The Magnuson-Stevens Act requires the establishment of an AP for each FMP for Atlantic HMS, *i.e.,* tunas, swordfish, billfish, and sharks. 16 U.S.C. 1854(g)(1)(A)–(B). Since the inception of the AP in 1998, NMFS has consulted with and considered the comments and views of AP members when preparing and implementing Atlantic HMS FMPs or FMP amendments. In this notice, NMFS solicits nominations for the Atlantic HMS AP. Nominations are being sought to fill approximately one-third (12) of the seats on the HMS AP for 3-year appointments. Individuals with definable interests in the recreational and commercial fishing and related industries, environmental community, academia, and non-governmental organizations are considered for membership on the HMS AP as described below. NMFS also intends to select a nominee to fill an additional academic vacancy on the HMS AP for the remainder of a term that expires on December 31, 2023. This vacancy is the result of a sitting HMS AP member

moving to the HMS AP seat designated for the ICCAT Advisory Committee Chair.

Procedures and Guidelines

A. Nomination Procedures for Appointments to the Advisory Panel

Nomination packages should include:

1. The name of the nominee and a description of his/her interest in HMS or HMS fisheries, or in particular species of sharks, swordfish, tunas, or billfish;
2. Contact information, including mailing address, phone, and email of the nominee;
3. A statement of background and/or qualifications;
4. A written commitment that the nominee shall actively participate in good faith, and consistent with ethics obligations, in the meetings and tasks of the HMS AP; and
5. A list of outreach resources that the nominee has at his/her disposal to communicate qualifications for HMS AP membership.

Qualification for membership includes one or more of the following: (1) Experience in HMS recreational fisheries; (2) experience in HMS commercial fisheries; (3) experience in fishery-related industries (*e.g.,* marinas, bait and tackle shops); (4) experience in the scientific community working with HMS; and/or (5) representation of a private, non-governmental, regional, national, or international organization that represents marine fisheries, or environmental, governmental, or academic interests regarding HMS.

Tenure for the HMS AP

Member tenure will be for 3 years, with approximately one-third of the members' terms expiring on December 31 of each year. Nominations are sought for terms beginning January 2022 and expiring December 2024. NMFS also intends to select a nominee to fill an additional vacancy for the remainder of a term that expires on December 31, 2023.

B. Participants

Nominations for the HMS AP will be accepted to allow representation from commercial and recreational fishing interests, academic/scientific interests, and the environmental/non-governmental organization community, for individuals who are knowledgeable about Atlantic HMS and/or Atlantic HMS fisheries. Current representation on the HMS AP, as shown in Table 1, consists of 12 members representing commercial interests, 12 members representing recreational interests, 4 members representing environmental interests, 4 academic representatives, and the International Commission for the Conservation of Atlantic Tunas (ICCAT) Advisory Committee Chair. NMFS seeks to fill 4 commercial, 4 recreational, 3 academic, and 1 environmental organization vacancies for terms starting in 2022. In addition to these 12 vacancies, NMFS also intends to select a nominee to fill an academic vacancy for the remainder of the term that expires on December 31, 2023. This vacancy is the result of a sitting HMS AP member moving to the HMS AP seat designated for the ICCAT Advisory Committee Chair.

In filling vacancies, NMFS will seek to maintain the current representation from each of the sectors. NMFS also considers species expertise and representation from the fishing regions (Northeast, Mid-Atlantic, Southeast, Gulf of Mexico, and Caribbean) to ensure the diversity and balance of the HMS AP. Table 1 includes the current representation on the HMS AP by sector, region, and species with terms that are expiring identified in bold. It is not meant to indicate that NMFS will only consider persons who have expertise in the species or fishing regions that are listed. Rather, NMFS will aim toward having as diverse and balanced an AP as possible. The intent is to have a group that, as a whole, reflects an appropriate and equitable balance and mix of interests given the responsibilities of the HMS AP.

TABLE 1—CURRENT REPRESENTATION ON THE HMS AP BY SECTOR, REGION, AND SPECIES

Sector	Fishing region	Species	Date appointed	Date term expires	Member status
Academic *	All	Swordfish/Tuna	1/1/2021	12/31/2023	Active.
Academic	All	Tuna	1/1/2019	12/31/2021	Expiring.
Academic	Gulf of Mexico/Southeast	Shark	1/1/2019	12/31/2021	Expiring.
Academic	Southeast	Swordfish/HMS	1/1/2019	12/31/2021	Expiring.
Commercial	Mid-Atlantic	HMS/Shark	1/1/2020	12/31/2022	Active.
Commercial	Mid-Atlantic	Swordfish/Tuna	1/1/2020	12/31/2022	Active.
Commercial	Gulf of Mexico	Shark	1/1/2020	12/31/2022	Active.
Commercial	Gulf of Mexico	Sharks	1/1/2021	12/31/2023	Active.
Commercial	Northeast	Tuna	1/1/2021	12/31/2023	Active.
Commercial	Gulf of Mexico/Southeast	Swordfish/Tuna	1/1/2021	12/31/2023	Active.
Commercial	Gulf of Mexico	Tuna	1/1/2021	12/31/2023	Active.
Commercial	Northeast	Tuna	1/1/2021	12/31/2023	Active.
Commercial	Northeast/Southeast/Gulf of Mexico	HMS/Tuna	1/1/2019	12/31/2021	Expiring.
Commercial	Southeast	Shark	1/1/2019	12/31/2021	Expiring.
Commercial	Southeast	Swordfish/Tuna	1/1/2019	12/31/2021	Expiring.
Commercial	Northeast	Swordfish/Tuna	1/1/2019	12/31/2021	Expiring.
Environmental	All	Tuna	1/1/2020	12/31/2022	Active.
Environmental	All	HMS	1/1/2020	12/31/2022	Active.
Environmental	All	Shark	1/1/2021	12/31/2023	Active.
Environmental	Caribbean	HMS	1/1/2019	12/31/2021	Expiring.
Recreational	Northeast	HMS	1/1/2020	12/31/2022	Active.
Recreational	Northeast	Tuna/Sharks	1/1/2020	12/31/2022	Active.
Recreational	Mid-Atlantic	HMS	1/1/2020	12/31/2022	Active.
Recreational	Southeast	Billfish	1/1/2020	12/31/2022	Active.
Recreational	Gulf of Mexico	HMS	1/1/2020	12/31/2022	Active.
Recreational	All	Billfish	1/1/2021	12/31/2023	Active.
Recreational	Mid-Atlantic	Shark	1/1/2021	12/31/2023	Active.
Recreational	Southeast/Mid Atlantic	Billfish	1/1/2021	12/31/2023	Active.
Recreational	Northeast	Tuna/Shark	1/1/2019	12/31/2021	Expiring.
Recreational	Gulf of Mexico/Southeast	HMS	1/1/2019	12/31/2021	Expiring.

TABLE 1—CURRENT REPRESENTATION ON THE HMS AP BY SECTOR, REGION, AND SPECIES—Continued

Sector	Fishing region	Species	Date appointed	Date term expires	Member status
Recreational	Mid-Atlantic	HMS	1/1/2019	12/31/2021	Expiring.
Recreational	Southeast	HMS/Billfish	1/1/2019	12/31/2021	Expiring.

Note: Terms that are expiring or associated with current members stepping down are identified in bold and marked as ''Expiring''. * Designates term shift to the HMS AP seat designated for the ICCAT Advisory Committee Chair.

Five additional members on the HMS AP include one member representing each of the following Councils: New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Gulf of Mexico Fishery Management Council, and the Caribbean Fishery Management Council. The HMS AP also includes 22 ex-officio participants: 20 representatives of the coastal states and 2 representatives of the interstate commissions (the Atlantic States Marine Fisheries Commission and the Gulf States Marine Fisheries Commission).

NMFS will provide the necessary administrative support, including technical assistance, for the HMS AP. However, NMFS will not compensate participants with monetary support of any kind. Depending on availability of funds, members may be reimbursed for travel costs related to the HMS AP meetings.

C. Meeting Schedule

Meetings of the HMS AP will be held as frequently as necessary but are routinely held twice each year. In recent years, meetings have been held once in the spring, and once in the fall. The meetings may be held in conjunction with public hearings.

Dated: November 12, 2021.

Michael Ruccio,

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

[FR Doc. 2021–25097 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB535]

Atlantic Highly Migratory Species; Exempted Fishing, Scientific Research, Display, and Shark Research Fishery Permits; Letters of Acknowledgment

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

ACTION: Notice of intent; request for comments.

SUMMARY: NMFS announces its intent to issue exempted fishing permits (EFPs), scientific research permits (SRPs), display permits, letters of acknowledgment (LOAs), and shark research fishery permits for Atlantic highly migratory species (HMS) in 2022. EFPs and related permits would authorize collection of a limited number of Atlantic HMS, including tunas, swordfish, billfishes, and sharks, from Federal waters in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico for the purposes of scientific research, data collection, the investigation of bycatch, and public display, among other things. LOAs acknowledge that scientific research activity aboard a scientific research vessel is being conducted. Generally, EFPs and related permits would be valid from the date of issuance through December 31, 2022, unless otherwise specified in the permit, subject to the terms and conditions of individual permits.

DATES: Written comments received in response to this notice will be considered by NMFS when issuing EFPs and related permits, and must be received on or before December 17, 2021.

ADDRESSES: Comments may be submitted electronically via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2021–0108 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Craig Cockrell, phone: (301) 427–8503, email: *craig.cockrell@noaa.gov.*

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries are managed under the dual authority of both the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (2006 Consolidated HMS FMP) and its amendments are implemented by regulations at 50 CFR part 635. The regulations specific to HMS EFPs and related permits can be found at § 635.32.

NMFS issues EFPs and related permits where Atlantic HMS regulations (*e.g.,* fishing seasons, prohibited species, authorized gear, closed areas, and minimum sizes) may otherwise prohibit the collection of live animals and/or biological samples for data collection and public display purposes or may otherwise prohibit certain fishing activities that NMFS has an interest in permitting or acknowledging. Consistent with 50 CFR 600.745 and 635.32, the NMFS Regional Administrator or Director may authorize, for limited testing, public display, data collection, exploratory fishing, compensation fishing, conservation engineering, health and safety surveys, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under a fishery management plan (FMP) or fishery regulations that would otherwise be prohibited. These permits exempt permit holders from the specific portions of the regulations that may otherwise prohibit the collection of Atlantic HMS for public education, public display, or scientific research. Collection of Atlantic HMS under EFPs, SRPs, display permits, and shark research fishery permits represents a small portion of the overall fishing mortality for Atlantic HMS, and this mortality is counted against the relevant quota, as appropriate and applicable. The terms and conditions of individual permits are unique; however, all permits

will include reporting requirements, limit the number and/or species of Atlantic HMS to be collected, and only authorize collection in Federal waters of the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea.

The Magnuson-Stevens Act exempts scientific research conducted by a scientific research vessel from the definition of ''fishing.'' NMFS issues LOAs acknowledging such bona fide research activities involving species that are only regulated under the Magnuson-Stevens Act (*e.g.,* most species of sharks) and not under ATCA. NMFS generally does not consider recreational or commercial vessels to be bona fide research vessels. However, if the vessels have been contracted only to conduct research and not participate in any commercial or recreational fishing activities during that research, NMFS may consider those vessels as bona fide research platforms while conducting the specified research. For example, in the past, NMFS has determined that commercial pelagic longline vessels assisting with population surveys for sharks may be considered ''bona fide research vessels'' while engaged only in the specified research. For such activities, NMFS reviews scientific research plans and may issue an LOA acknowledging that the proposed activity is scientific research for purposes of the Magnuson-Stevens Act. Examples of research acknowledged by LOAs include tagging and releasing sharks during bottom longline surveys to understand the distribution and seasonal abundance of different shark species, and collecting and sampling sharks caught during trawl surveys for life history and bycatch studies.

While scientific research is not defined as ''fishing'' subject to the Magnuson-Stevens Act, scientific research is not exempt from regulation under ATCA. Therefore, NMFS issues SRPs that authorize researchers to collect HMS from bona fide research vessels for collection of species managed under this statute (*i.e.,* tunas, swordfish, and billfish). One example of research conducted under SRPs consists of scientific surveys of tunas, swordfish, and billfish conducted from NOAA research vessels.

EFPs are issued for activities conducted from commercial or recreational fishing vessels. Examples of activities conducted under EFPs include collection of young-of-the-year bluefin tuna for genetic research from recreational fishing vessels; conducting billfish larval tows from private vessels to determine billfish habitat use, life history, and population structure; and tagging sharks caught on commercial or recreational fishing gear to determine post-release mortality rates.

NMFS also intends to issue display permits for the collection of sharks and other HMS for public display in 2022. Collection of sharks and other HMS sought for public display in aquaria often involves collection when the commercial fishing seasons are closed, collection of otherwise prohibited species (*e.g.,* sand tiger sharks), and collection of fish below the regulatory minimum size. NMFS published the final rule for Amendment 2 to the 2006 Consolidated HMS FMP (73 FR 35778; June 24, 2008; corrected version published July 15, 2008; 73 FR 40658) which included, among other things, that dusky sharks cannot be collected for public display.

The majority of EFPs and related permits described in this annual notice relate to scientific sampling and tagging of Atlantic HMS within existing quotas, and the impacts of the activities to be conducted usually have been previously analyzed in various environmental assessments and environmental impact statements for Atlantic HMS management. In most such cases, NMFS intends to issue these permits without additional opportunity for public comment beyond what is provided in this notice. Occasionally, NMFS receives applications for research activities that were not anticipated, or for research that is outside the scope of general scientific sampling and tagging of Atlantic HMS, or rarely, for research that is particularly controversial. NMFS will provide additional opportunity for public comment, consistent with the regulations at 50 CFR 600.745, should such applications be received by NMFS.

In addition, this notice invites comments on the shark research fishery first implemented through Amendment 2 to the 2006 Consolidated HMS FMP. This research fishery is conducted under the auspices of the EFP program. Shark research fishery permit holders assist NMFS in collecting valuable shark life history and other scientific data required in shark stock assessments. Since the shark research fishery was established in 2008, the research fishery has allowed for: The collection of fishery dependent data for current and future stock assessments; the operation of cooperative research to meet NMFS' ongoing research objectives; the collection of updated life-history information used in the sandbar shark (and other species) stock assessment; the collection of data on habitat preferences that might help reduce fishery interactions through bycatch mitigation; the evaluation of the utility of the mid-Atlantic closed area on the recovery of dusky sharks; the collection of hook-timer and pop-up satellite archival tag information to determine at-vessel and post-release mortality of dusky sharks; and the collection of sharks to update the weight conversion factor from dressed weight to whole weight. Shark research fishery participants are subject to 100-percent observer coverage. In recent years, all non-prohibited shark species brought back to the vessel dead have been required to be retained and were counted against the appropriate quotas of the shark research fishery participant. Additionally, in recent years, all participants of the shark research fishery were limited to a very small number of dusky shark mortalities on a regional basis. Once the designated number of dusky shark mortalities occurs in a specific region, certain terms and conditions are applied (*e.g.,* soak time limits). While the specific terms and conditions of the 2022 SRF permit have yet to be decided, NMFS expects that participants would continue to be limited in the number of sets allowed on each trip and the number of hooks allowed on each set and on the vessel itself. A **Federal Register** notice describing the specific objectives for the shark research fishery in 2022 and requesting applications from interested and eligible shark fishermen is expected to publish in the near future. NMFS requests public comment regarding NMFS' intent to issue shark research fishery permits in 2022 during the comment period of this notice.

The number of specimens that have been authorized thus far under EFPs and other related permits for 2021, as well as the number of specimens collected in 2020, is summarized in Table 1. The total amount of collections in 2020 were within the analyzed quotas for all quota managed Atlantic HMS species. The number of specimens collected in 2021 will be available when all 2021 interim and annual reports are submitted to NMFS.

In all cases, mortalities associated with EFPs, SRPs, or display permits (except for larvae) are counted against the appropriate quota. NMFS issued a total of 31 EFPs, SRPs, display permits, and LOAs in 2020 for the collection of HMS and 8 shark research fishery permits. As of October 13, 2021, NMFS has issued a total of 38 EFPs, SRPs, display permits, and LOAs and 4 shark research fishery permits.

TABLE 1—SUMMARY OF HMS EXEMPTED FISHING PERMITS ISSUED IN 2020 AND 2021, OTHER THAN SHARK RESEARCH FISHERY PERMITS

Permit type	Species	2020			2021	
		Permits issued	Authorized fish (numbers) [1]	Fish kept/ discarded dead (numbers)	Permits issued	Authorized fish (numbers) [1]
EFP	HMS	10	550	0	5	[2] N/A
	Shark	3	0	2	3	0
	Tuna	2	750	0	1	[2] N/A
	Swordfish	0	0	0	1	0
SRP	HMS	1	50	0	3	770
	Shark	2	1,325	3	1	1,010
Display	HMS	2	82	0	1	55
	Shark	6	321	22	5	287
Total		28	3,078	27	20	2,122
LOA [3]	Shark	5	0	427	18	0

Note: "HMS" refers to multiple species being collected under a given permit type.

[1] Some shark EFPs, SRPs, and LOAs were issued for the purposes of tagging and the opportunistic sampling of sharks or other Atlantic HMS and were not expected to result in large amounts of mortality, thus no limits on sampling were set. Some mortality may occur throughout 2021, and will be accounted for under the 60 metric ton shark research and display quota.

[2] These permits are issued to commercial fishermen and the number of species retained are governed by commercial retention limits.

[3] LOAs acknowledge, but do not authorize, scientific research activity. Thus, the number of sharks in the authorized fish column are in part estimates of harvest under LOAs. LOA holders are either required or encouraged to report all fishing activities in a timely manner.

Final decisions on the issuance of any EFPs, SRPs, display permits, and shark research fishery permits will depend on the submission of all required information about the proposed activities, NMFS' review of public comments received on this notice, an applicant's reporting history on past permits, if vessels or applicants were issued any prior violations of marine resource laws administered by NOAA, consistency with relevant NEPA documents, and any consultations with appropriate Regional Fishery Management Councils, states, or Federal agencies. NMFS does not anticipate any significant environmental impacts from the issuance of these EFPs, consistent with the assessment of such activities within the environmental impacts analyses in existing HMS actions, including the 1999 FMP, the 2006 Consolidated HMS FMP and its amendments, Amendment 2 to the Consolidated HMS FMP, the Environmental Assessment for the 2012 Swordfish Specifications, and the Environmental Assessment for the 2015 Final Bluefin Tuna Quota and Atlantic Tuna Fisheries Management Measures.

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

Dated: November 12, 2021.

Michael Ruccio,

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

[FR Doc. 2021–25096 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Review of Nomination for St. George Unangan Heritage National Marine Sanctuary

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice; request for written comments.

SUMMARY: The Office of National Marine Sanctuaries (ONMS) of the National Oceanic and Atmospheric Administration (NOAA) is requesting written comments to facilitate ONMS' review of the nomination for St. George Unangan Heritage National Marine Sanctuary (NMS) at the five-year interval. In particular, NOAA is requesting relevant information as it pertains to its 11 evaluation criteria for inclusion in the inventory. In this five-year review, NOAA will pay particular attention to any new information about the significance of the area's natural or cultural resources, changes to any threats to these resources, and any updates to the management framework of the area. NOAA has provided the original nominating party, the City of St. George, an opportunity to share its views on these same questions. Following this information gathering and internal analysis, NOAA will make a final determination on whether or not the St. George Unangan Heritage NMS nomination will remain in the inventory for another five year period.

DATES: Written comments must be received by December 17, 2021.

ADDRESSES: Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Submit electronic comments via the Federal eRulemaking Portal and search for Docket Number NOAA–NOS–2021–0094.
- *Mail:* Paul E. Michel, Regional Policy Coordinator, NOAA Sanctuaries West Coast Region, 99 Pacific Street, Bldg. 100F, Monterey, CA 93940.
- *Email: Paul.Michel@noaa.gov.*
- *Phone:* 831–241–4217.

Instructions: All comments received are a part of the public record. All personal identifying 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. NOAA will accept anonymous comments (enter N/A in the required fields to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Paul Michel, Regional Policy Coordinator, NOAA Sanctuaries West Coast Region, 99 Pacific Street, Bldg. 100F, Monterey, CA 93940, or at *Paul.Michel@noaa.gov,* or 831–241–4217.

SUPPLEMENTARY INFORMATION:

Background Information

In 2014, NOAA issued a final rule establishing the sanctuary nomination process (SNP), which details how communities may submit nominations to NOAA for consideration of national marine sanctuary designation (79 FR 33851). NOAA moves successful nominations to an inventory of areas that could be considered for national marine sanctuary designation. The final rule establishing the SNP included a five-year limit on any nomination added to the inventory that NOAA does not advance for designation.

In November 2019, NOAA issued a **Federal Register** notice (84 FR 61546) to clarify procedures for evaluating and updating a nomination as it approaches the five-year mark on the inventory of areas that could be considered for national marine sanctuary designation. This notice explained that if a nomination remains responsive to the evaluation criteria for inclusion on the inventory, it may be appropriate to allow the nomination to remain on the inventory for another five years. The notice also established a process for NOAA to consider the continuing viability of nominations nearing the five-year expiration mark.

The nomination for St. George Unangan Heritage NMS was accepted to the national inventory on January 27, 2017, and is therefore scheduled to expire on January 27, 2022. The full nomination can be found at *https://nominate.noaa.gov/nominations/.*

NOAA is not proposing to designate the St. George Unangan Heritage NMS with this action. Instead, NOAA is seeking public comment on ONMS' five-year review of the nomination for St. George Unangan Heritage NMS. Accordingly, written comments submitted as part of this request should not focus on whether NOAA should initiate the designation process for a St. George Unangan Heritage NMS. Rather, comments should address the relevance of the nomination towards NOAA's 11 evaluation criteria and any new information NOAA should consider about the nominated area (these criteria are detailed at *https://nominate.noaa.gov/guide.html*). Comments that do not pertain to the evaluation criteria, or present new information on the St. George Unangan Heritage NMS nomination, will not be considered in NOAA's decision on whether to retain this nomination in the inventory.

Whether removing or maintaining the nomination for St. George Unangan Heritage NMS, NOAA would follow the same procedure for notifying the public as was followed when the nomination was submitted, including a letter to the nominator, a notice in the **Federal Register**, and posting information on ''*nominate.noaa.gov*''.

(Authority: 16 U.S.C. 1431 *et seq.*)

John Armor,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2021–24998 Filed 11–16–21; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0162]

Agency Information Collection Activities; Comment Request; Native Hawaiian Education and Alaska Native Education Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new collection.

DATES: Interested persons are invited to submit comments on or before January 18, 2022.

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–2021–SCC–0162. 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 *regulations.gov* site is not available to the public for any reason, ED 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 by fax or email and those 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 PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Joanne Osborne, (202) 401–1265.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Native Hawaiian Education and Alaska Native Education Annual Performance Report.

OMB Control Number: 1810–NEW.

Type of Review: New collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 102.

Total Estimated Number of Annual Burden Hours: 510.

Abstract: This is a request for a new Annual Performance Report (APR) information collection for the Title VI, Part B of the ESEA (Native Hawaiian Education), Title VI, Part C of the ESEA (Alaska Native Education), and Title XI, Section 11006 of the American Rescue Plan Act of 2021. The information shared with the Rural, Insular, and Native Achievement Program (RINAP) division will help ensure Native Hawaiian and Alaska Native Education program grantees make progress toward meeting program goals and objectives. Information collected will also inform the selection and delivery of technical assistance to grantees, allowing RINAP to better monitor the connection between grant administration and intended outcomes. Collection of APR information will also allow RINAP to proactively engage with grantees to

identify potential compliance issues ahead of more comprehensive monitoring, decreasing the need for enforcement action and minimizing burden for grantees.

Dated: November 12, 2021.

Kate 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. 2021–25047 Filed 11–16–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

U.S. Energy Information Administration

Agency Information Collection Proposed Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA invites public comment on the proposed three-year extension of the following Oil and Gas Reserves System Survey Forms, as required under the Paperwork Reduction Act of 1995; extension without changes of Form EIA–64A, *Annual Report of the Origin of Natural Gas Liquids Production;* extension without changes of Form EIA–23L, *Annual Report of Domestic Oil and Gas Reserves, County Level Report;* and continued suspension of Form EIA–23S, *Annual Survey of Domestic Oil and Gas Reserves, Summary Level Report.*

DATES: EIA must receive all comments on this proposed information collection no later than January 18, 2022. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

ADDRESSES: Submit comments electronically to *steven.grape@eia.gov* or mail comments to Mr. Steven Grape, EI–24, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, or by fax at (202) 586–4420.

FOR FURTHER INFORMATION CONTACT: If you need additional information, contact Mr. Steven Grape, U.S. Energy Information Administration, telephone (202) 586–1868, or by email at *steven.grape@eia.gov.* The forms and instructions are available on EIA's website at *https://www.eia.gov/survey/.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1905–0057;

(2) *Information Collection Request Title:* Oil and Gas Reserves System;

(3) *Type of Request:* Three year extension without changes of the currently approved Form EIA–64A; extension without changes of the currently approved Form EIA–23L; and continued suspension of collection of the currently approved Form EIA–23S (suspended).

(4) *Purpose:* In response to Public Law 95–91 Section 657, estimates of U.S. oil and gas reserves are to be reported annually. Many U.S. government agencies have an interest in the definitions of proved oil and gas reserves and the quality, reliability, and usefulness of estimates of reserves. Among these are the U.S. Energy Information Administration (EIA), Department of Energy; Bureau of Ocean Energy Management (BOEM), Department of Interior; Internal Revenue Service (IRS), Department of the Treasury; and the Securities and Exchange Commission (SEC). Each of these organizations has specific purposes for collecting, using, or estimating proved reserves. The EIA has a congressional mandate to provide accurate annual estimates of U.S. proved crude oil, natural gas, and natural gas liquids reserves, and EIA presents annual reserves data in EIA Web reports to meet this requirement. The BOEM maintains estimates of proved reserves to carry out their responsibilities in leasing, collecting royalty payments, and regulating the activities of oil and gas companies on Federal waters. Accurate reserve estimates are important, as the BOEM is second only to the IRS in generating Federal revenue. For the IRS, proved reserves and occasionally probable reserves are an essential component of calculating taxes for companies owning or producing oil and gas. The SEC requires publicly traded petroleum companies to annually file a reserves statement as part of their 10–K filing. The basic purpose of the 10–K filing is to give the investing public a clear and reliable financial basis to assess the relative value, as a financial asset, of a company's reserves, especially in comparison to other similar oil and gas companies. The Government also uses the resulting information to develop national and regional estimates of proved reserves of domestic crude oil, natural gas, and natural gas liquids to facilitate national energy policy decisions. These estimates are essential to the development, implementation, and evaluation of energy policy and legislation. Data are used directly in EIA Web reports concerning U.S. crude oil, natural gas, and natural gas liquids reserves, and are incorporated into a number of other Web reports and analyses;

(5) *Annual Estimated Number of Respondents:* Forms EIA–23L/23S/64A: 1,100;

(6) *Annual Estimated Number of Total Responses:* Forms EIA–23L/23S/64A: 1,100;

(7) *Annual Estimated Number of Burden Hours:* 24,800 hours;

Form EIA–23L Annual Survey of Domestic Oil and Gas Reserves, County Level Report: 110 hours (120 large operators); 40 hours (140 medium operators); 15 hours (240 small operators): 22,400 hours

Form EIA–23S Annual Survey of Domestic Oil and Gas Reserves, Summary Level Report: 4 hours (small operators): 0 hours (Currently suspended)

Form EIA–64A Annual Report of the Origin of Natural Gas Liquids Production: 4 hours (600 natural gas plant operators): 2,400 hours

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $2,024,920 (24,800 burden hours times $81.65 per hour). EIA estimates that respondents will have no additional costs associated with the surveys other than the burden hours and the maintenance of the information during the normal course of business.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology; (e) All data items collected on Form EIA–23L are necessary for the proper performance of agency functions, and if not which data items could be removed without affecting practical utility; and (f) The ability to upload the Form EIA–23L data in a standard file format (xlsx, csv, txt, xml, ectc.) would improve data preparation and reduce burden compared to the current process.

Statutory Authority: 15 U.S.C. 772(b) and 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on November, 10, 2021.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2021–25025 Filed 11–16–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5261–023]

Green Mountain Power Corporation; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 5261–023.

c. *Date filed:* August 27, 2021.

d. *Applicant:* Green Mountain Power Corporation.

e. *Name of Project:* Newbury Hydroelectric Project.

f. *Location:* On the Wells River, in the town of Newbury, Orange County, Vermont. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John Greenan, Green Mountain Power Corporation, 2152 Post Road, Rutland, VT 05701; Phone at (802) 770–2195, or email at *John.Greenan@greenmountainpower.com.*

i. *FERC Contact:* Adam Peer at (202) 502–8449, or *adam.peer@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Newbury Hydroelectric Project (P–5261–023).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. The Newbury Project consists of: (1) An 11.4-acre impoundment at a normal water surface elevation of 463.9 feet mean sea level; (2) a 26 foot-high by 90-foot-long concrete gravity dam that includes a 73.3-foot-long spillway topped with 5-foot-high pneumatic crest gates; (3) a seasonally installed, 8-foot-long by 4-foot-wide steel sluice box on the south side of the spillway to provide downstream fish passage; (4) an 11.2-foot-wide, 9-foot-long intake structure with trash racks, connected to a 5-foot-diameter, 435-foot-long underground steel penstock; (5) a powerhouse containing a single 315-kilowatt turbine-generator unit; (6) a second 50-kilowatt turbine-generator unit located outside of the powerhouse approximately 75-feet downstream of the dam along the bypassed reach; (7) a 125-foot-long tailrace; (8) three 150-foot-long generator leads that create a 480 Volt, 3 phase 150-foot-long underground transmission line connected to three pole mounted 167 kilovolt-ampere step-up transformers; and (9) appurtenant facilities. The project creates a 590-foot-long bypassed reach of the Wells River.

The current license requires Green Mountain Power Corporation to: (1) Operate the project in run-of-river mode; (2) release a continuous bypassed reach minimum flow of 50 cubic feet per second (cfs) from April 15 to June 10 and 25 cfs during the remainder of the year; and (3) release a year-round, continuous aesthetic flow of 5 cfs over the dam. The average annual generation of the project is approximately 882 megawatt-hours.

Green Mountain Power Corporation proposes to: (1) Continue operating the project in run-of-river mode; (2) release new bypassed reach minimum flows of 35 cfs from May 15 to October 15 and 30 cfs from October 16 to May 14; (3) release a new aesthetic flow of 10 cfs over the dam from May 15 to October 15 during daytime hours and no aesthetic flow the remainder of the year; and (4) construct a hand-carry access area at the head of the project impoundment for recreational boaters.

m. 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*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC Online Support at *FERCOnllineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to

the schedule will be made as appropriate.

Issue Scoping Document 1 for comments—December 2021
Request Additional Information (if necessary)—February 2021
Issue Scoping Document 2—March 2021
Issue Notice of Ready for Environmental Analysis—March 2021

Dated: November 10, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–25081 Filed 11–16–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2289–012; ER10–2564–012; ER10–2600–012.
Applicants: UNS Electric, Inc., Tucson Electric Power Company, UniSource Energy Develop.m.ent Company.
Description: Notice of Change in Status to Reflect Participation in Energy Imbalance Market of Tucson Electric Power Company, et al.
Filed Date: 11/10/21.
Accession Number: 20211110–5199.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER21–2217–002.
Applicants: Lincoln Land Wind, LLC.
Description: Notice of Non-Material Change in Status of Lincoln Land Wind, LLC.
Filed Date: 11/10/21.
Accession Number: 20211110–5162.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER21–2348–001.
Applicants: Midcontinent Independent System Operator, Inc., Michigan Public Power Agency.
Description: ALJ Settlement: Midcontinent Independent System Operator, Inc. submits tariff filing per 385.602: 2021–10–25_MPPA Revenue Requirement Compliance Filing to be effective N/A.
Filed Date: 10/25/21.
Accession Number: 20211025–5062.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–377–000.
Applicants: Florida Power & Light Company.
Description: § 205(d) Rate Filing: FPL & Alabama Power Facility Construction Agreement for Affected System Project to be effective 11/11/2021.
Filed Date: 11/10/21.
Accession Number: 20211110–5001.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–378–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: ISO New England Inc. submits Installed Capacity Requirement, Hydro Quebec Interconnection Capability Credits and Related Values for the 2025/2026 Capacity Commitment Period.
Filed Date: 11/9/21.
Accession Number: 20211109–5227.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ER22–379–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Revisions to Implement Effective Load Carrying Capability Methodology to be effective 2/15/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5076.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–380–000.
Applicants: Avista Corporation.
Description: Tariff Amendment: Avista Corp Cancellation of RS T1158 NorthernGrid Funding Agmt to be effective 12/31/2021.
Filed Date: 11/10/21.
Accession Number: 20211110–5079.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–381–000.
Applicants: Dunns Bridge Solar Center, LLC.
Description: Baseline eTariff Filing: Dunns Bridge Solar Center, LLC Application for MBR Authority to be effective 1/10/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5090.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–382–000.
Applicants: American Electric Power Service Corporation, Indiana Michigan Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: American Electric Power Service Corporation submits tariff filing per 35.13(a)(2)(iii: AEP submits one FA with IMPA re: SA No. 1436 to be effective 1/10/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5099.
Comment Date: 5 p.m. ET 12/1/21.

Docket Numbers: ER22–383–000.
Applicants: Northern States Power Company, a Minnesota corporation.
Description: § 205(d) Rate Filing: 2021–11–10 Huntley-Wilmarth-CMA–657–0.1.0 to be effective 11/10/2021.
Filed Date: 11/10/21.
Accession Number: 20211110–5113.
Comment Date: 5 p.m. ET 12/1/21.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES21–69–000.
Applicants: Allegheny Generating Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Allegheny Generating Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5128.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–70–000.
Applicants: Jersey Central Power & Light Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Jersey Central Power & Light Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5132.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–71–000.
Applicants: Mid-Atlantic Interstate Transmission, LLC.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Mid-Atlantic Interstate Transmission, LLC.
Filed Date: 11/9/21.
Accession Number: 20211109–5129.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–72–000.
Applicants: Metropolitan Edison Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Metropolitan Edison Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5133.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–73–000.
Applicants: Monongahela Power Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Monongahela Power Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5134.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–74–000.
Applicants: Pennsylvania Power Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Pennsylvania Power Company.
Filed Date: 11/9/21.

Accession Number: 20211109–5141.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–75–000.
Applicants: Potomac Edison Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Potomac Edison Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5144.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–76–000.
Applicants: West Penn Power Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of West Penn Power Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5147.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–77–000.
Applicants: Trans-Allegheny Interstate Line Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Trans-Allegheny Interstate Line Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5162.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: ES21–78–000.
Applicants: Pennsylvania Electric Company.
Description: Supplement to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Pennsylvania Electric Company.
Filed Date: 11/9/21.
Accession Number: 20211109–5161.
Comment Date: 5 p.m. ET 11/30/21.

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 or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 10, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–25056 Filed 11–16–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14–517–001]

Golden Pass Terminal, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Golden Pass LNG Export Variance Request No. 15 Amendment

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document, that will discuss the environmental impacts of the Golden Pass LNG Export Variance Request No. 15 Amendment (Amendment), involving an increase to traffic volumes and work week and work hour limits by Golden Pass Terminal, LLC (Golden Pass), in Jefferson County, Texas. If authorized, the Amendment would increase the workforce numbers, amount of traffic volume, and work week/hour limits that were not reviewed during preparation of the final Environmental Impact Statement (EIS) for the Golden Pass LNG Export Project (Docket Nos. CP14–517–000 and CP14–518–000), which the Commission authorized on December 21, 2016. Golden Pass proposed Amendment would increase construction to 24-hour-day and 7 days a week at the Golden Pass LNG Export Terminal. The Commission will use this environmental document in its decision-making process to determine whether the project Amendment 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 Amendment. 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 5:00 p.m. Eastern Time on December 10, 2021. 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 Amendment to the Commission before the opening of this docket on November 3, 2021, you will need to file those comments in Docket No. CP14–517–001 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 Amendment. State and local government representatives should notify their constituents of this proposed project Amendment and encourage them to comment on their areas of concern.

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 Amendment docket number (CP14–517–001) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Summary of the Proposed Project Amendment

Golden Pass identified the need for an increased workforce at the Golden Pass LNG Export Terminal site. The final EIS for the Golden Pass LNG Export Project reviewed a peak construction workforce of 2,900 employees; Golden Pass is requesting the authority to increase the potential peak workforce to 7700 workers per day. Golden Pass is also requesting the authority to increase traffic volumes to accommodate the additional workforce, and a 7-day-per-week, 24-hour-per-day, construction schedule for the remaining construction period at the terminal site; Golden Pass anticipates completing the Golden Pass LNG Export Project in 2025.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

There are no revisions to land requirements for the Amendment.

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 Amendment under the relevant general resource areas:

- Environmental Justice
- Air quality and noise; and
- Visual Resources.

Commission staff will also evaluate reasonable alternatives to the proposed project Amendment or portions of the project Amendment and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project Amendment. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary[2] 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 Amendment 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 Amendment's potential effects on historic properties.[4] The environmental document for this project Amendment 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 Amendment 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

[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. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

[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.

potentially affected by the proposed project Amendment.

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 CP14–517–001 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 Amendment 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: November 10, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–25080 Filed 11–16–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9709–070]

ECOsponsible, LLC; Notice of Termination of License (Major Project) by Implied Surrender and Soliciting Comments, Protests, and Motions To Intervene

Take notice that the following hydroelectric proceeding has been initiated by the Commission:

a. *Application Type:* Termination of License by Implied Surrender.

b. *Project No:* 9709–070.

c. *Date Initiated:* November 8, 2021.

d. *Licensee:* ECOsponsible, LLC.

e. *Name of Project:* Herkimer Hydroelectric Project.

f. *Location:* The Herkimer Hydroelectric Project is located on the West Canada Creek, Herkimer County, New York.

g. *Filed Pursuant to:* Standard Article 26.

h. *Applicant Contact:* Mr. Dennis Ryan, ECOsponsible, LLC, 469 Snyder Road, East Aurora, New York 14052–9710.

i. *FERC Contact:* David Rudisail, (202) 502–6376, *david.rudisail@ferc.gov.*

j. *Deadline for filing comments, motions to intervene and protests:* December 27, 2021.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket numbers P–9709–070. Comments emailed to Commission staff are not considered part of the Commission record.

k. *Description of Project Facilities:* The project works include: A timber crib dam with a 9-foot-high, 95-foot-long section reaching a crest elevation of 420 feet mean sea level (msl) and 12-foot-high, 145-foot-long section reaching a crest elevation of 419.2 feet msl; a reservoir with a surface area of 19 acres, storage capacity of 163 acre-feet, and normal water surface elevation of 420.5 feet msl; timber flashboards; an intake structure; a reinforced concrete and steel powerhouse containing four generating units with a capacity of 400 kilowatts (kW) each and an 80-kW minimum flow generator at the base of the dam for a total installed capacity of 1,680 kW; a 50-foot-long, 13.2-kilovolt transmission line; and appurtenant facilities. The project has been not operated since 2006.

l. *Description of Proceeding:* License Article 26 states in part: *If the licensee shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the licensee or its agent, the Commission will deem it to be the intent of the licensee to surrender the license.*

The project has fallen into disrepair and has not operated since 2006. The project was transferred to the licensee by order dated March 12, 2015 (2015 Order). The 2015 Order required the licensee to file a plan and schedule to restore project operation within 60 days. Since that time, the Commission's Division of Dam Safety and Inspections New York Regional Office (NYRO) has issued eight letters requiring the licensee to file a plan and schedule to make the needed repairs and to restore project operation. The licensee has responded over the years with at least five plans, but all have been deficient because they lack sufficient detail for NYRO's review and approval. The licensee has never filed satisfactory plans and specifications to repair the project. On August 26, 2021, NYRO inspected the project and found it in unsatisfactory condition and largely abandoned. The licensee did not attend the inspection and has failed to respond to phone calls and emails since. In a final letter to the licensee dated October 18, 2021, NYRO again required the licensee to reply to past letters but the licensee has stopped responding to the Commission.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described proceeding. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments.

p. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS,'' ''PROTEST,'' or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001–385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the implied surrender. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: November 10, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–25077 Filed 11–16–21; 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: PR22–4–000.
Applicants: Rocky Mountain Natural Gas LLC.
Description: Submits tariff filing per 284.123(b),(e)/: RMNG 2021 SOC Filing to be effective 11/1/2021.
Filed Date: 11/8/21.
Accession Number: 20211108–5096.
Comments/Protests Due: 5 p.m. ET 11/29/21.

Docket Numbers: CP22–14–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: Application for Authorization to Abandon Services of Southern Natural Gas Company, L.L.C.
Filed Date: 11/09/2021.
Accession Number: 20211109–5055.
Comment Date: 5 p.m. ET 11/30/21.

Docket Numbers: RP22–202–000.
Applicants: Tres Palacios Gas Storage LLC.
Description: Compliance filing: Tres Palacios Gas Storage LLC Order No. 587–Z Compliance Filing to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5152.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–203–000.
Applicants: ANR Storage Company.
Description: Compliance filing: Compliance to RM96–1–042—Order No. 587–Z to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5196.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–204–000.
Applicants: Midwestern Gas Transmission Company.
Description: Compliance filing: NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5204.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–205–000.
Applicants: OkTex Pipeline Company, L.L.C.
Description: Compliance filing: NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5207.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–206–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Compliance filing: NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5209.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–207–000.
Applicants: Viking Gas Transmission Company.
Description: Compliance filing: NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/9/21.
Accession Number: 20211109–5210.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–208–000.
Applicants: Bison Pipeline LLC.
Description: Compliance filing: Compliance to RM96–1–042—Order No. 587–Z to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5000.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–209–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: Compliance filing: MNUS Order 587–Z (Docket RM96–1–042) Compliance Filing to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5022.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–210–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: Compliance filing: NEXUS Order 587–Z (Docket RM96–1–042) Compliance Filing to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5025.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–211–000.
Applicants: Dominion Energy Questar Pipeline, LLC.
Description: Compliance filing: Order No. 587–Z—NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5035.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–212–000.
Applicants: Dominion Energy Overthrust Pipeline, LLC.
Description: Compliance filing: Order No. 587–Z—NAESB 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5036.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–213–000.
Applicants: White River Hub, LLC.
Description: Compliance filing: Order 587–Z—NAESB 3.2 Compliance Filing to be effective 6/1/2022.

Filed Date: 11/10/21.
Accession Number: 20211110–5038.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–214–000.
Applicants: Eastern Gas Transmission and Storage, Inc.
Description: Compliance filing: EGTS—NAESB Version 3.2 Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5047.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–215–000.
Applicants: Cimarron River Pipeline, LLC.
Description: Compliance filing: Order No. 587–Z NAESB 3.2 Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5040.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–216–000.
Applicants: Dauphin Island Gathering Partners.
Description: Compliance filing: Order No. 587–Z NAESB 3.2 Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5042.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–217–000.
Applicants: Cove Point LNG, LP.
Description: Compliance filing: Cove Point—NAESB Version 3.2 Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5044.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–218–000.
Applicants: Carolina Gas Transmission, LLC.
Description: Compliance filing: CGT—NAESB Version 3.2 Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5049.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–219–000.
Applicants: KPC Pipeline, LLC.
Description: Compliance filing: Order No. 587–Z Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5052.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–220–000.
Applicants: NGO Transmission, Inc.
Description: Compliance filing: Order No. 587–Z Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5053.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–221–000.
Applicants: Venice Gathering System, L.L.C.
Description: Compliance filing: Order No. 587–Z Compliance to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5054.
Comment Date: 5 p.m. ET 11/22/21.

Docket Numbers: RP22–222–000.
Applicants: WBI Energy Transmission, Inc.
Description: Compliance filing: 2021 NAESB Version 3.2 Compliance Filing to be effective 6/1/2022.
Filed Date: 11/10/21.
Accession Number: 20211110–5062.
Comment Date: 5 p.m. ET 11/22/21.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP21–1187–002.
Applicants: Eastern Gas Transmission and Storage, Inc.
Description: Compliance filing: EGTS—Rate Case Compliance Filing to be effective 11/1/2021.
Filed Date: 11/9/21.
Accession Number: 20211109–5048.
Comment Date: 5 p.m. ET 11/22/21.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 10, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–25054 Filed 11–16–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA–04–2021–2503; FRL–9144–01–R4]

Horton Iron and Metal Superfund Site, Wilmington, North Carolina; Proposed Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement.

SUMMARY: Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency proposes to enter into a settlement with Horton Iron and Metal Company concerning the Horton Iron and Metal Superfund Site located in Wilmington, North Carolina. The proposed settlement addresses recovery of CERCLA costs for a cleanup that will be performed at the Site and costs incurred by EPA.

DATES: The Agency will consider public comments on the proposed settlement until December 17, 2021. The Agency will consider all comments received and may modify or withdraw its consent to the proposed settlement if comments received disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the proposed settlement are available from the Agency by contacting Ms. Paula V. Painter, Program Analyst, using the contact information provided in this notice. Comments may also be submitted by referencing the Site's name through one of the following methods:

Internet: https://www.epa.gov/aboutepa/about-epa-region-4-southeast#r4-public-notices.

Email: Painter.Paula@epa.gov.

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Maurice Horsey,

Chief, Enforcement Branch, Superfund & Emergency Management Division.

[FR Doc. 2021–25075 Filed 11–16–21; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is proposing to establish a new system of records. The Health and Safety in the Workplace Records System will collect and maintain information used for ensuring workplace health and safety in response to a public health emergency, such as a pandemic or epidemic.

DATES: You may send written comments on or before December 17, 2021. The FCA filed a Notice of a New System Report with Congress and the Office of Management and Budget on (Insert date). This notice will become effective without further publication on December 27, 2021, unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Website: http://www.fca.gov.* Click inside the ''I want to . . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* Kevin Kramp, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to . . .'' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Jane Virga, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4071, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when establishing a new system of records.

The new system of records, FCA–20—Health and Safety in the Workplace Records System—FCA, will be used to capture and manage information necessary to ensure workplace health and safety in response to a public health emergency, obtained from FCA and Farm Credit Insurance Corporation (FCSIC) employees, interns, volunteers, job applicants, and contractors (collectively ''staff''), as well as visitors to FCA facilities and field offices.

FCA is committed to providing all staff and visitors with a safe and healthy work environment. FCA may require staff and visitors to provide health-related, medical screening, and contact tracing information, before being allowed to enter an FCA facility or field office. Staff may also need to provide health-related information before being authorized to travel on official agency business.

Certain records collected from federal employees and interns, and maintained in this system, may also be maintained and covered by OPM/GOVT–10 Employee Medical File System Records (75 FR 35099, June 21, 2010), FCA–1—Employee Attendance, Leave, and Payroll Records—FCA (85 FR 13900, March 10, 2020), and FCA–19—Non-Payroll Employee Administrative Records System—FCA (85 FR 51432, August 20, 2020). This system complements those systems, and in some cases, this notice incorporates by reference but does not repeat all the information contained in those systems.

As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, the FCA sent notice of this new system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–20—Health and Safety in the Workplace Records System—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Director, Office of Agency Services and Chief Human Capital Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 2243, 2252; Civil Rights Act of 1964 § 7, 42 U.S.C. 2000e *et seq.* Workforce safety federal requirements, including 5 U.S.C. Chapters 11 and 79; 29 U.S.C. 791, Employment of Individuals with Disabilities; Executive Order 14043 on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees dated September 9, 2021; Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors dated September 9, 2021; Executive Order 13991 on Protecting the Federal Workforce and Requiring Mask-Wearing dated January 20, 2021; and Executive Order 12196 on Occupational Safety and Health Program for Federal Employees dated February 26, 1980.

PURPOSES OF THE SYSTEM:

The purpose of the Health and Safety in the Workplace Records System is to capture and manage information necessary to ensure workplace health and safety in response to a public health emergency.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former FCA and FCSIC employees, interns, volunteers, job applicants, and contractors (collectively ''staff''), and other visitors to FCA facilities and field offices.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information may include, without limitation: (a) Individual name and employee ID number; (b) employment related information including title, position, grade, and supervisor's name; (c) home and work contact information, including address, telephone number, and email address; (d) recent travel history; (e) health information including body temperature, confirmation of pathogen or communicable disease test, test results, dates, symptoms, potential or actual exposure to a pathogen or communicable disease, immunization or vaccination information, other medical history related to the treatment of a pathogen or communicable disease; (f) information related to requests for and approval of reasonable accommodation(s) due to the public health emergency, including type of accommodation(s) requested, date of request, reason for request, specific information regarding type of request, including but not limited to the characteristics of impairment, job function difficulties, current limitation(s), past accommodation(s), specific accommodation(s), permanent or temporary medical condition(s), or religious beliefs or practices, supporting

documentation and related materials that substantiate a request for ''reasonable accommodations,'' case notes or similar pertaining to the request, including any notes created in evaluating the request, and status of the request, including denial or approval; (g) information necessary to support contact tracing efforts for communicable diseases such as dates, times, and locations when an individual visited an FCA facility or field office, as well as locations visited within the facility or field office, and names of other individuals with whom they may have had contact during those visits; and (h) copies of government issued identification cards.

RECORD SOURCE CATEGORIES:

Information in this system is obtained from the individual to whom it applies, or is derived from (i) information supplied by that individual; (ii) FCA or FCSIC employee's, intern's or contractor's supervisor; (iii) private and Federal health care providers, and medical institutions; (iv) security systems monitoring access to FCA facilities and offices, such as access badge card readers; (v) human resources systems; (vi) emergency notification systems; and (vii) federal, state, and local agencies assisting with the response to a public health emergency. Information may also be collected from property management companies responsible for managing office buildings that house FCA facilities.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Routine uses 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the FCA's ''General Statement of Routine Uses'' (85 FR 31495, May 26, 2020) are applicale to this system. The ''General Statement of Routine Uses'' is also available on its website, *www.fca.gov/privacy.* The information collected in the system will be used in a manner compatible with the purposes for which the information has been collected and, in addition to the applicable general routine uses, may be disclosed for the following purposes:

(1) To a Federal, State, or local agency to the extent necessary to comply with laws governing reporting of infectious disease;

(2) To the emergency contact of staff for purposes of locating staff during a public health emergency or to communicate that staff may have potentially suffered exposure during a public health emergency while visiting a FCA facility or field office;

(3) To medical personnel to meet a bona fide medical emergency;

(4) To an authorized appeal grievance examiner, formal complaints examiner, administrative judge, equal employment opportunity investigator, arbitrator or other duly authorized official engaged in investigation or settlement of a grievance, complaint or appeal filed by an employee; and

(5) To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion on such matters as settlement, plea bargaining, or in information discovery proceedings.

DISCLSOURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in paper and electronic form. Paper records are maintained in file folders, with sensitive information kept under lock and key, with access limited to those with a need-to-know in support of their official duties. Electronic records are maintained in secure file shares and similar systems with technical access restricted to authorized personnel with a need-to know in support of their official duties.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrievable by a variety of fields including, but not limited to, individual name, employee ID, or some combination thereof.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records related to requests for and approval of a reasonable accommodation are managed in accordance with the National Archives and Records Administration (NARA) General Records Schedule (GRS) 2.3, item 20. Such records are considered temporary and destroyed three years after employee separation from the agency or all appeals are concluded, whichever is longer. For all other records in the system, FCA is currently awaiting further guidance from NARA on retention and destruction. Until such time, these records will be considered permanent.

ADMINSITRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with need-to-know in support of their official duties. Paper records are physically safeguarded in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Direct all inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

HISTORY:

None. This is a new System of Records.

Dated: November 10, 2021.

Ashley Waldron,

Secretary, Farm Credit Administration Board.

[FR Doc. 2021–25013 Filed 11–16–21; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0439, OMB 3060–0665, OMB 3060–0973, FR ID 58095]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the

information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid 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.

DATES: Written PRA comments should be submitted on or before January 18, 2022. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0439.

Title: Section 64.201, Regulations Concerning Indecent Communications by Telephone.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Individuals or households.

Number of Respondents and Responses: 10,200 respondents; 30,000 responses.

Estimated Time per Response: .166 hours (10 minutes average per response).

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found at Section 223 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 223, Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications.

Total Annual Burden: 4,980 hours.

Total Annual Cost: None.

Needs and Uses: Under section 223 of the Act, common carriers are required, to the extent technically feasible, to prohibit access to obscene or indecent communications from the telephone of a subscriber who has not previously requested such access in writing, if the carrier collects charges from subscribers for such communications. 47 CFR 64.201 implements section 223 of the Act, and also include the following information collection requirements: (1) Adult message service providers notify their carriers in writing of the nature of their service; and (2) A provider of adult message services request that its carriers identify these services as such in bills to their subscribers. The information requirements are imposed on carriers, and on adult message service providers and those who solicit their services, to ensure that minors and anyone who has not consented to access such material are denied access to such material in adult message services.

OMB Control Number: 3060–0665.

Title: Section 64.707, Public Dissemination of Information by Providers of Operator Services.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 448 respondents; 448 responses.

Estimated Time per Response: 4 hours (average per response).

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority citation for the information collection requirements is found at Section 226 of the Act, 47 U.S.C. 226.

Total Annual Burden: 1,792 hours.

Total Annual Cost: $44,800.

Needs and Uses: Pursuant to 47 CFR 64.707, providers of operator services must regularly publish and make available at no cost to requesting consumers written materials that describe any recent changes in operator services and choices available to consumers. Consumers use the information to increase their knowledge of the choices available to them in the operator services marketplace.

OMB Control Number: 3060–0973.

Title: Section 64.1120(e), Verification of Orders for Telecommunications Service.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 50 respondents; 150 responses.

Estimated Time per Response: 1 to 5 hours (average per response).

Frequency of Response: On occasion reporting requirements; Third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority citation for the information collection requirements is found at Section 258 of the Act, 47 U.S.C. 258.

Total Annual Burden: 350 hours.

Total Annual Cost: None.

Needs and Uses: Pursuant to 47 CFR 64.1120(e), a carrier acquiring all or part of another carrier's subscriber base without obtaining each subscriber's authorization and verification will file a letter specifying certain information with the Commission, in advance of the transfer, and it will also certify that the carrier will comply with required procedures, including giving advance notice to the affected subscribers.

These streamlined carrier change rules balance the protection of consumers' interests with ensuring that the Commission's rules do not unnecessarily inhibit routine business transactions.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–25083 Filed 11–16–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID 58310]

Open Commission Meeting Thursday, November 18, 2021

November 10, 2021.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, November 18, 2021, which is scheduled to commence at 10:30 a.m.

Due to the current COVID–19 pandemic and related agency telework and headquarters access policies, this meeting will be in a wholly electronic format and will be open to the public on the internet via live feed from the FCC's web page at *www.fcc.gov/live* and on the FCC's YouTube channel.

Item No.	Bureau	Subject
1	WIRELINE COMPETITION	*Title:* Enabling Text-to-988 (WC Docket No. 18–336). *Summary:* The Commission will consider a Second Report and Order that would require covered text providers to support text messaging to 988 by routing certain text messages sent to 988 to the National Suicide Prevention Hotline by July 16, 2022.
2	WIRELESS TELE-COMMUNICATIONS	*Title:* Enhanced Competition Incentive Program for Wireless Radio Services (WT Docket No. 19–38). *Summary:* The Commission will consider a Further Notice of Proposed Rulemaking proposing an Enhanced Competition Incentive Program (ECIP) and other rule changes intended to promote competition, access to spectrum by small carriers and Tribal Nations, and expanded rural wireless coverage.
3	MEDIA	*Title:* Updating FM Radio Directional Antenna Verification (MB Docket No. 21–422). *Summary:* The Commission will consider a Notice of Proposed Rulemaking to allow applicants proposing directional FM antennas the option of verifying the directional antenna pattern through computer modeling.
4	INTERNATIONAL	*Title:* Kinéis Low-Earth Orbit Satellites Market Access (IBFS File No. SAT–PDR–20191011–00113). *Summary:* The Commission will consider an Order and Declaratory Ruling on Kinéis' petition to access the U.S. market using a low-earth orbit satellite system to provide connectivity for Internet of Things devices, as well as enhancements to maritime domain awareness through monitoring of maritime communications.

* * * * *

The meeting will be webcast with open captioning at: *www.fcc.gov/live.* Open captioning will be provided as well as a text only version on the FCC website. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted but may be impossible to fill. Send an email to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530. Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418–0500. Audio/Video coverage of the meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.*

Federal Communications Commission.

Marlene Dortch,

Office of the Secretary.

[FR Doc. 2021–25085 Filed 11–16–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS21–07]

Appraisal Subcommittee; Notice of Meeting; Cancellation

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting; cancellation.

The Open Meeting, which was published in accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, at 86 FR 62168, November 9, 2021 and scheduled for Wednesday, November 17, 2021 at 10:00 a.m. ET, has been cancelled.

James R. Park,

Executive Director.

[FR Doc. 2021–25078 Filed 11–16–21; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 21–09]

Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC.—Possible Violations; Order of Investigation and Hearing

AGENCY: Federal Maritime Commission.

DATES: The Order of Investigation and Hearing was served November 10, 2021.

ACTION: Notice of order of investigation and hearing.

SUPPLEMENTARY INFORMATION: On November 10, 2021, the Federal Maritime Commission instituted an Order of Investigation and Hearing entitled Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC Possible Violations of 46 U.S.C. 41102(c). Acting pursuant to Section 41302 of Title 46 of the United States Code, that investigation is instituted to determine:

(1) Whether Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC. are violating or have violated section 41102(c) of the Shipping Act by failing to establish, observe, and enforce just and reasonable regulations and practices relating to its assessment of charges on containers when return locations with corresponding appointments were unavailable.

The Order may be viewed in its entirety at *http://www.fmc.gov/21-09.*

Authority: 46 U.S.C. 41302.

Rachel Dickon,

Secretary.

[FR Doc. 2021–25098 Filed 11–16–21; 8:45 am]

BILLING CODE 6730–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1760–N]

Medicare Program; Virtual Public Meetings in December 2021 for New Revisions to the Healthcare Common Procedure Coding System (HCPCS) Code Set

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces the dates and times of virtual Healthcare Common Procedure Coding System (HCPCS) public meetings to be held in December 2021 to discuss our preliminary coding recommendations for new revisions to the HCPCS Level II code set, as well as how to register for those meetings.

DATES:

Virtual meeting dates: Wednesday, December 1, 2021, 9 a.m. to 5 p.m.,

eastern standard time (e.s.t.), Thursday, December 2, 2021, 9 a.m. to 5 p.m., e.s.t.

Deadline for primary speaker registrations and presentation materials: The deadline for primary speakers to register and submit any supporting PowerPoint presentation, as well as any relevant studies published after the date the applicant submitted its HCPCS code application, is 5 p.m., e.s.t., Wednesday, November 17, 2021.

Deadline for 5-minute speaker registrations: The deadline for registering to be a 5-minute speaker is 5 p.m., e.s.t., Wednesday, November 17, 2021.

Deadline for registration for all other attendees: All individuals who plan to attend the virtual public meetings to listen, but do not plan to speak, must register to attend. Attendees can attend more than one meeting. Except for individuals who require special assistance, the deadline to register for each public meeting is the date of that public meeting. Individuals who plan to attend one or both of the virtual public meetings and require special assistance must register and request special assistance services by 5 p.m., e.s.t., Wednesday, November 17, 2021.

Registration Link: The registration link is posted on the CMS website at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublic Meetings.* The same website also contains detailed information on how attendees can join the virtual public meetings using Zoom, including dial-in information for primary speakers, 5-minute speakers, and all other attendees.

Deadline for submission of written comments: In addition to primary speaker presentation materials noted above, CMS will accept written comments from any stakeholder pertaining to a HCPCS code application scheduled for discussion at the public meetings. The deadline for submission of written comments pertaining to a specific HCPCS code application is 5 p.m., e.s.t., on the date of the virtual public meeting at which the applicable HCPCS code application is scheduled for discussion. As part of CMS' response to the COVID–19 public health emergency (PHE), written comments will only be accepted when emailed to *HCPCS_Level_II_Code_Applications@cms.hhs.gov.*

ADDRESSES: *Virtual meeting location:* The December 1 and 2, 2021 HCPCS public meetings will be held virtually via Zoom only. The public meeting agendas (including the specific HCPCS code applications that will be discussed), meetings guidelines and the information to join these meetings are published at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublicMeetings.*

FOR FURTHER INFORMATION CONTACT: Kimberlee Combs, (410) 786–6707, or *Kimberlee.Combsmiller@cms.hhs.gov;* Irina Akelaitis, (410) 786–4602, or *Irina.Akelaitis@cms.hhs.gov;* Felicia Kyeremeh, (410) 786–1898, or *Felicia.Kyeremeh@cms.hhs.gov;* William Walker, (410) 786–5023, or *William.Walker@cms.hhs.gov;* Constantine Markos, (410) 786–0911, *Constantine.Markos@cms.hhs.gov, or HCPCS_Level_II_Code_Applications@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, Congress enacted the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554). Section 531(b) of BIPA mandated that the Secretary establish procedures that permit public consultation for coding and payment determinations for new durable medical equipment (DME) under Medicare Part B of title XVIII of the Social Security Act (the Act). In the November 23, 2001, **Federal Register** (66 FR 58743), we published a notice providing information regarding the establishment of the annual public meeting process for DME.

In 2020, we implemented changes to our HCPCS coding procedures, including the establishment of quarterly coding cycles for drugs and biological products and bi-annual coding cycles for non-drug and non-biological items and services.

II. Virtual Meeting Registration

Because of the ''Notice of the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic'' [1] issued on February 24, 2021, there will not be an in-person meeting. The December 1 and 2, 2021 HCPCS public meetings will be virtual and available for remote audio attendance and participation only via Zoom.

A. Required Information for Registration

The following information must be provided when registering online to attend:

- Name;
- Company name and address (if applicable);
- Direct-dial telephone;
- Email address;
- Any special assistance requests (which, as stated above, will be considered if the registration is submitted by 5:00 p.m., e.s.t., Wednesday, November 17, 2021); and
- Whether the registrant is a primary speaker or a 5-minute speaker for an agenda item.

B. Additional Information

1. Primary Speakers

Each applicant that submitted a HCPCS code application that will be discussed at the virtual public meetings is permitted to designate a primary speaker. As stated above, we will accept PowerPoint presentations and relevant studies if those materials are emailed to *HCPCS_Level_II_Code_Applications@cms.hhs.gov* by 5 p.m., e.s.t., Wednesday, November 17, 2021. Due to the timeframe needed for planning and coordination of the HCPCS virtual public meetings, materials that are not submitted in accordance with these deadlines cannot be accommodated.

All PowerPoint presentation materials must not exceed 10 pages (each side of a page counts as 1 page). Newly relevant studies are not subject to this page limit.

Fifteen minutes is the total time interval for each presentation. In establishing the public meeting agenda, we may group multiple, related code requests under the same agenda item.

On the day of the virtual meeting that the primary speaker attends and speaks on a HCPCS code application, before 5 p.m., e.s.t., the primary speaker must email a brief written summary (one paragraph) of their comments and conclusions to *HCPCS_Level_II_Code_Applications@cms.hhs.gov.*

Every primary speaker must also declare at the beginning of their presentation at the meeting, as well as in their written summary, whether they have any financial involvement with the manufacturer of the item that is the subject of the HCPCS code application that the primary speaker presented, or any competitors of that manufacturer with respect to the item. This includes any payment, salary, remuneration, or benefit provided to that speaker by the applicant.

2. 5-Minute Speakers

As noted above, the deadline for registering to be a 5-minute speaker is 5 p.m., e.s.t., Wednesday, November 17, 2021.

On the day of the virtual meeting that the 5-minute speaker attends and speaks on a HCPCS code application, before 5 p.m., e.s.t., the 5-minute speaker must

[1] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/.*

email a brief written summary of their comments and conclusions to *HCPCS_Level_II_Code_Applications@cms.hhs.gov.* CMS will not accept any other written materials from a 5-minute speaker.

Every 5-minute speaker must also declare at the beginning of their presentation at the meeting, as well as in their written summary, whether they have any financial involvement with the manufacturer of the item that is the subject of the HCPCS code application that the 5-minute speaker presented, or any competitors of that manufacturer with respect to the item. This includes any payment, salary, remuneration, or benefit provided to that speaker by the applicant.

C. Additional Virtual Meeting/Registration Information

Prior to registering to attend a virtual public meeting, all potential participants and other stakeholders are advised to review the public meeting agendas at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublicMeetings* which identify our preliminary coding recommendations, and the date each item will be discussed. All potential participants and other stakeholders are also encouraged to regularly check the HCPCS section of the CMS website at *https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSPublicMeetings* for publication of the draft agendas, including a summary of each HCPCS code application and our preliminary recommendations.

The HCPCS section of the CMS website also includes details regarding the public meeting process for new revisions to the HCPCS code set, including information on how to join the meeting remotely, and guidelines for an effective presentation. The HCPCS section of the CMS website also contains a document titled ''Healthcare Common Procedure Coding System (HCPCS) Level II Coding Procedures,'' which is a description of the HCPCS coding process, including a detailed explanation of the procedures CMS uses to make HCPCS coding determinations.

III. Written Comments From Meeting Attendees Who Are Not Speakers

Written comments from anyone who is not a primary speaker or 5-minute speaker will only be accepted when emailed to *HCPCS_Level_II_Code_Applications@cms.hhs.gov* before 5 p.m., e.s.t., on the date of the virtual public meeting at which the HCPCS code application that is the subject of the comments is discussed.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: November 12, 2021.

Lynette Wilson,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2021–25132 Filed 11–15–21; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8079–N]

RIN 0938–AU48

Medicare Program; Medicare Part B Monthly Actuarial Rates, Premium Rates, and Annual Deductible Beginning January 1, 2022

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces the monthly actuarial rates for aged (age 65 and over) and disabled (under age 65) beneficiaries enrolled in Part B of the Medicare Supplementary Medical Insurance (SMI) program beginning January 1, 2022. In addition, this notice announces the monthly premium for aged and disabled beneficiaries, the deductible for 2022, and the income-related monthly adjustment amounts to be paid by beneficiaries with modified adjusted gross income above certain threshold amounts. The monthly actuarial rates for 2022 are $334.20 for aged enrollees and $368.90 for disabled enrollees. The standard monthly Part B premium rate for all enrollees for 2022 is $170.10, which is equal to 50 percent of the monthly actuarial rate for aged enrollees (or approximately 25 percent of the expected average total cost of Part B coverage for aged enrollees) plus the $3.00 repayment amount required under current law. (The 2021 standard premium rate was $148.50, which included the $3.00 repayment amount.) The Part B deductible for 2022 is $233.00 for all Part B beneficiaries. (The 2021 Part B deductible was $203.00.) If a beneficiary has to pay an income-related monthly adjustment, he or she will have to pay a total monthly premium of about 35, 50, 65, 80, or 85 percent of the total cost of Part B coverage plus a repayment amount of $4.20, $6.00, $7.80, $9.60, or $10.20, respectively.

DATES: The premium and related amounts announced in this notice are effective on January 1, 2022.

FOR FURTHER INFORMATION CONTACT: M. Kent Clemens, (410) 786–6391.

SUPPLEMENTARY INFORMATION:

I. Background

Part B is the voluntary portion of the Medicare program that pays all or part of the costs for physicians' services; outpatient hospital services; certain home health services; services furnished by rural health clinics, ambulatory surgical centers, and comprehensive outpatient rehabilitation facilities; and certain other medical and health services not covered by Medicare Part A, Hospital Insurance. Medicare Part B is available to individuals who are entitled to Medicare Part A, as well as to U.S. residents who have attained age 65 and are citizens and to aliens who were lawfully admitted for permanent residence and have resided in the United States for 5 consecutive years. Part B requires enrollment and payment of monthly premiums, as described in 42 CFR part 407, subpart B, and part 408, respectively. The premiums paid by (or on behalf of) all enrollees fund approximately one-fourth of the total incurred costs, and transfers from the general fund of the Treasury pay approximately three-fourths of these costs.

The Secretary of the Department of Health and Human Services (the Secretary) is required by section 1839 of the Social Security Act (the Act) to announce the Part B monthly actuarial rates for aged and disabled beneficiaries as well as the monthly Part B premium. The Part B annual deductible is included because its determination is directly linked to the aged actuarial rate.

The monthly actuarial rates for aged and disabled enrollees are used to determine the correct amount of general revenue financing per beneficiary each month. These amounts, according to actuarial estimates, will equal, respectively, one-half of the expected average monthly cost of Part B for each aged enrollee (age 65 or over) and one-half of the expected average monthly cost of Part B for each disabled enrollee (under age 65).

The Part B deductible to be paid by enrollees is also announced. Prior to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173), the Part

B deductible was set in statute. After setting the 2005 deductible amount at $110, section 629 of the MMA (amending section 1833(b) of the Act) required that the Part B deductible be indexed beginning in 2006. The inflation factor to be used each year is the annual percentage increase in the Part B actuarial rate for enrollees age 65 and over. Specifically, the 2022 Part B deductible is calculated by multiplying the 2021 deductible by the ratio of the 2022 aged actuarial rate to the 2021 aged actuarial rate. The amount determined under this formula is then rounded to the nearest $1.

The monthly Part B premium rate to be paid by aged and disabled enrollees is also announced. (Although the costs to the program per disabled enrollee are different than for the aged, the statute provides that the two groups pay the same premium amount.) Beginning with the passage of section 203 of the Social Security Amendments of 1972 (Pub. L. 92–603), the premium rate, which was determined on a fiscal-year basis, was limited to the lesser of the actuarial rate for aged enrollees, or the current monthly premium rate increased by the same percentage as the most recent general increase in monthly Title II Social Security benefits.

However, the passage of section 124 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) suspended this premium determination process. Section 124 of TEFRA changed the premium basis to 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees). Section 606 of the Social Security Amendments of 1983 (Pub. L. 98–21), section 2302 of the Deficit Reduction Act of 1984 (DEFRA 84) (Pub. L. 98–369), section 9313 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 85) (Pub. L. 99–272), section 4080 of the Omnibus Budget Reconciliation Act of 1987 (OBRA 87) (Pub. L. 100–203), and section 6301 of the Omnibus Budget Reconciliation Act of 1989 (OBRA 89) (Pub. L. 101–239) extended the provision that the premium be based on 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees). This extension expired at the end of 1990.

The premium rate for 1991 through 1995 was legislated by section 1839(e)(1)(B) of the Act, as added by section 4301 of the Omnibus Budget Reconciliation Act of 1990 (OBRA 90) (Pub. L. 101–508). In January 1996, the premium determination basis would have reverted to the method established by the 1972 Social Security Act Amendments. However, section 13571 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93) (Pub. L. 103–66) changed the premium basis to 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees) for 1996 through 1998.

Section 4571 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) permanently extended the provision that the premium be based on 50 percent of the monthly actuarial rate for aged enrollees (that is, 25 percent of program costs for aged enrollees).

The BBA included a further provision affecting the calculation of the Part B actuarial rates and premiums for 1998 through 2003. Section 4611 of the BBA modified the home health benefit payable under Part A for individuals enrolled in Part B. Under this section, beginning in 1998, expenditures for home health services not considered ''post-institutional'' are payable under Part B rather than Part A. However, section 4611(e)(1) of the BBA required that there be a transition from 1998 through 2002 for the aggregate amount of the expenditures transferred from Part A to Part B. Section 4611(e)(2) of the BBA also provided a specific yearly proportion for the transferred funds. The proportions were one-sixth for 1998, one-third for 1999, one-half for 2000, two-thirds for 2001, and five-sixths for 2002. For the purpose of determining the correct amount of financing from general revenues of the Federal Government, it was necessary to include only these transitional amounts in the monthly actuarial rates for both aged and disabled enrollees, rather than the total cost of the home health services being transferred.

Section 4611(e)(3) of the BBA also specified, for the purpose of determining the premium, that the monthly actuarial rate for enrollees age 65 and over be computed as though the transition would occur for 1998 through 2003 and that one-seventh of the cost be transferred in 1998, two-sevenths in 1999, three-sevenths in 2000, four-sevenths in 2001, five-sevenths in 2002, and six-sevenths in 2003. Therefore, the transition period for incorporating this home health transfer into the premium was 7 years while the transition period for including these services in the actuarial rate was 6 years.

Section 811 of the MMA, which amended section 1839 of the Act, requires that, starting on January 1, 2007, the Part B premium a beneficiary pays each month be based on his or her annual income. Specifically, if a beneficiary's modified adjusted gross income is greater than the legislated threshold amounts (for 2022, $91,000 for a beneficiary filing an individual income tax return and $182,000 for a beneficiary filing a joint tax return), the beneficiary is responsible for a larger portion of the estimated total cost of Part B benefit coverage. In addition to the standard 25-percent premium, these beneficiaries now have to pay an income-related monthly adjustment amount. The MMA made no change to the actuarial rate calculation, and the standard premium, which will continue to be paid by beneficiaries whose modified adjusted gross income is below the applicable thresholds, still represents 25 percent of the estimated total cost to the program of Part B coverage for an aged enrollee. However, depending on income and tax filing status, a beneficiary can now be responsible for 35, 50, 65, 80, or 85 percent of the estimated total cost of Part B coverage, rather than 25 percent. Section 402 of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) (Pub. L. 114–10) modified the income thresholds beginning in 2018, and section 53114 of the Bipartisan Budget Act of 2018 (BBA of 2018) (Pub. L. 115–123) further modified the income thresholds beginning in 2019. For years beginning in 2019, the BBA of 2018 established a new income threshold. If a beneficiary's modified adjusted gross income is greater than or equal to $500,000 for a beneficiary filing an individual income tax return and $750,000 for a beneficiary filing a joint tax return, the beneficiary is responsible for 85 percent of the estimated total cost of Part B coverage. The BBA of 2018 specified that these new income threshold levels be inflation-adjusted beginning in 2028. The end result of the higher premium is that the Part B premium subsidy is reduced, and less general revenue financing is required, for beneficiaries with higher income because they are paying a larger share of the total cost with their premium. That is, the premium subsidy continues to be approximately 75 percent for beneficiaries with income below the applicable income thresholds, but it will be reduced for beneficiaries with income above these thresholds. The MMA specified that there be a 5-year transition period to reach full implementation of this provision. However, section 5111 of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171) modified the transition to a 3-year period.

Section 4732(c) of the BBA added section 1933(c) of the Act, which required the Secretary to allocate money from the Part B trust fund to the State

Medicaid programs for the purpose of providing Medicare Part B premium assistance from 1998 through 2002 for the low-income Medicaid beneficiaries who qualify under section 1933 of the Act. This allocation, while not a benefit expenditure, was an expenditure of the trust fund and was included in calculating the Part B actuarial rates through 2002. For 2003 through 2015, the expenditure was made from the trust fund because the allocation was temporarily extended. However, because the extension occurred after the financing was determined, the allocation was not included in the calculation of the financing rates for these years. Section 211 of MACRA permanently extended this expenditure, which is included in the calculation of the Part B actuarial rates for 2016 and subsequent years.

Another provision affecting the calculation of the Part B premium is section 1839(f) of the Act, as amended by section 211 of the Medicare Catastrophic Coverage Act of 1988 (MCCA 88) (Pub. L. 100–360). (The Medicare Catastrophic Coverage Repeal Act of 1989 (Pub. L. 101–234) did not repeal the revisions to section 1839(f) of the Act made by MCCA 88.) Section 1839(f) of the Act, referred to as the ''hold-harmless'' provision, provides that, if an individual is entitled to benefits under section 202 or 223 of the Act (the Old-Age and Survivors Insurance Benefit and the Disability Insurance Benefit, respectively) and has the Part B premium deducted from these benefit payments, the premium increase will be reduced, if necessary, to avoid causing a decrease in the individual's net monthly payment. This decrease in payment occurs if the increase in the individual's Social Security benefit due to the cost-of-living adjustment under section 215(i) of the Act is less than the increase in the premium. Specifically, the reduction in the premium amount applies if the individual is entitled to benefits under section 202 or 223 of the Act for November and December of a particular year and the individual's Part B premiums for December and the following January are deducted from the respective month's section 202 or 223 benefits. The hold-harmless provision does not apply to beneficiaries who are required to pay an income-related monthly adjustment amount.

A check for benefits under section 202 or 223 of the Act is received in the month following the month for which the benefits are due. The Part B premium that is deducted from a particular check is the Part B payment for the month in which the check is received. Therefore, a benefit check for November is not received until December, but December's Part B premium has been deducted from it.

Generally, if a beneficiary qualifies for hold-harmless protection, the reduced premium for the individual for that January and for each of the succeeding 11 months is the greater of either—

- The monthly premium for January reduced as necessary to make the December monthly benefits, after the deduction of the Part B premium for January, at least equal to the preceding November's monthly benefits, after the deduction of the Part B premium for December; or
- The monthly premium for that individual for that December.

In determining the premium limitations under section 1839(f) of the Act, the monthly benefits to which an individual is entitled under section 202 or 223 of the Act do not include retroactive adjustments or payments and deductions on account of work. Also, once the monthly premium amount is established under section 1839(f) of the Act, it will not be changed during the year even if there are retroactive adjustments or payments and deductions on account of work that apply to the individual's monthly benefits.

Individuals who have enrolled in Part B late or who have re-enrolled after the termination of a coverage period are subject to an increased premium under section 1839(b) of the Act. The increase is a percentage of the premium and is based on the new premium rate before any reductions under section 1839(f) of the Act are made.

Section 1839 of the Act, as amended by section 601(a) of the Bipartisan Budget Act of 2015 (Pub. L. 114–74), specified that the 2016 actuarial rate for enrollees age 65 and older be determined as if the hold-harmless provision did not apply. The premium revenue that was lost by using the resulting lower premium (excluding the forgone income-related premium revenue) was replaced by a transfer of general revenue from the Treasury, which will be repaid over time to the general fund.

Similarly, section 1839 of the Act, as amended by section 2401 of the Continuing Appropriations Act, 2021 and Other Extensions Act (Pub. L. 116–159), specified that the 2021 actuarial rate for enrollees age 65 and older be determined as the sum of the 2020 actuarial rate for enrollees age 65 and older and one-fourth of the difference between the 2020 actuarial rate and the preliminary 2021 actuarial rate (as determined by the Secretary) for such enrollees. The premium revenue lost by using the resulting lower premium (excluding the forgone income-related premium revenue) was replaced by a transfer of general revenue from the Treasury, which will be repaid over time.

Starting in 2016, in order to repay the balance due (which includes the transfer amounts and the forgone income-related premium revenue from the Bipartisan Budget Act of 2015 and the Continuing Appropriations Act, 2021 and Other Extensions Act), the Part B premium otherwise determined will be increased by $3.00. These repayment amounts will be added to the Part B premium otherwise determined each year and will be paid back to the general fund of the Treasury, and they will continue until the balance due is paid back.

High-income enrollees pay the $3 repayment amount plus an additional $1.20, $3.00, $4.80, $6.60, or $7.20 in repayment as part of the income-related monthly adjustment amount (IRMAA) premium dollars, which reduce (dollar for dollar) the amount of general revenue received by Part B from the general fund of the Treasury. Because of this general revenue offset, the repayment IRMAA premium dollars are not included in the direct repayments made to the general fund of the Treasury from Part B in order to avoid a double repayment. (Only the $3.00 monthly repayment amounts are included in the direct repayments).

These repayment amounts will continue until the balance due is zero. (In the final year of the repayment, the additional amounts may be modified to avoid an overpayment.) The repayment amounts (excluding those for high-income enrollees) are subject to the hold-harmless provision. The original balance due was $9,066,409,000, consisting of $1,625,761,000 in forgone income-related premium revenue plus a transfer amount of $7,440,648,000 from the provisions of the Bipartisan Budget Act of 2015. The increase in the balance due in 2021 was $8,799,829,000, consisting of $946,046,000 in forgone income-related premium income plus a transfer amount of $7,853,783,000 from the provisions of the Continuing Appropriations Act, 2021 and Other Extensions Act. An estimated $8,891,766,000 will have been collected for repayment to the general fund by the end of 2021.

II. Provisions of the Notice

A. Notice of Medicare Part B Monthly Actuarial Rates, Monthly Premium Rates, and Annual Deductible

The Medicare Part B monthly actuarial rates applicable for 2022 are $334.20 for enrollees age 65 and over and $368.90 for disabled enrollees under age 65. In section II.B. of this notice, we present the actuarial assumptions and bases from which these rates are derived. The Part B standard monthly premium rate for all enrollees for 2022 is $170.10.

The following are the 2022 Part B monthly premium rates to be paid by (or on behalf of) beneficiaries who file either individual tax returns (and are single individuals, heads of households, qualifying widows or widowers with dependent children, or married individuals filing separately who lived apart from their spouses for the entire taxable year) or joint tax returns.

Beneficiaries who file individual tax returns with modified adjusted gross income:	Beneficiaries who file joint tax returns with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	Less than or equal to $182,000	$0.00	$170.10
Greater than $91,000 and less than or equal to $114,000	Greater than $182,000 and less than or equal to $228,000	68.00	238.10
Greater than $114,000 and less than or equal to $142,000	Greater than $228,000 and less than or equal to $284,000	170.10	340.20
Greater than $142,000 and less than or equal to $170,000	Greater than $284,000 and less than or equal to $340,000	272.20	442.30
Greater than $170,000 and less than $500,000	Greater than $340,000 and less than $750,000	374.20	544.30
Greater than or equal to $500,000	Greater than or equal to $750,000	408.20	578.30

In addition, the monthly premium rates to be paid by (or on behalf of) beneficiaries who are married and lived with their spouses at any time during the taxable year, but who file separate tax returns from their spouses, are as follows:

Beneficiaries who are married and lived with their spouses at any time during the year, but who file separate tax returns from their spouses, with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	$0.00	$170.10
Greater than $91,000 and less than $409,000	374.20	544.30
Greater than or equal to $409,000	408.20	578.30

The Part B annual deductible for 2022 is $233.00 for all beneficiaries.

B. Statement of Actuarial Assumptions and Bases Employed in Determining the Monthly Actuarial Rates and the Monthly Premium Rate for Part B Beginning January 2022

The actuarial assumptions and bases used to determine the monthly actuarial rates and the monthly premium rates for Part B are established by the Centers for Medicare & Medicaid Services' Office of the Actuary. The estimates underlying these determinations are prepared by actuaries meeting the qualification standards and following the actuarial standards of practice established by the Actuarial Standards Board.

1. Actuarial Status of the Part B Account in the Supplementary Medical Insurance Trust Fund

Under section 1839 of the Act, the starting point for determining the standard monthly premium is the amount that would be necessary to finance Part B on an incurred basis. This is the amount of income that would be sufficient to pay for services furnished during that year (including associated administrative costs) even though payment for some of these services will not be made until after the close of the year. The portion of income required to cover benefits not paid until after the close of the year is added to the trust fund and used when needed.

Because the premium rates are established prospectively, they are subject to projection error. Additionally, legislation enacted after the financing was established, but effective for the period in which the financing is set, may affect program costs. As a result, the income to the program may not equal incurred costs. Trust fund assets must therefore be maintained at a level that is adequate to cover an appropriate degree of variation between actual and projected costs, and the amount of incurred, but unpaid, expenses. Numerous factors determine what level of assets is appropriate to cover variation between actual and projected costs. For 2022, the five most important of these factors are (1) the impact of the COVID–19 pandemic on program spending; (2) the impact on program spending of Aduhelm (aducanumab-avwa), the drug newly approved by the Food and Drug Administration (FDA) for treatment of Alzheimer's disease; (3) the difference from prior years between the actual performance of the program and estimates made at the time financing was established; (4) the likelihood and potential magnitude of expenditure changes resulting from enactment of legislation affecting Part B costs in a year subsequent to the establishment of financing for that year; and (5) the expected relationship between incurred and cash expenditures. The first two factors, the impacts of the pandemic and of Aduhelm on program spending, bring a higher-than-usual degree of uncertainty to projected costs for the 2022 Part B financing. The other three factors are analyzed on an ongoing basis, as the trends can vary over time.

Table 1 summarizes the estimated actuarial status of the trust fund as of the end of the financing period for 2020 and 2021.

TABLE 1—ESTIMATED ACTUARIAL STATUS OF THE PART B ACCOUNT IN THE SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND AS OF THE END OF THE FINANCING PERIOD

Financing period ending	Assets (in millions)	Liabilities [1] (in millions)	Assets less liabilities[1] (in millions)
December 31, 2020	$133,283	$42,000	$91,283

TABLE 1—ESTIMATED ACTUARIAL STATUS OF THE PART B ACCOUNT IN THE SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND AS OF THE END OF THE FINANCING PERIOD—Continued

Financing period ending	Assets (in millions)	Liabilities [1] (in millions)	Assets less liabilities[1] (in millions)
December 31, 2021	153,017	49,721	103,296

[1] These amounts include only items incurred but not paid. They do not include the amounts that are to be paid back to the general fund of the Treasury over time as specified by section 1839 of the Act as amended by section 601(a) of the Bipartisan Budget Act of 2015 and further amended by section 2401 of the Continuing Appropriations Act, 2021 and Other Extensions Act, or the Accelerated and Advance Payments Program amounts that are to be repaid by providers and returned to the general fund of the Treasury.

2. Monthly Actuarial Rate for Enrollees Age 65 and Older

The monthly actuarial rate for enrollees age 65 and older is one-half of the sum of monthly amounts for (1) the projected cost of benefits and (2) administrative expenses for each enrollee age 65 and older, after adjustments to this sum to allow for interest earnings on assets in the trust fund and an adequate contingency margin. The contingency margin is an amount appropriate to provide for possible variation between actual and projected costs and to amortize any surplus assets or unfunded liabilities.

The monthly actuarial rate for enrollees age 65 and older for 2022 is determined by first establishing per enrollee costs by type of service from program data through 2020 and then projecting these costs for subsequent years. The projection factors used for financing periods from January 1, 2019 through December 31, 2022 are shown in Table 2.

As indicated in Table 3, the projected per enrollee amount required to pay for one-half of the total of benefits and administrative costs for enrollees age 65 and over for 2022 is $317.68. Based on current estimates, the assets at the end of 2021 are not sufficient to cover the amount of incurred, but unpaid, expenses, to provide for substantial variation between actual and projected costs, and to accommodate the unusually high degree of uncertainty for program costs due to the drug Aduhelm and the COVID–19 pandemic. Thus, a positive contingency margin is needed to increase assets to a more appropriate level. The monthly actuarial rate of $334.20 provides an adjustment of $18.67 for a contingency margin and −$2.15 for interest earnings.

The contingency margin for 2022 is affected by several factors. First, as noted previously, Aduhelm is a drug newly approved by the FDA for the treatment of Alzheimer's disease. The annual cost per patient for a course of treatment is reported to be $56,000 for the drug plus the additional costs for the associated administration, diagnosis, testing, and monitoring. The program cost of potential Medicare coverage of Aduhelm would be paid from the Part B account of the Supplemental Medical Insurance Trust Fund. Depending on utilization, the potential costs for this course of treatment range from negligible to very significant. To ensure that Part B is able to pay claims in full and on time, the Part B financing must be sufficient to provide for a realistic high-cost scenario of Aduhelm coverage. The contingency margin has been increased to accommodate this risk.

Second, in order to take the uncertainty and potential impact of the COVID–19 pandemic into account, assumptions were developed for testing and treatment for COVID–19, utilization of non-COVID-related care, potential costs for COVID–19 vaccines, and possible paths of the pandemic. The Part B projected program costs were developed based on these assumptions and were included in the margin development.

Third, starting in 2011, manufacturers and importers of brand-name prescription drugs pay a fee that is allocated to the Part B account of the SMI trust. For 2022, the total of these brand-name drug fees are estimated to be $2.8 billion. The contingency margin for 2022 has been reduced to account for this additional revenue.

The traditional goal for the Part B reserve has been that assets minus liabilities at the end of a year should represent between 15 and 20 percent of the following year's total incurred expenditures. To accomplish this goal, a 17-percent reserve ratio, which is a fully adequate contingency reserve level, has been the normal target used to calculate the Part B premium. The financing rates for 2022 are set above the normal target due to the higher-than-usual uncertainty for 2022. The actuarial rate of $334.20 per month for aged beneficiaries, as announced in this notice for 2022, reflects the combined effect of the factors and legislation previously described and the projected assumptions listed in Table 2.

3. Monthly Actuarial Rate for Disabled Enrollees

Disabled enrollees are those persons under age 65 who are enrolled in Part B because of entitlement to Social Security disability benefits for more than 24 months or because of entitlement to Medicare under the end-stage renal disease (ESRD) program. Projected monthly costs for disabled enrollees (other than those with ESRD) are prepared in a manner parallel to the projection for the aged using appropriate actuarial assumptions (see Table 2). Costs for the ESRD program are projected differently because of the different nature of services offered by the program.

As shown in Table 4, the projected per enrollee amount required to pay for one-half of the total of benefits and administrative costs for disabled enrollees for 2022 is $389.63. The monthly actuarial rate of $368.90 also provides an adjustment of −$2.66 for interest earnings and −$18.07 for a contingency margin, reflecting the same factors and legislation described previously for the aged actuarial rate at magnitudes applicable to the disabled rate determination. Potential Medicare coverage of the drug Aduhelm is expected to have a negligible impact on program costs for disabled enrollees as the vast majority of the population with Alzheimer's disease is age 65 and older. Based on current estimates, the assets associated with the disabled Medicare beneficiaries at the end of 2021 are sufficient to cover the amount of incurred, but unpaid, expenses and to provide for a significant degree of variation between actual and projected costs.

The actuarial rate of $368.90 per month for disabled beneficiaries, as announced in this notice for 2022, reflects the combined net effect of the factors and legislation described previously for aged beneficiaries and the projection assumptions listed in Table 2.

4. Sensitivity Testing

Several factors contribute to uncertainty about future trends in medical care costs. It is appropriate to test the adequacy of the rates using alternative cost growth rate assumptions, the results of which are shown in Table 5. One set represents increases that are higher and, therefore, more pessimistic than the current estimate, and the other set represents increases that are lower and, therefore, more optimistic than the current estimate. The values for the alternative assumptions were determined from a statistical analysis of the historical variation in the respective increase factors. The historical variation may not be representative of the current level of uncertainty due to the COVID–19 pandemic and the Alzheimer's drug Aduhelm.

As indicated in Table 5, the monthly actuarial rates would result in an excess of assets over liabilities of $120,442 million by the end of December 2022 under the cost growth rate assumptions shown in Table 2 and under the assumption that the provisions of current law are fully implemented. This result amounts to 23.7 percent of the estimated total incurred expenditures for the following year.

Assumptions that are somewhat more pessimistic (and that therefore test the adequacy of the assets to accommodate projection errors) produce a surplus of $67,927 million by the end of December 2022 under current law, which amounts to 11.9 percent of the estimated total incurred expenditures for the following year. Under fairly optimistic assumptions, the monthly actuarial rates would result in a surplus of $198,532 million by the end of December 2022, or 44.6 percent of the estimated total incurred expenditures for the following year.

The sensitivity analysis indicates that, in a typical year, the premium and general revenue financing established for 2022, together with existing Part B account assets, would be adequate to cover estimated Part B costs for 2022 under current law, should actual costs prove to be somewhat greater than expected. However, the current level of uncertainty due to the pandemic and Aduhelm may differ from the historical variation included in this analysis.

5. Premium Rates and Deductible

As determined in accordance with section 1839 of the Act, the following are the 2022 Part B monthly premium rates to be paid by beneficiaries who file either individual tax returns (and are single individuals, heads of households, qualifying widows or widowers with dependent children, or married individuals filing separately who lived apart from their spouses for the entire taxable year) or joint tax returns.

Beneficiaries who file individual tax returns with modified adjusted gross income:	Beneficiaries who file joint tax returns with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	Less than or equal to $182,000	$0.00	$170.10
Greater than $91,000 and less than or equal to $114,000	Greater than $182,000 and less than or equal to $228,000	68.00	238.10
Greater than $114,000 and less than or equal to $142,000	Greater than $228,000 and less than or equal to $284,000	170.10	340.20
Greater than $142,000 and less than or equal to $170,000	Greater than $284,000 and less than or equal to $340,000	272.20	442.30
Greater than $170,000 and less than $500,000	Greater than $340,000 and less than $750,000	374.20	544.30
Greater than or equal to $500,000	Greater than or equal to $750,000	408.20	578.30

In addition, the monthly premium rates to be paid by beneficiaries who are married and lived with their spouses at any time during the taxable year, but who file separate tax returns from their spouses, are as follows:

Beneficiaries who are married and lived with their spouses at any time during the year, but who file separate tax returns from their spouses, with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	$0.00	$170.10
Greater than $91,000 and less than $409,000	374.20	544.30
Greater than or equal to $409,000	408.20	578.30

TABLE 2—PROJECTION FACTORS [1]

[12–Month periods ending December 31 of 2019–2022 (in percent)]

Calendar year (CY)	Physician fee schedule	Durable medical equipment	Carrier lab [2]	Physician-administered drugs	Other carrier services [3]	Outpatient hospital	Home health agency	Hospital lab [4]	Other intermediary services [5]	Managed care
Aged:										
2019	4.1	7.4	4.6	11.2	2.4	5.4	0.9	−3.5	5.7	8.1
2020	−11.3	2.7	8.1	4.2	−0.3	−7.8	−11.0	10.6	−5.0	8.6
2021	20.9	2.5	8.4	14.9	6.2	23.6	17.2	5.1	6.7	5.5
2022	−0.3	2.4	−5.8	11.5	4.3	9.2	4.3	−6.1	5.5	3.7
Disabled:										
2019	3.2	3.1	8.2	9.2	3.4	4.3	1.9	−1.7	10.5	8.1
2020	−8.3	−0.4	−7.2	9.2	8.4	−9.2	−11.1	9.6	−2.3	9.7
2021	16.8	1.1	8.1	16.9	2.4	18.5	23.3	6.6	12.8	5.6
2022	−0.1	2.6	−5.9	11.8	4.9	9.8	7.7	−6.1	8.2	3.8

[1] All values for services other than managed care are per fee-for-service enrollee. Managed care values are per managed care enrollee.
[2] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[3] Includes ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[4] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[5] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.

TABLE 3—DERIVATION OF MONTHLY ACTUARIAL RATE FOR ENROLLEES AGE 65 AND OVER FOR FINANCING PERIODS ENDING DECEMBER 31, 2019 THROUGH DECEMBER 31, 2022

	CY 2019	CY 2020	CY 2021	CY 2022
Covered services (at level recognized):				
Physician fee schedule	$73.10	$62.11	$70.96	$68.60
Durable medical equipment	6.32	6.21	6.02	5.98
Carrier lab [1]	4.35	4.51	4.62	4.22
Physician-administered drugs	17.37	17.34	20.68	24.56
Other carrier services [2]	9.29	8.87	8.91	9.01
Outpatient hospital	50.83	44.89	52.46	55.52
Home health agency	8.70	7.41	8.21	8.30
Hospital lab [3]	2.04	2.16	2.15	1.95
Other intermediary services [4]	19.12	17.40	17.55	17.94
Managed care	113.35	130.43	147.20	157.93
Total services	304.47	301.33	338.75	354.02
Cost sharing:				
Deductible	−6.32	−6.75	−6.93	−7.94
Coinsurance	−28.74	−25.73	−29.74	−26.06
Sequestration of benefits	−5.38	−1.79	0.00	−6.31
Total benefits	264.02	267.06	302.08	313.70
Administrative expenses	4.11	4.40	4.33	3.98
Incurred expenditures	268.14	271.46	306.41	317.68
Value of interest	−1.89	−1.33	−1.64	−2.15
Contingency margin for projection error and to amortize the surplus or deficit [5]	−1.35	13.07	−13.77	18.67
Monthly actuarial rate	264.90	283.20	291.00	334.20

[1] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[2] Includes ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[3] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[4] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.
[5] The significant negative margin included in the 2021 actuarial rate is attributable to the application of the provisions of the Continuing Appropriations Act, 2021 and Other Extensions Act.

TABLE 4—DERIVATION OF MONTHLY ACTUARIAL RATE FOR DISABLED ENROLLEES FOR FINANCING PERIODS ENDING DECEMBER 31, 2019 THROUGH DECEMBER 31, 2022

	CY 2019	CY 2020	CY 2021	CY 2022
Covered services (at level recognized):				
Physician fee schedule	$72.64	$62.39	$67.69	$62.92
Durable medical equipment	12.00	11.06	10.29	9.78
Carrier lab [1]	6.00	5.34	5.33	4.65
Physician-administered drugs	15.49	15.58	18.59	20.15
Other carrier services [2]	12.37	12.42	11.81	11.52
Outpatient hospital	65.12	54.88	60.42	61.44
Home health agency	6.83	5.61	6.35	6.32
Hospital lab [3]	2.48	2.54	2.51	2.19
Other intermediary services [4]	53.01	49.88	48.04	49.64
Managed care	124.51	151.94	179.62	202.67
Total services	370.42	371.64	410.66	431.27
Cost sharing:				
Deductible	−6.15	−6.56	−6.75	−7.73
Coinsurance	−41.62	−37.05	−39.25	−33.68
Sequestration of benefits	−6.45	−2.19	0.00	−7.74
Total benefits	316.21	325.84	364.65	382.12
Administrative expenses	4.93	5.37	7.39	7.51
Incurred expenditures	321.14	331.21	372.04	389.63
Value of interest	−2.52	−1.65	−2.04	−2.66
Contingency margin for projection error and to amortize the surplus or deficit [5]	−3.21	14.04	−20.10	−18.07
Monthly actuarial rate	315.40	343.60	349.90	368.90

[1] Includes services paid under the lab fee schedule furnished in the physician's office or an independent lab.
[2] Includes ambulatory surgical center facility costs, ambulance services, parenteral and enteral drug costs, supplies, etc.
[3] Includes services paid under the lab fee schedule furnished in the outpatient department of a hospital.
[4] Includes services furnished in dialysis facilities, rural health clinics, federally qualified health centers, rehabilitation and psychiatric hospitals, etc.

[5] The significant negative margin included in the 2021 actuarial rate is attributable to the application of the provisions of the Continuing Appropriations Act, 2021 and Other Extensions Act.

TABLE 5—ACTUARIAL STATUS OF THE PART B ACCOUNT IN THE SMI TRUST FUND UNDER THREE SETS OF ASSUMPTIONS FOR FINANCING PERIODS THROUGH DECEMBER 31, 2022

As of December 31,	2020	2021	2022
Actuarial status (in millions):			
Assets	$133,283	$153,017	$170,553
Liabilities	$42,000	$49,721	$50,111
Assets less liabilities	$91,283	$103,296	$120,442
Ratio [1]	20.7%	22.0%	23.7%
Low-cost projection:			
Actuarial status (in millions):			
Assets	$133,283	$176,208	$246,751
Liabilities	$42,000	$47,145	$48,220
Assets less liabilities	$91,283	$129,064	$198,532
Ratio [1]	22.0%	30.4%	44.6%
High-cost projection:			
Actuarial status (in millions):			
Assets	$133,283	$132,266	$120,112
Liabilities	$42,000	$52,027	$52,186
Assets less liabilities	$91,283	$80,239	$67,927
Ratio [1]	19.7%	15.6%	11.9%

[1] Ratio of assets less liabilities at the end of the year to the total incurred expenditures during the following year, expressed as a percent.

III. Collection of Information Requirements

This document does not impose information collection requirements—that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

IV. Regulatory Impact Analysis

A. Statement of Need

This notice announces the Part B monthly actuarial rates and premium rates, as required by Section 1839(a) of the Act, and the Part B annual deductible, as required by Section 1833(b) of the Act, for beneficiaries enrolled in Part B of the Medicare Supplementary Medical Insurance (SMI) program, effective January 1, 2022. Section 1839(a)(1) of the Act requires the Secretary to provide for publication of these amounts in the **Federal Register** during the September that precedes the start of each CY. As section 1839 of the Act prescribes a detailed methodology for calculating these amounts, we do not have the discretion to adopt an alternative approach on these issues.

B. Overall Impact

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a notice/rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules or other regulatory documents with economically significant effects ($100 million or more in any one year). Based on our estimates, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs has determined this rulemaking is ''economically significant'' as measured by the $100 million threshold. The 2022 standard Part B premium of $170.10 is $21.60 higher than the 2021 premium of $148.50. We estimate that the total premium increase, for the approximately 60 million Part B enrollees in 2022, will be $15.5 billion, which is an annual effect on the economy of $100 million or more. As a result, this notice is economically significant under section 3(f)(1) of Executive Order 12866 and is a major action as defined under the Congressional Review Act (5 U.S.C. 804(2)).

C. Detailed Economic Analysis

As discussed earlier, this notice announces that the monthly actuarial rates applicable for 2022 are $334.20 for enrollees age 65 and over and $368.90 for disabled enrollees under age 65. It also announces the 2022 monthly Part B premium rates to be paid by beneficiaries who file either individual tax returns (and are single individuals, heads of households, qualifying widows or widowers with dependent children, or married individuals filing separately who lived apart from their spouses for the entire taxable year) or joint tax returns.

Beneficiaries who file individual tax returns with modified adjusted gross income:	Beneficiaries who file joint tax returns with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	Less than or equal to $182,000	$0.00	$170.10
Greater than $91,000 and less than or equal to $114,000	Greater than $182,000 and less than or equal to $228,000	68.00	238.10
Greater than $114,000 and less than or equal to $142,000	Greater than $228,000 and less than or equal to $284,000	170.10	340.20
Greater than $142,000 and less than or equal to $170,000	Greater than $284,000 and less than or equal to $340,000	272.20	442.30
Greater than $170,000 and less than $500,000	Greater than $340,000 and less than $750,000	374.20	544.30
Greater than or equal to $500,000	Greater than or equal to $750,000	408.20	578.30

In addition, the monthly premium rates to be paid by beneficiaries who are married and lived with their spouses at any time during the taxable year, but who file separate tax returns from their spouses, are also announced and listed in the following chart:

Beneficiaries who are married and lived with their spouses at any time during the year, but who file separate tax returns from their spouses, with modified adjusted gross income:	Income-related monthly adjustment amount	Total monthly premium amount
Less than or equal to $91,000	$0.00	$170.10
Greater than $91,000 and less than $409,000	374.20	544.30
Greater than or equal to $409,000	408.20	578.30

D. Accounting Statement and Table

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in Table 6 we have prepared an accounting statement showing the estimated aggregate Part B premium increase for all enrollees in 2022.

TABLE 6—ACCOUNTING STATEMENT

[The estimated aggregate Part B premium increase for all enrollees for 2022]

Estimated Aggregate Part B Premium Increase for All Enrollees for 2022	
Category	
Annualized Monetized Transfers.	$15.5 billion.
From Whom to Whom?	Beneficiaries to Federal Government.

E. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule or other regulatory document has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Individuals and States are not included in the definition of a small entity. This notice announces the monthly actuarial rates for aged (age 65 and over) and disabled (under 65) beneficiaries enrolled in Part B of the Medicare SMI program beginning January 1, 2022. Also, this notice announces the monthly premium for aged and disabled beneficiaries as well as the income-related monthly adjustment amounts to be paid by beneficiaries with modified adjusted gross income above certain threshold amounts. As a result, we are not preparing an analysis for the RFA because the Secretary has determined that this notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule or other regulatory document may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. As we discussed previously, we are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this notice will not have a significant effect on a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. Part B enrollees who are also enrolled in Medicaid have their monthly Part B premiums paid by Medicaid. The cost to each State Medicaid program from the 2022 premium increase is estimated to be more than the threshold. This notice does impose mandates that will have a consequential effect of the threshold amount or more on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a proposed rule or other regulatory document (and subsequent final rule or other regulatory document) that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has federalism implications. We have determined that this notice does not significantly affect the rights, roles, and responsibilities of States. Accordingly, the requirements of Executive Order 13132 do not apply to this notice.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment prior to a rule taking effect in accordance with section 1871 of the Act and section 553(b) of the Administrative Procedure Act (APA). Section 1871(a)(2) of the Act provides that no rule, requirement, or other statement of policy (other than a national coverage

determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under Medicare shall take effect unless it is promulgated through notice and comment rulemaking. Unless there is a statutory exception, section 1871(b)(1) of the Act generally requires the Secretary of the Department of Health and Human Services (the Secretary) to provide for notice of a proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment before establishing or changing a substantive legal standard regarding the matters enumerated by the statute. Similarly, under 5 U.S.C. 553(b) of the APA, the agency is required to publish a notice of proposed rulemaking in the **Federal Register** before a substantive rule takes effect. Section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act usually require a 30-day delay in effective date after issuance or publication of a rule, subject to exceptions. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the advance notice and comment requirement and the delay in effective date requirements. Sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act also provide exceptions from the notice and 60-day comment period and the 30-day delay in effective date. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act expressly authorize an agency to dispense with notice and comment rulemaking for good cause if the agency makes a finding that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest.

The annual updated amounts for the Part B monthly actuarial rates for aged and disabled beneficiaries, the Part B premium, and the Part B deductible set forth in this notice do not establish or change a substantive legal standard regarding the matters enumerated by the statute or constitute a substantive rule that would be subject to the notice requirements in section 553(b) of the APA. However, to the extent that an opportunity for public notice and comment could be construed as required for this notice, we find good cause to waive this requirement.

Section 1839 of the Act requires the Secretary to determine the monthly actuarial rates for aged and disabled beneficiaries, as well as the monthly Part B premium (including the income-related monthly adjustment amounts to be paid by beneficiaries with modified adjusted gross income above certain threshold amounts), for each calendar year in accordance with the statutory formulae, in September preceding the year to which they will apply. Further, the statute requires that the agency promulgate the Part B premium amount, in September preceding the year to which it will apply, and include a public statement setting forth the actuarial assumptions and bases employed by the Secretary in arriving at the amount of an adequate actuarial rate for enrollees age 65 and older. We include the Part B annual deductible, which is established in accordance with a specific formula described in section 1833(b) of the Act, because the determination of the amount is directly linked to the rate of increase in actuarial rate under section 1839(a)(1) of the Act. We have calculated the monthly actuarial rates for aged and disabled beneficiaries, the Part B deductible, and the monthly Part B premium as directed by the statute; since the statute establishes both when the monthly actuarial rates for aged and disabled beneficiaries and the monthly Part B premium must be published and the information that the Secretary must factor into those amounts, we do not have any discretion in that regard. We find notice and comment procedures to be unnecessary for this notice and we find good cause to waive such procedures under section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act, if such procedures may be construed to be required at all. Through this notice, we are simply notifying the public of the updates to the monthly actuarial rates for aged and disabled beneficiaries and the Part B deductible, as well as the monthly Part B premium amounts and the income-related monthly adjustment amounts to be paid by certain beneficiaries, in accordance with the statute, for CY 2022. As such, we also note that even if notice and comment procedures were required for this notice, we would find good cause, for the previously stated reason, to waive the delay in effective date of the notice, as additional delay would be contrary to the public interest under section 1871(e)(1)(B)(ii) of the Act. Publication of this notice is consistent with section 1839 of the Act, and we believe that any potential delay in the effective date of the notice, if such delay were required at all, could cause unnecessary confusion for both the agency and Medicare beneficiaries.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on November 10, 2021.

Dated: November 12, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–25050 Filed 11–12–21; 5:00 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8078–N]

RIN 0938–AU47

Medicare Program; CY 2022 Part A Premiums for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces Medicare's Hospital Insurance Program (Medicare Part A) premium for uninsured enrollees in calendar year 2022. This premium is paid by enrollees age 65 and over who are not otherwise eligible for benefits under Medicare Part A (hereafter known as the ''uninsured aged'') and by certain individuals with disabilities who have exhausted other entitlement. The monthly Medicare Part A premium for the 12 months beginning January 1, 2022 for these individuals will be $499. The premium for certain other individuals as described in this notice will be $274.

DATES: The premium announced in this notice is effective on January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Yaminee Thaker, (410) 786–7921.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1818 of the Social Security Act (the Act) provides for voluntary enrollment in the Medicare Hospital Insurance Program (Medicare Part A), subject to payment of a monthly premium, of certain persons aged 65 and older who are uninsured under the Old-Age, Survivors, and Disability Insurance (OASDI) program or the Railroad Retirement Act and do not otherwise meet the requirements for entitlement to Medicare Part A. These ''uninsured aged'' individuals are uninsured under the OASDI program or the Railroad Retirement Act, because they do not have 40 quarters of coverage under Title II of the Act (or are/were not married to someone who did). (Persons insured under the OASDI program or

the Railroad Retirement Act and certain others do not have to pay premiums for Medicare Part A.)

Section 1818A of the Act provides for voluntary enrollment in Medicare Part A, subject to payment of a monthly premium for certain individuals with disabilities who have exhausted other entitlement. These are individuals who were entitled to coverage due to a disabling impairment under section 226(b) of the Act, but who are no longer entitled to disability benefits and premium-free Medicare Part A coverage because they have gone back to work and their earnings exceed the statutorily defined ''substantial gainful activity'' amount (section 223(d)(4) of the Act).

Section 1818A(d)(2) of the Act specifies that the provisions relating to premiums under section 1818(d) through section 1818(f) of the Act for the aged will also apply to certain individuals with disabilities as described above.

Section 1818(d)(1) of the Act requires us to estimate, on an average per capita basis, the amount to be paid from the Federal Hospital Insurance Trust Fund for services incurred in the upcoming calendar year (CY) (including the associated administrative costs) on behalf of individuals aged 65 and over who will be entitled to benefits under Medicare Part A. We must then determine the monthly actuarial rate for the following year (the per capita amount estimated above divided by 12) and publish the dollar amount for the monthly premium in the succeeding CY. If the premium is not a multiple of $1, the premium is rounded to the nearest multiple of $1 (or, if it is a multiple of 50 cents but not of $1, it is rounded to the next highest $1).

Section 13508 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66) amended section 1818(d) of the Act to provide for a reduction in the premium amount for certain voluntary enrollees (sections 1818 and 1818A of the Act). The reduction applies to an individual who is eligible to buy into the Medicare Part A program and who, as of the last day of the previous month:

- Had at least 30 quarters of coverage under Title II of the Act;
- Was married, and had been married for the previous 1-year period, to a person who had at least 30 quarters of coverage;
- Had been married to a person for at least 1 year at the time of the person's death if, at the time of death, the person had at least 30 quarters of coverage; or
- Is divorced from a person and had been married to the person for at least 10 years at the time of the divorce if, at the time of the divorce, the person had at least 30 quarters of coverage.

Section 1818(d)(4)(A) of the Act specifies that the premium that these individuals will pay for CY 2022 will be equal to the premium for uninsured aged enrollees reduced by 45 percent.

Section 1818(g) of the Act requires the Secretary of the Department of Health and Human Services (the Secretary), at the request of a state, to enter into a Medicare Part A buy-in agreement with a state to pay Medicare Part A premiums for Qualified Medicare Beneficiaries (QMBs). Under the QMB program, state Medicaid agencies must pay the Medicare Part A premium for those not eligible for premium-free Medicare Part A if those individuals meet all of the eligibility requirements for the QMB program under the state's Medicaid state plan. (Entering into a Medicare Part A buy-in agreement would permit a state to avoid any Medicare Part A late enrollment penalties that the individual may owe and would allow states to enroll persons in Medicare Part A at any time of the year, without regard to Medicare enrollment periods.) Other individuals may be eligible for the Qualified Disabled Working Individuals program, through which state Medicaid programs provide coverage for the Medicare Part A premiums of individuals eligible to enroll in Medicare Part A by virtue of section 1818A of the Act who meet certain financial eligibility criteria.

II. Monthly Premium Amount for CY 2022

The monthly premium for the uninsured aged and certain individuals with disabilities who have exhausted other entitlement for the 12 months beginning January 1, 2022, is $499. The monthly premium for the individuals eligible under section 1818(d)(4)(B) of the Act, and therefore, subject to the 45 percent reduction in the monthly premium, is $274.

III. Monthly Premium Rate Calculation

As discussed in section I of this notice, the monthly Medicare Part A premium is equal to the estimated monthly actuarial rate for CY 2022 rounded to the nearest multiple of $1 and equals one-twelfth of the average per capita amount, which is determined by projecting the number of Medicare Part A enrollees aged 65 years and over, as well as the benefits and administrative costs that will be incurred on their behalf.

The steps involved in projecting these future costs to the Federal Hospital Insurance Trust Fund are:

- Establishing the present cost of services furnished to beneficiaries, by type of service, to serve as a projection base;
- Projecting increases in payment amounts for each of the service types; and
- Projecting increases in administrative costs.

We base our projections for CY 2022 on—(1) current historical data; and (2) projection assumptions derived from current law and the President's Fiscal Year 2022 Budget.

For CY 2022, we estimate that 55,776,099 people aged 65 years and over will be entitled to (enrolled in) benefits (without premium payment) and that they will incur about $334.180 billion in benefits and related administrative costs. Thus, the estimated monthly average per capita amount is $499.29 and the monthly premium is $499. Subsequently, the full monthly premium reduced by 45 percent is $274.

IV. Costs to Beneficiaries

The CY 2022 premium of $499 is approximately 5.9 percent higher than the CY 2021 premium of $471. We estimate that approximately 721,000 enrollees will voluntarily enroll in Medicare Part A by paying the full premium. We estimate that over 90 percent of these individuals will have their Medicare Part A premium paid for by states, since they are enrolled in the QMB program. Furthermore, the CY 2022 reduced premium of $274 is approximately 5.8 percent higher than the CY 2021 premium of $259. We estimate an additional 87,000 enrollees will pay the reduced premium. Therefore, we estimate that the total aggregate cost to enrollees paying these premiums in CY 2022, compared to the amount that they paid in CY 2021, will be about $258 million.

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment prior to a rule taking effect in accordance with section 1871 of the Act and section 553(b) of the Administrative Procedure Act (APA). Section 1871(a)(2) of the Act provides that no rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under Medicare shall take effect unless it is promulgated through notice and

comment rulemaking. Unless there is a statutory exception, section 1871(b)(1) of the Act generally requires the Secretary to provide for notice of a proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment before establishing or changing a substantive legal standard regarding the matters enumerated by the statute. Similarly, under 5 U.S.C. 553(b) of the APA, the agency is required to publish a notice of proposed rulemaking in the **Federal Register** before a substantive rule takes effect. Section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act usually require a 30-day delay in effective date after issuance or publication of a rule, subject to exceptions. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the advance notice and comment requirement and the delay in effective date requirements. Sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act also provide exceptions from the notice and 60-day comment period and the 30-day delay in effective date. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act expressly authorize an agency to dispense with notice and comment rulemaking for good cause if the agency makes a finding that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest.

The annual Medicare Part A premium announcement set forth in this notice does not establish or change a substantive legal standard regarding the matters enumerated by the statute or constitute a substantive rule which would be subject to the notice requirements in section 553(b) of the APA. However, to the extent that an opportunity for public notice and comment could be construed as required for this notice, we find good cause to waive this requirement.

Section 1818(d) of the Act requires the Secretary during September of each year to determine and publish the amount to be paid, on an average per capita basis, from the Federal Hospital Insurance Trust Fund for services incurred in the impending CY (including the associated administrative costs) on behalf of individuals aged 65 and over who will be entitled to benefits under Medicare Part A. Further, the statute requires that the agency determine the applicable premium amount for each CY in accordance with the statutory formula, and we are simply notifying the public of the changes to the Medicare Part A premiums for CY 2022. We have calculated the Medicare Part A premiums as directed by the statute; the statute establishes both when the premium amounts must be published and the information that the Secretary must factor into the premium amounts, so we do not have any discretion in that regard. We find notice and comment procedures to be unnecessary for this notice and we find good cause to waive such procedures under section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act, if such procedures may be construed to be required at all. Through this notice, we are simply notifying the public of the updates to the Medicare Part A premiums, in accordance with the statute, for CY 2022. As such, we also note that even if notice and comment procedures were required for this notice, for the reasons stated above, we would find good cause to waive the delay in effective date of the notice, as additional delay would be contrary to the public interest under section 1871(e)(1)(B)(ii) of the Act. Publication of this notice is consistent with section 1818(d) of the Act, and we believe that any potential delay in the effective date of the notice, if such delay were required at all, could cause unnecessary confusion both for the agency and Medicare beneficiaries.

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VII. Regulatory Impact Analysis

Although this notice does not constitute a substantive rule, we nevertheless prepared this Regulatory Impact Analysis section in the interest of ensuring that the impacts of this notice are fully understood.

A. Statement of Need

This notice announces the CY 2022 Medicare Part A premiums for the uninsured aged and for certain disabled individuals who have exhausted other entitlement, as required by section 1818 and 1818A of the Act. It also responds to section 1818(d) of the Act, which requires the Secretary to provide for publication of these amounts in the **Federal Register** during the September that precedes the start of each CY. As this statutory provision prescribes a detailed methodology for calculating these amounts, we do not have the discretion to adopt an alternative approach on these issues.

B. Overall Impact

We have examined the impacts of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). Although we do not consider this notice to constitute a substantive rule, based on our estimates, OMB's Office of Information and Regulatory Affairs has determined this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). As stated in section IV of this notice, we estimate that the overall

effect of the changes in the Medicare Part A premium will be a cost to voluntary enrollees (sections 1818 and 1818A of the Act) of about $258 million.

C. Accounting Statement and Table

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in the Table below, we have prepared an accounting statement showing the total aggregate cost to enrollees paying premiums in CY 2022, compared to the amount that they paid in CY 2021. This amount will be about $258 million. As stated in section IV of this notice, the CY 2022 premium of $499 is approximately 5.9 percent higher than the CY 2021 premium of $471. We estimate that approximately 721,000 enrollees will voluntarily enroll in Medicare Part A by paying the full premium. We estimate that over 90 percent of these individuals will have their Medicare Part A premium paid for by states, since they are enrolled in the QMB program. Furthermore, the CY 2022 reduced premium of $274 is approximately 5.8 percent higher than the CY 2021 premium of $259.

TABLE—ESTIMATED TRANSFERS FOR CY 2022 MEDICARE PART A PREMIUMS

Category	Transfers
Annualized Monetized Transfers.	$258 million.
From Whom to Whom	Beneficiaries to Federal Government.

D. Regulatory Flexibility Act

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration's definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). Individuals and states are not included in the definition of a small entity. This annual notice announces the Medicare Part A premiums for CY 2022 and will have an impact on certain Medicare beneficiaries. As a result, we are not preparing an analysis for the RFA because the Secretary has certified that this notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This annual notice announces the Medicare Part A premiums for CY 2022 and will have an impact on certain Medicare beneficiaries. As a result, we are not preparing an analysis for section 1102(b) of the Act, because the Secretary has certified that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. This notice does not impose mandates that will have a consequential effect of $158 million or more on state, local, or tribal governments or on the private sector.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. This notice will not have a substantial direct effect on state or local governments, preempt state law, or otherwise have federalism implications.

G. Congressional Review

This final action is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to the Congress and the Comptroller General for review.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on November 10, 2021.

Dated: November 12, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–25052 Filed 11–12–21; 5:00 pm]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–8077–N]

RIN 0938–AU46

Medicare Program; CY 2022 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces the inpatient hospital deductible and the hospital and extended care services coinsurance amounts for services furnished in calendar year (CY) 2022 under Medicare's Hospital Insurance Program (Medicare Part A). The Medicare statute specifies the formulae used to determine these amounts. For CY 2022, the inpatient hospital deductible will be $1,556. The daily coinsurance amounts for CY 2022 will be: $389 for the 61st through 90th day of hospitalization in a benefit period; $778 for lifetime reserve days; and $194.50 for the 21st through 100th day of extended care services in a skilled nursing facility in a benefit period.

DATES: The deductible and coinsurance amounts announced in this notice are effective on January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Yaminee Thaker, (410) 786–7921 for general information and case mix analysis.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1813 of the Social Security Act (the Act) provides for an inpatient hospital deductible to be subtracted from the amount payable by Medicare for inpatient hospital services furnished to a beneficiary. It also provides for certain coinsurance amounts to be subtracted from the amounts payable by Medicare for inpatient hospital and extended care services. Section 1813(b)(2) of the Act requires the Secretary of the Department of Health and Human Services (the Secretary) to determine and publish each year the

amount of the inpatient hospital deductible and the hospital and extended care services coinsurance amounts applicable for services furnished in the following calendar year (CY).

II. Computing the Inpatient Hospital Deductible for CY 2022

Section 1813(b) of the Act prescribes the method for computing the amount of the inpatient hospital deductible. The inpatient hospital deductible is an amount equal to the inpatient hospital deductible for the preceding CY, adjusted by our best estimate of the payment-weighted average of the applicable percentage increases (as defined in section 1886(b)(3)(B) of the Act) used for updating the payment rates to hospitals for discharges in the fiscal year (FY) that begins on October 1 of the same preceding CY, and adjusted to reflect changes in real case-mix. The adjustment to reflect real case-mix is determined on the basis of the most recent case-mix data available. The amount determined under this formula is rounded to the nearest multiple of $4 (or, if midway between two multiples of $4, to the next higher multiple of $4).

Under section 1886(b)(3)(B)(i)(XX) of the Act, the percentage increase used to update the payment rates for FY 2022 for hospitals paid under the inpatient prospective payment system is the market basket percentage increase, otherwise known as the market basket update, reduced by an adjustment based on changes in the economy-wide productivity (the multifactor productivity (MFP) adjustment) (see section 1886(b)(3)(B)(xi)(II) of the Act). Under section 1886(b)(3)(B)(viii) of the Act, for FY 2022, the applicable percentage increase for hospitals that do not submit quality data as specified by the Secretary is reduced by one quarter of the market basket update. We are estimating that after accounting for those hospitals receiving the lower market basket update in the payment-weighted average update, the calculated deductible will not be affected, since the majority of hospitals submit quality data and receive the full market basket update. Section 1886(b)(3)(B)(ix) of the Act requires that any hospital that is not a meaningful electronic health record (EHR) user (as defined in section 1886(n)(3) of the Act) will have three-quarters of the market basket update reduced by 100 percent for FY 2017 and each subsequent FY. We are estimating that after accounting for these hospitals receiving the lower market basket update, the calculated deductible will not be affected, since the majority of hospitals are meaningful EHR users and are expected to receive the full market basket update.

Under section 1886 of the Act, the percentage increase used to update the payment rates (or target amounts, as applicable) for FY 2022 for hospitals excluded from the inpatient prospective payment system is as follows:

- The percentage increase for long term care hospitals is the market basket percentage increase reduced by the MFP adjustment (see section 1886(m)(3)(A) of the Act). In addition, these hospitals may also be impacted by the quality reporting adjustments and the site-neutral payment rates (see sections 1886(m)(5) and 1886(m)(6) of the Act).
- The percentage increase for inpatient rehabilitation facilities is the market basket percentage increase reduced by a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act. In addition, these hospitals may also be impacted by the quality reporting adjustments (see section 1886(j)(7) of the Act).
- The percentage increase used to update the payment rate for inpatient psychiatric facilities is the market basket percentage increase reduced by the MFP adjustment (see section 1886(s)(2)(A)(i) of the Act). In addition, these hospitals may also be impacted by the quality reporting adjustments (see section 1886(s)(4) of the Act).
- The percentage increase used to update the target amounts for other types of hospitals that are excluded from the inpatient prospective payment system and that are paid on a reasonable cost basis, subject to a rate-of-increase ceiling, is the inpatient prospective payment system operating market basket percentage increase, which is described at section 1886(b)(3)(B)(ii)(VIII) of the Act and 42 CFR 413.40(c)(3). These other types of hospitals include cancer hospitals, children's hospitals, extended neoplastic disease care hospitals, and hospitals located outside the 50 states, the District of Columbia, and Puerto Rico.

The inpatient prospective payment system market basket percentage increase for FY 2022 is 2.7 percent and the MFP adjustment is 0.7 percentage point, as announced in the final rule that appeared in the **Federal Register** on August 13, 2021, entitled, ''Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2022 Rates; Quality Programs and Medicare Promoting Interoperability Programs Requirements for Eligible Hospitals and Critical Access Hospitals; Changes to Medicaid Provider Enrollment; and Changes to the Medicare Shared Savings Programs'' (86 FR 45613). Therefore, the percentage increase for hospitals paid under the inpatient prospective payment system that submit quality data and are meaningful EHR users is 2.0 percent (that is, the FY 2022 market basket update of 2.7 percent less the MFP adjustment of 0.7 percentage point). The average payment percentage increase for hospitals excluded from the inpatient prospective payment system is 2.07 percent. This average includes long term care hospitals, inpatient rehabilitation facilities, and other hospitals excluded from the inpatient prospective payment system. Weighting these percentages in accordance with payment volume, our best estimate of the payment-weighted average of the increases in the payment rates for FY 2022 is 2.01 percent.

To develop the adjustment to reflect changes in real case-mix, we first calculated an average case-mix for each hospital that reflects the relative costliness of that hospital's mix of cases compared to those of other hospitals. We then computed the change in average case-mix for hospitals paid under the Medicare inpatient prospective payment system in FY 2021 compared to FY 2020. (We excluded from this calculation hospitals whose payments are not based on the inpatient prospective payment system because their payments are based on alternate prospective payment systems or reasonable costs.) We used Medicare bills from prospective payment hospitals that we received as of August 2021. These bills represent a total of about 6.4 million Medicare discharges for FY 2021 and provide the most recent case-mix data available at this time. Based on these bills, the change in average case-mix in FY 2021 is 2.9 percent. Based on these bills and past experience, we expect the overall case mix change to be 2.9 percent as the year progresses and more FY 2021 data become available.

Section 1813 of the Act requires that the inpatient hospital deductible be adjusted only by that portion of the case mix change that is determined to be real. Real case-mix is that portion of case-mix that is due to changes in the mix of cases in the hospital and not due to coding optimization. COVID–19 has complicated the determination of real case-mix increase. COVID 19 cases typically have higher-weighted MS DRGs which would cause a real increase in case-mix while hospitals have experienced a reduction in lower-weighted cases which would also cause a real increase in case-mix. In addition, care that was deferred in 2020 could be

more costly in 2021 causing an increase in real case-mix. Due to the uncertainty we are assuming that all of the recently observed care is not due to coding optimization and hence all of the 2.9 percent is real.

Thus, the estimate of the payment-weighted average of the applicable percentage increases used for updating the payment rates is 2.01 percent, and the real case-mix adjustment factor for the deductible is 2.9 percent. Therefore, using the statutory formula as stated in section 1813(b) of the Act, we calculate the inpatient hospital deductible for services furnished in CY 2022 to be $1,556. This deductible amount is determined by multiplying $1,484 (the inpatient hospital deductible for CY 2021 (85 FR 71916)) by the payment-weighted average increase in the payment rates of 1.0201 multiplied by the increase in real case-mix of 1.029, which equals $1,558 and is rounded to $1,556.

III. Computing the Inpatient Hospital and Extended Care Services Coinsurance Amounts for CY 2022

The coinsurance amounts provided for in section 1813 of the Act are defined as fixed percentages of the inpatient hospital deductible for services furnished in the same CY. The increase in the deductible generates increases in the coinsurance amounts. For inpatient hospital and extended care services furnished in CY 2022, in accordance with the fixed percentages defined in the law, the daily coinsurance for the 61st through 90th day of hospitalization in a benefit period will be $389 (one-fourth of the inpatient hospital deductible as stated in section 1813(a)(1)(A) of the Act); the daily coinsurance for lifetime reserve days will be $778 (one-half of the inpatient hospital deductible as stated in section 1813(a)(1)(B) of the Act); and the daily coinsurance for the 21st through 100th day of extended care services in a skilled nursing facility (SNF) in a benefit period will be $194.50 (one-eighth of the inpatient hospital deductible as stated in section 1813(a)(3) of the Act).

IV. Cost to Medicare Beneficiaries

Table 1 summarizes the deductible and coinsurance amounts for CYs 2021 and 2022, as well as the number of each that is estimated to be paid.

TABLE 1—MEDICARE PART A DEDUCTIBLE AND COINSURANCE AMOUNTS FOR CYS 2021 AND 2022

Type of cost sharing	Value		Number paid (in millions)	
	2021	2022	2021	2022
Inpatient hospital deductible	$1,484	$1,556	6.11	6.43
Daily coinsurance for 61st–90th day	371	389	1.37	1.44
Daily coinsurance for lifetime reserve days	742	778	0.69	0.72
SNF coinsurance	185.50	194.50	29.69	28.63

The estimated total increase in costs to beneficiaries is about $1,100 million (rounded to the nearest $10 million) due to: (1) The increase in the deductible and coinsurance amounts; and (2) the increase in the number of deductibles and daily coinsurance amounts paid. We determine the increase in cost to beneficiaries by calculating the difference between the 2021 and 2022 deductible and coinsurance amounts multiplied by the estimated increase in the number of deductible and coinsurance amounts paid.

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment prior to a rule taking effect in accordance with section 1871 of the Act and section 553(b) of the Administrative Procedure Act (APA). Section 1871(a)(2) of the Act provides that no rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under Medicare shall take effect unless it is promulgated through notice and comment rulemaking. Unless there is a statutory exception, section 1871(b)(1) of the Act generally requires the Secretary to provide for notice of a proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment before establishing or changing a substantive legal standard regarding the matters enumerated by the statute. Similarly, under 5 U.S.C. 553(b) of the APA, the agency is required to publish a notice of proposed rulemaking in the **Federal Register** before a substantive rule takes effect. Section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act usually require a 30-day delay in effective date after issuance or publication of a rule, subject to exceptions. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the advance notice and comment requirement and the delay in effective date requirements. Sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act also provide exceptions from the notice and 60-day comment period and the 30-day delay in effective date. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act expressly authorize an agency to dispense with notice and comment rulemaking for good cause if the agency makes a finding that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest.

The annual inpatient hospital deductible and the hospital and extended care services coinsurance amounts announcement set forth in this notice does not establish or change a substantive legal standard regarding the matters enumerated by the statute or constitute a substantive rule which would be subject to the notice requirements in section 553(b) of the APA. However, to the extent that an opportunity for public notice and comment could be construed as required for this notice, we find good cause to waive this requirement.

Section 1813(b)(2) of the Act requires publication of the inpatient hospital deductible and the hospital and extended care services coinsurance amounts between September 1 and September 15 of the year preceding the year to which they will apply. Further, the statute requires that the agency determine and publish the inpatient hospital deductible and hospital and extended care services coinsurance amounts for each CY in accordance with the statutory formulae, and we are simply notifying the public of the changes to the deductible and coinsurance amounts for CY 2022. We have calculated the inpatient hospital deductible and hospital and extended

care services coinsurance amounts as directed by the statute; the statute establishes both when the deductible and coinsurance amounts must be published and the information that the Secretary must factor into the deductible and coinsurance amounts, so we do not have any discretion in that regard. We find notice and comment procedures to be unnecessary for this notice and we find good cause to waive such procedures under section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act, if such procedures may be construed to be required at all. Through this notice, we are simply notifying the public of the updates to the inpatient hospital deductible and the hospital and extended care services coinsurance amounts, in accordance with the statute, for CY 2022. As such, we also note that even if notice and comment procedures were required for this notice, for the reasons stated above, we would find good cause to waive the delay in effective date of the notice, as additional delay would be contrary to the public interest under section 1871(e)(1)(B)(ii) of the Act. Publication of this notice is consistent with section 1813(b)(2) of the Act, and we believe that any potential delay in the effective date of the notice, if such delay were required at all, could cause unnecessary confusion both for the agency and Medicare beneficiaries.

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VII. Regulatory Impact Analysis

Although this notice does not constitute a substantive rule, we nevertheless prepared this Regulatory Impact Analysis section in the interest of ensuring that the impacts of this notice are fully understood.

A. Statement of Need

This notice announces the Medicare Part A inpatient hospital deductible and associated coinsurance amounts for hospital and extended care services applicable for care provided in CY 2022, as required by section 1813 of the Act. It also responds to section 1813(b)(2) of the Act, which requires the Secretary to provide for publication of these amounts in the **Federal Register** between September 1 and September 15 of the year preceding the year to which they will apply. As this statutory provision prescribes a detailed methodology for calculating these amounts, we do not have the discretion to adopt an alternative approach on these issues.

B. Overall Impact

We have examined the impacts of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). Although we do not consider this notice to constitute a substantive rule, based on our estimates, OMB's Office of Information and Regulatory Affairs has determined this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). As stated in section IV of this notice, we estimate that the total increase in costs to beneficiaries associated with this notice is about $1,100 million due to: (1) The increase in the deductible and coinsurance amounts; and (2) the increase in the number of deductibles and daily coinsurance amounts paid.

C. Accounting Statement and Table

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a–4.pdf*), in Table 2, we have prepared an accounting statement showing the estimated total increase in costs to beneficiaries of about $1,100 million, which is due to the increase in the deductible and coinsurance amounts, and the increase in the number of deductibles and daily coinsurance amounts paid. As stated in section IV of this notice, we determined the increase in cost to beneficiaries by calculating the difference between the 2021 and 2022 deductible and coinsurance amounts multiplied by the estimated increase in the number of deductible and coinsurance amounts paid.

TABLE 2—ESTIMATED TRANSFERS FOR CY 2022 DEDUCTIBLE AND COINSURANCE AMOUNTS

Category	Transfers
Annualized Monetized Transfers.	$1,100 million.
From Whom to Whom	Beneficiaries to Providers.

D. Regulatory Flexibility Act

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration's definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). Individuals and states are not included in the definition of a small entity. This annual notice announces the Medicare Part A deductible and coinsurance amounts for CY 2022 and will have an impact on the Medicare beneficiaries. As a result, we are not preparing an analysis for the RFA because the Secretary has certified that

this notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This annual notice announces the Medicare Part A deductible and coinsurance amounts for CY 2022 and will have an impact on the Medicare beneficiaries. As a result, we are not preparing an analysis for section 1102(b) of the Act because the Secretary has certified that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. This notice does not impose mandates that will have a consequential effect of $158 million or more on state, local, or tribal governments or on the private sector.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. This notice will not have a substantial direct effect on state or local governments, preempt state law, or otherwise have federalism implications.

G. Congressional Review

This final action is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to the Congress and the Comptroller General for review.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on November 10, 2021.

Dated: November 12, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–25051 Filed 11–12–21; 5:00 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Head Start Evaluation of a Trauma-Informed Care Program (New Collection)

AGENCY: Office of Head Start, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Head Start, Administration for Children and Families (ACF), is proposing to collect data for a new evaluation of a trauma-informed care program that will include a small randomized controlled trial across 10 sites within Head Start Region V. The goals of the project are to identify the implementation supports and methods needed to enable teachers to effectively implement Trauma-Informed Care in early care and education programs, and to evaluate its outcomes. Information collected will be used to inform ongoing training and technical assistance (TTA) work provided by the Head Start Centers, particularly decisions regarding allocation of TTA resources. More generally, results may inform OHS guidance around social-emotional programming.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The National Center on Health, Behavioral Health, and Safety, in partnership with Child Trends and the Center for Childhood Resilience at the Anne & Robert H. Lurie Children's Hospital of Chicago (Lurie), will conduct information collection activities across 10 sites within Head Start Region V as part of a small randomized controlled trial of the Ready to Learn through Relationships (RLR) program, a trauma-informed Framework and Toolkit designed to promote resilience in young children. In this evaluation, sites will be matched on a number of factors that may be related to implementation and randomized to either a low- or high-intensity TTA condition. The low-intensity condition will receive 4 hours of training, a ''toolkit'' of activity-based handouts, and access to virtual TA office hours. The high-intensity condition will include 4 hours of additional training on use of the toolkit modules, 6 hours of implementation support, and monthly classroom coaching.

Region V Head Start programs that choose to voluntarily participate in the RLR program will be asked to complete a number of implementation and outcomes measures and participate in other evaluation activities. Data collection will involve virtual semi-structured interviews and focus groups at the end of the evaluation period, web-based surveys (pre and post), a monthly web-based log of coaching activities completed, and repeated teacher reports of practices throughout the day on a mobile app during 5 weeks across the school year.

The information to be collected focuses on teacher practices for supporting children's social-emotional development and on training and implementation factors that may enhance these practices, which is directly relevant to Head Start's mission. Information obtained will be shared with Regional TTA providers and site administrators to inform their ongoing and future TTA work. More specifically, results of the evaluation will identify the extent to which more intensive TTA with ongoing coaching and on-site expert consultation enhances teacher practice beyond a lower-intensity TTA approach. Additionally, data are expected to identify implementation factors that may enhance outcomes at both the level of the teacher and Head Start Centers.

Respondents: All early childhood centers in Head Start Region V that meet inclusion criteria will be invited to submit application forms to participate in the evaluation, and approximately 10

centers will be selected. Within each center (or site), we anticipate there will be three classrooms of 3–5 year olds. Participants at each center will consist of 7 or 8 individuals (*e.g.,* directors, mental health and behavior consultants, lead and assistant teachers, and coaches), for a total of 75 individuals across all centers or sites.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total/annual burden hours
Trauma-Informed System Change Instrument (TISCI) Questionnaire (all site staff)	75	2	0.17	26
Attitudes Related to Trauma-Informed Care (ARTIC) Questionnaire (all site staff)	75	2	0.25	38
Site Application Form (site administrators)	20	1	1	20
Site Administrator Interview	10	1	1	10
Coach/Teacher Background Form	50	1	0.10	5
Coaching Logs	20	14	0.25	70
Coach Satisfaction Survey	20	1	0.25	5
Coach Interview	20	1	1	20
Professional Self-Care Scale (PSCS)—teachers	30	2	0.10	6
Ecological Momentary Assessment (EMA) Survey—teachers	30	100	0.07	210
Teacher Satisfaction Survey	30	1	0.25	8
Teacher Focus Group	15	1	1	15

Estimated Total Annual Burden Hours: 433.

Authority: Head Start Act Sec. 648.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021–25065 Filed 11–16–21; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) 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 Environmental Health Sciences Special Emphasis Panel; SBIR E-Learning for HAZMAT and Emergency Response (R43/R44) Review in the Environmental Health Sciences.

Date: December 1, 2021.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Qingdi Quentin Li, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, National Institute Environmental Health Sciences, Research Triangle Park, NC 27709, (240) 858–3914, *liquenti@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: November 10, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–25031 Filed 11–16–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2022 Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of intent to award a single source cooperative agreement to Mental Health Association of New York City, Inc. (DBA Vibrant Emotional Health).

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) intends to award $152,000,000 (total costs) for up to two years to Vibrant Emotional Health for the 988 National Suicide Prevention Lifeline Expansion for Behavioral Health Crisis Response (Lifeline Expansion). Under this cooperative agreement, Vibrant Emotional Health will improve and expand the national Lifeline backup centers, text/chat centers, and Spanish language crisis centers to: (1) Respond, intervene, and provide follow-up to individuals experiencing a behavioral health crisis by recruiting and training additional behavioral health staff; (2) support and expand services for populations at high risk of suicide; and (3) develop the infrastructure needed to meet the increased service demand requirements anticipated with the FCC's national launch of 988 in July 2022.

It is expected that this program will: (1) Increase response rates for national Lifeline backup centers, text/chat centers, and Spanish language crisis centers; (2) increase the workforce capacity of the national Lifeline backup centers, text/chat centers, and Spanish language crisis centers; and (3) improve the oversight and standardization of outcomes of the Lifeline.

With this award, Vibrant Emotional Health will directly support the much needed expansion of the behavioral health workforce for all designated national Lifeline backup centers, text/chat centers, and Spanish language crisis centers to ensure the Network can meet or exceed established metrics; provide direct support to increase the workforce at national Lifeline back-up centers, text/chat centers, and Spanish language crisis centers to expand the

implementation of follow-up protocols; expand and enhance core Lifeline network functions; expand and facilitate timely and ongoing communication with the existing network of backup and text/chat centers to minimize wait time and maximize call connectivity; expand the ability of backup and text/chat centers to respond to sudden and large spikes in call volume immediately following a public service announcement, disaster, or other type of traumatic event; expand collaboration with backup and text/chat centers to ensure they have sufficient policies and procedures for the training and supervision of center staff in caller engagement, risk assessment, intervention, and linkage to appropriate services; develop and implement a quality improvement plan focusing on policies, first contact, assessment, referral, and access to local care to ensure there is a comprehensive and coordinated response to individuals at imminent risk for suicide; develop and implement a plan to support backup call centers, text/chat centers, and the Spanish language sub-network in accessing mobile crisis services and coordinating with 911 throughout the United States; provide technical assistance to states and crisis centers in communicating and aligning 988 implementation plans, including the ability to meet Key Performance Indicator expectations; establish interoperability with the VA infrastructure and operations to ensure veterans, service members, and families can access at the VA through authorized 988 phone and text services; and expand the Lifeline network by incorporating additional centers or developing formal agreements with service providers for populations at higher risk of suicide for the expansion of services, training, referrals, facilitated transfers and other approaches to link individuals in crisis with the most person centered and culturally appropriate responses.

This is not a formal request for application. Assistance will be provided only to Vibrant Emotional Health based on the receipt of a satisfactory application that is approved by an independent review group.

Funding Opportunity Title: Lifeline Expansion.

Assistance Listing Number: 93.243.

Authority: Section 520E–3 of the Public Health Service Act, as amended; and Section 9005 of the 21st Century Cures Act.

Justification: Eligibility for this award is limited to the Mental Health Association of New York City, Inc. (DBA Vibrant Emotional Health). Vibrant Emotional Health is the current Lifeline system administrator and this award funds a rapid expansion of the ongoing Lifeline services to meet the anticipated demands of the FCC's 988 launch before July 2022. Since 2005, Vibrant Emotional Health has provided oversight and management of the Suicide Prevention Lifeline and its local call centers, backup centers, and chat/text functions with a network of over 180 centers in all fifty states. This longstanding history has positioned Vibrant Emotional Health as the best suited organization as the only identified organization with the required experience and national reach to work with the backup centers and chat/text organizations with expansion of their workforce and development of the infrastructure that is needed for the launch of 988 in July 2022. Vibrant Emotional Health's history, experience, and ongoing communications with these centers are critical given the time sensitivity of the need for sufficient capacity to be in place by July 2022. Several external evaluations have reinforced the evidence of effectiveness of Lifeline services through oversight of the Lifeline by Vibrant Emotional Health.

The Federal Communication Commission has ordered that by July 16, 2022 every cell phone, land line and voice over internet provider in the United States must make 988 operational and this date of implementation is also a requirement in the National Suicide Hotline Designation Act. Given the anticipated significantly increased contact volumes with the universal availability of 988, a rapid upgrading of Lifeline capacity is required by July 2022. It would not be possible for any other organization to establish the relationships with crisis centers that Vibrant Emotional Health has built over the last 15 years by July 2022, running the risk of significant numbers of unanswered calls, chats, and texts. In addition, if these funds were awarded to another organization, oversight of the expanded backup and chat/text centers would be fragmented and the network would run the risk of inefficiencies and adverse outcomes to individuals in crisis during the period when the demand for Lifeline is expected to surge with the launch of 988. Coordination, quality monitoring, and rapid response would be compromised. Vibrant Emotional Health also has extensive engagement with the Department of Veterans Affairs Veterans Crisis Line (VCL) that helps ensure call connectivity between Vibrant Emotional Health and VCL, backup services, and engagement across the Lifeline local crisis centers on Veteran identification, care, and linkage to the VA. Vibrant Emotional Health has long been recognized throughout the nation for its state-of-art technology-enabled services, community wellness programs, and advocacy and education work and is uniquely qualified to carry-out the requirements of this funding opportunity.

FOR FURTHER INFORMATION CONTACT: James Wright, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857; telephone: (240) 276–1615; email: *james.wright@samhsa.hhs.gov.*

Dated: November 10, 2021.

Carlos Castillo,

Committee Management Officer.

[FR Doc. 2021–25035 Filed 11–16–21; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2021–0018; OMB No. 1660–NW132]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA-Administered Disaster Case Management Intake Form

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice 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, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension without change of a currently approved information collection.

DATES: Comments must be submitted on or before December 17, 2021.

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 Rebekah Kennedy, Team Lead, Community Services Section, Individual Assistance Division, at (202) 212–1175 or *rebekah.kennedy@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on June 29, 2021 at 86 FR 34266 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.

Collection of Information

Title: FEMA-Administered Disaster Case Management Intake Form.

Type of information collection: New information collection.

OMB Number: 1660–NW132.

FEMA Forms: FF–104–FY–21–146 and FF–104–FY–21–147.

Abstract: This collection tool will primarily be used as a guide to support FEMA-administered Disaster Case Management (DCM) case managers by outlining the allowable data elements they can collect from survivors on behalf of FEMA. While there will be a paper collection tool, the case managers will primarily be using the tool as a reference of data elements they can collect, and using their own case management database systems to guide the order in which the elements are collected. The elements within the tool are used to assess, screen, and refer disaster survivors to available resources that address their specific disaster-related unmet needs. Case managers then take the information from the intake form and manually upload the data into their secured case management database.

Prior to any data collection, survivors will complete and sign a FEMA-administered DCM Consent Form, authorizing FEMA, or its agent, to collect data from the survivor in order to effectively provide case management services.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 75,000.

Estimated Number of Responses: 75,000.

Estimated Total Annual Burden Hours: 48,000 burden hours.

Estimated Total Annual Respondent Cost: $1,746,240.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $51,640,374.

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 L. Brown,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2021–25101 Filed 11–16–21; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2021–0001]

Notice of Adjustment of Minimum Project Worksheet Amount

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: FEMA gives notice that the minimum Project Worksheet Amount under the Public Assistance program for disasters and emergencies declared on or after October 1, 2021, will be increased.

DATES: This adjustment applies to major disasters and emergencies declared on or after October 1, 2021.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Recovery Directorate, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: 44 CFR 206.202(d)(2) provides that FEMA will annually adjust the minimum Project Worksheet amount under the Public Assistance program to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

FEMA gives notice of an increase to $3,500 for the minimum amount that will be approved for any Project Worksheet under the Public Assistance program for all major disasters and emergencies declared on or after October 1, 2021.

FEMA bases the adjustment on an increase in the Consumer Price Index for All Urban Consumers of 5.3 percent for the 12-month period that ended in August 2021. This is based on information released by the Bureau of Labor Statistics at the U.S. Department of Labor on September 14, 2021.

Catalog of Federal Domestic Assistance No. 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters).

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2021–25048 Filed 11–16–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2021–N204; FXES11140800000–223–FF08ESMF00]

Proposed Programmatic Safe Harbor Agreement for Viticultural Activities on Vineyards in the Santa Rosa Plain for the Sonoma County Population of California Tiger Salamander, Sonoma County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from the North Bay Water District (applicant) for an enhancement of survival permit (permit) under the Endangered Species Act (ESA). The permit application includes a proposed safe harbor agreement (SHA) between the applicant and the Service

for the federally endangered Sonoma County distinct population segment (DPS) of California tiger salamander (*Ambystoma californiense*) (Sonoma CTS or covered species). We have prepared a draft environmental action statement (EAS) for our preliminary determination that the SHA and permit decision may be eligible for categorical exclusion under the National Environmental Policy Act. We invite the public to review and comment on the permit application, draft SHA, and draft EAS.

DATES: Written comments should be received on or before December 17, 2021.

ADDRESSES: Send comments to Ryan Olah, Coast Bay Division Chief, via U.S. Mail at U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825, or via email at *ryan_olah@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Ryan Olah, Sacramento Fish and Wildlife Office (see **ADDRESSES**); telephone: (916) 414–6623; email: *ryan_olah@fws.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the document for review by contacting the individual named above.

Background

SHAs are intended to encourage private or other non-Federal property owners to implement beneficial conservation actions for species listed under the ESA. SHA permit holders are assured that they will not be subject to increased property use restrictions as a result of their proactive actions to benefit listed species. Incidental take of listed species is authorized under a permit pursuant to the provisions of section 10(a)(1)(A) of the ESA. For an applicant to receive a permit through an SHA, the applicant must submit an application form that includes the following:

(1) The common and scientific names of the listed species for which the applicant requests incidental take authorization;

(2) A description of how incidental take of the listed species pursuant to the SHA is likely to occur, both as a result of management activities and as a result of the return to baseline; and

(3) A description of how the SHA complies with the requirements of the Service's Safe Harbor policy (64 FR 32717, June 17, 1999).

For the Service to issue a permit, we must determine that:

(1) The take of listed species will be incidental to an otherwise lawful activity and will be in accordance with the terms of the SHA;

(2) The implementation of the terms of the SHA is reasonably expected to provide a net conservation benefit to the covered species by contributing to its recovery, and the SHA otherwise complies with the Service's Safe Harbor Policy;

(3) The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species;

(4) Implementation of the terms of the SHA is consistent with applicable Federal, State, and Tribal laws and regulations;

(5) Implementation of the terms of the SHA will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit; and

(6) The applicant has shown capability for and commitment to implementing all of the terms of the SHA.

The Service's Safe Harbor Policy and Safe Harbor regulations (68 FR 53320, September 10, 2003; 69 FR 24084, May 3, 2004) provide important terms and concepts for developing SHAs. The Service's Safe Harbor policy and regulations are available at *http://www.fws.gov/endangered/laws-policies/regulations-and-policies.html.* This SHA was developed by the Service and the applicant.

Proposed Action

The SHA is expected to promote the recovery of Sonoma CTS on non-Federal properties within Sonoma County. The proposed duration of the SHA and the associated enhancement of survival permit are 50 years. The proposed enhancement of survival permit would authorize the incidental taking of the covered species associated with the restoration, enhancement, and maintenance of suitable habitat for the covered species during routine and ongoing viticultural activities and the potential future return of any property included in the SHA to baseline conditions. Under this SHA, individual landowners (cooperators) may include their properties by entering into a cooperative agreement with the applicant. Each cooperative agreement will specify the restoration and/or enhancement, and management activities to be carried out on that specific property. All cooperative agreements will be reviewed by the Service to determine whether the proposed activities will result in a net conservation benefit for the covered species and meet all required standards of the Safe Harbor Policy. Upon Service approval, the applicant will issue a certificate of inclusion to the cooperator. Each certificate of inclusion will extend the incidental take coverage conferred by the enhancement of survival permit to the cooperator.

Baseline levels for the covered species will be determined by the cooperator first completing the baseline habitat worksheet (Exhibit B of the SHA), and then the Service will review each baseline determination prior to the applicant issuing a certificate of inclusion to the cooperator. The SHA also contains a monitoring component that requires the applicant to ensure that the cooperators are in compliance with the terms and conditions of the SHA. Results of these monitoring efforts will be provided to the Service by the applicant in an annual report.

Upon approval of this SHA, and consistent with the Service's safe harbor policy, the Service would issue an enhancement of survival permit to the applicant. This permit would authorize cooperators issued a certificate of inclusion to take the covered species incidental to the implementation of the management activities specified in the SHA, incidental to other lawful uses of the property including normal, routine land management activities, and to return to baseline conditions if desired. An applicant would receive assurances under our ''No Surprises'' regulations (50 CFR 17.22(c)(5) and 17.32(c)(5)) for all species included in the enhancement of survival permit. In addition to meeting other criteria, actions to be performed under an enhancement of survival permit must not jeopardize the existence of Federally listed fish, wildlife, or plants, and the Service is conducting a Section 7 consultation.

Species Information

The current range of the Sonoma CTS is in the Santa Rosa Plain in Sonoma County, California. The Sonoma CTS inhabits vernal pools and seasonal ponds, associated grassland, and oak savannah plant communities below 200 feet (60 meters). Sonoma CTS spend the majority of their lives underground in small mammal burrows in uplands, while ephemeral ponds play a critical role because they are necessary for breeding. Although Sonoma CTS are members of a family of ''burrowing'' salamanders, they are not known to create their own burrows. They depend on persistent small mammal (*e.g.,* pocket gopher) activity to create, maintain, and sustain sufficient underground refugia. These

underground burrow systems are critical during the drier months of the year, though juveniles and adults use them throughout the year to grow and survive. Loss and fragmentation of habitat is a major threat to the species and the protection of breeding habitat and adjacent upland habitats is needed for their recovery.

National Environmental Policy Act Compliance

The development of the draft SHA and the proposed issuance of an enhancement of survival permit are Federal actions that trigger the need for compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We have prepared a draft EAS to analyze the impacts of permit issuance and implementation of the SHA on the human environment in comparison to the no-action alternative. We have made a preliminary determination that issuing the permit and implementing the SHA would have minor or negligible impacts to the environment, and thus the proposed SHA and permit actions are eligible for categorical exclusion under NEPA. The basis for our preliminary determination is contained in the EAS, which is available for public review (see **ADDRESSES**).

Next Steps

We will evaluate the permit application, associated documents, and comments we receive to determine whether the permit application meets the requirements of the ESA, NEPA, and their implementing regulations. If we determine that all requirements are met, we will sign the proposed SHA and issue a permit under section 10(a)(1)(A) of the ESA to the applicant. We will not make our final decision on the permit application until after the end of the public comment period, and we will fully consider all comments we receive during the comment period.

Public Availability of Comments

Written comments we receive become part of the public 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 the entire comment, including your personal identifying information, may be made available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22 and 17.32), and NEPA (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6; 43 CFR part 46).

Kim Turner,

Acting Field Supervisor, Sacramento Fish and Wildlife Office, Sacramento, California.

[FR Doc. 2021–25073 Filed 11–16–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2021–0125; FXES11130400000EA–123–FF04EF4000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink, Lake County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment and information.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from PKY Clermont Owner, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the ITP to take the federally listed sand skink incidental to construction in Lake County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded, under the National Environmental Policy Act. To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

DATES: We must receive your written comments on or before December 17, 2021

ADDRESSES:

Obtaining Documents: You may obtain copies of the documents online in Docket No. FWS–R4–ES–2021–0125 at *http://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by any of the following methods:

- *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2021–0125.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R4–ES–2021–0125; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Erin M. Gawera, by telephone at (904) 731–3121 or via email at *erin_gawera@fws.gov.* Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the Fish and Wildlife Service (Service), announce receipt of an application from PKY Clermont Owner, LLC (Magnolia Pointe) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) incidental to the construction of a commercial development (project) in Lake County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on the Service's preliminary determination that this HCP qualifies as ''low-effect,'' categorically excluded, under the National Environmental Policy Act (NEPA; 42 U.S.C. 4231 *et seq.*). To make this determination, we used our environmental action statement and low-effect screening form, both of which are also available for public review.

Project

The applicant requests a 5-year ITP to take sand skinks through the conversion of approximately 13.00 acres (ac) of occupied sand skink foraging and sheltering habitat incidental to the construction of a commercial development located on a 52.99-ac parcel in Sections 25 and 26; Township 22 South; Range 26 East, Lake County, Florida, identified by Parcel ID numbers 25–22–26–0002–0000–1300, 25–22–26–0002–0000–1400, 26–22–26–0001–0000–3000. The applicant proposes to mitigate for take of the sand skinks by the purchase of 26 credits from Lake Wales Ridge Conservation Bank or another Service-approved Conservation Bank. The Service would require the applicant to purchase the credits prior to engaging in activities associated with the project on the parcel.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire

comment, including your personal identifying information, may be made available to the public. While you may request that we withhold your personal identifying information, we cannot guarantee that we will be able to do so.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including land clearing, infrastructure building, landscaping, and the proposed mitigation measures, would individually and cumulatively have a minor or negligible effect on sand skinks and the environment. Therefore, we have preliminarily concluded that the ITP for this project would qualify for categorical exclusion and the HCP is low effect under our NEPA regulations at 43 CFR 46.205 and 46.210. A low-effect HCP is one that would result in (1) minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) minor or negligible effects on other environmental values or resources; and (3) impacts that, when considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not over time result in significant cumulative effects to environmental values or resources.

Next Steps

The Service will evaluate the application and the comments received to determine whether to issue the requested permit. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the above findings, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue ITP number PER0017025 to PKY Clermont Owner, LLC.

Authority

The Service provides this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.32) and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6 and 43 CFR 46.305).

Robert L. Carey,

Division Manager, Environmental Review, Florida Ecological Service Field Office.

[FR Doc. 2021–25049 Filed 11–16–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX22GS00EMMA900]

2021 Draft List of Critical Minerals; Correction

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice; correction.

SUMMARY: The U.S Geological Survey published a document in the **Federal Register** on November 9, 2021 that presented a description of the draft methodology used to identify a draft list of critical minerals; a draft list of minerals, elements, substances, and materials that qualify as critical minerals; and a draft list of critical minerals recovered as byproducts and their host minerals. The document contained a billing address code and docket number.

FOR FURTHER INFORMATION CONTACT: James Mosley, (703) 648–6312, *jmosley@usgs.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In FR Doc. 2021–24488, appearing on page 62199 in the **Federal Register** of November 9, 2021, the following corrections are made:

1. On page 62200, in the first column, under **ADDRESSES**, correct to read:

You may submit written comments online at *http://www.regulations.gov* by entering ''DOI–2021–0013'' in the Search bar and clicking ''Search'' or by mail to Draft List of Critical Minerals, MS–102, U.S. Geological Survey, 12201 Sunrise Valley Dr., Reston, VA 20192.

2. On page 62203, in the second column, correct the BILLING CODE to read:

4338–11.

Dated: November 12, 2021.

Dionne Duncan-Hughes,

Federal Liaison Officer, USGS.

[FR Doc. 2021–25055 Filed 11–16–21; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–IR1–GEWA–31966; PS.SNELA0102.00.1]

Minor Boundary Revision at George Washington Birthplace National Monument

AGENCY: National Park Service, Interior.

ACTION: Notification of boundary revision.

SUMMARY: The boundary of George Washington Birthplace National Monument is modified to include 1.01 acres (more or less) of land located in Colonial Beach, Westmoreland County, Virginia, immediately adjoining and being surrounded by the boundary of George Washington Birthplace National Monument. Subsequent to the boundary revision, the National Park Service will acquire the property from The Trust for Public Land, a non-profit organization.

DATES: The effective date of this boundary revision is November 17, 2021.

ADDRESSES: The map depicting this boundary revision is available for inspection at the following locations: National Park Service, Interior Region 1, Land Resources Program Center, 115 John Street, 5th Floor, Lowell, MA 01852, and National Park Service, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Realty Officer Jennifer Cherry, National Park Service, Interior Region 1, Land Resources Program Center, 115 John Street, 5th Floor, Lowell, MA 01852, telephone (978) 970–5260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 54 U.S.C. 100506(c), the boundary of George Washington Birthplace National Monument is modified to include one adjoining tract containing 1.01 acres of land, more or less. This boundary revision is depicted on Map No. 332/173,707, dated September 2020.

54 U.S.C. 100506(c) provides that, after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior is authorized to make a boundary revision upon publication of notice in the **Federal Register**. The Committees have been notified of this boundary revision. This boundary revision and subsequent acquisition will ensure preservation and protection of the Park's historic and natural resources.

Deborah Conway,

Acting Regional Director, Interior Region 1.

[FR Doc. 2021–25043 Filed 11–16–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NER–SARA–30417; PS.SNELA0070.00.1]

Minor Boundary Revision at Saratoga National Historical Park

AGENCY: National Park Service, Interior.

ACTION: Notification of boundary revision.

SUMMARY: The boundary of Saratoga National Historical Park is modified to include four parcels of land totaling approximately 28.45 acres of land located in Saratoga County, New York, immediately adjoining the boundaries of Saratoga National Historical Park. Subsequent to the boundary revision, the National Park Service will acquire two properties from American Battlefield Trust (25.62 acres) and Open Space Institute Land Trust, Inc. (2.56 acres), nonprofit conservation organizations. The other two parcels (together, 0.27 acre) are federally owned.

DATES: The applicable date of this boundary revision is November 17, 2021.

ADDRESSES: The map depicting this boundary revision is available for inspection at the following locations: National Park Service, Interior Region 1, Land Resources Program Center, 115 John Street, 5th Floor, Lowell, MA 01852; and National Park Service, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Realty Officer Jennifer Cherry, National Park Service, Interior Region 1, Land Resources Program Center, 115 John Street, 5th Floor, Lowell, MA 01852, telephone (978) 970–5260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 54 U.S.C. 100506(c), the boundary of Saratoga National Historical Park is modified to include four adjoining tracts containing approximately 28.45 acres of land. The boundary revision is depicted on Map No. 374/165,366, dated October 2019.

54 U.S.C. 100506(c) provides that, after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior is authorized to make this boundary revision upon publication of notice in the **Federal Register**. The Committees have been notified of this boundary revision. This boundary revision and subsequent acquisition will ensure preservation and protection of the park's historic and cultural landscape resources.

Deborah Conway,

Acting Regional Director, Interior Region 1.

[FR Doc. 2021–25044 Filed 11–16–21; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1200]

Certain Electronic Devices, Including Streaming Players, Televisions, Set Top Boxes, Remote Controllers, and Components Thereof; Notice of a Final Determination Finding a Violation of Section 337, Denying a Motion To Reopen the Record, and Issuing a Limited Exclusion Order and Cease and Desist Order; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined that respondent Roku Inc. has violated Section 337 of the Tariff Act of 1930, as amended, by importing, selling for importation, or selling in the United States after importation certain electronic devices, including streaming players, televisions, set top boxes, remote controllers, and components thereof, that infringe one or more claims of complainant's U.S. Patent No. 10,593,196 (''the '196 patent''). The Commission has determined that the appropriate remedies are a limited exclusion order and a cease and desist order against the respondent. The Commission has also determined to set a bond in the amount of zero (0) percent (*i.e.,* no bond) of the entered value of the excluded products imported during the period of Presidential review. This investigation is hereby terminated.

FOR FURTHER INFORMATION CONTACT: Carl P. Bretscher, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 22, 2020, based on a complaint filed by Universal Electronics, Inc. (''UEI'') of Scottsdale, Arizona. 85 FR 31211–212 (May 22, 2020). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''Section 337''), in the importation into the United States, sale for importation, or sale in the United States after importation of certain electronic devices, including streaming players, televisions, set top boxes, remote controllers, and components thereof, by reason of infringement of one or more of the asserted claims of the '196 patent and U.S. Patent Nos. 7,696,514 (''the '514 patent''), 9,911,325 (''the '325 patent''), 9,716,853 (''the '853 patent''), 7,589,642 (''the '642 patent''), and 10,600,317 (''the '317 patent''). *Id.* The complaint alleges that a domestic industry exists. *Id.*

The Commission's notice of investigation names the following respondents: Roku Inc. of Los Gatos, California (''Roku''); TCL Electronics Holdings Ltd. of New Territories, Hong Kong; Shenzhen TCL New Technology Co. Ltd. of Shenzhen, China; TCL King Electrical Appliances Co. Ltd. of Huizhou, China; TTE Technology Inc. of Corona, California; TCL Corp. of Huizhou City, China; TCL Moka Int'l Ltd. of New Territories, Hong Kong; TCL Overseas Marketing Ltd. of New Territories, Hong Kong; TCL Industries Holdings Co., Ltd. of New Territories, Hong Kong; and TCL Smart Device Co. of Bac Tan Uyen District, Vietnam (collectively, ''the TCL Respondents''); Hisense Co. Ltd. of Qingdao, China; Hisense Electronics Manufacturing Co. of America Corp. of Suwanee, Georgia; Hisense Import & Export Co. Ltd. of Qingdao, China; Qingdao Hisense Electric Co., Ltd. of Qingdao, China; and Hisense International Co., Ltd. of Shen Wang, Hong Kong (collectively, ''the Hisense Respondents''); Funai Electric Co., Ltd. of Osaka, Japan; Funai Corp. Inc. of Rutherford, New Jersey; and Funai Co., Ltd. of Nakhon Ratchasima, Thailand (collectively, ''the Funai Respondents''). *Id.* The Office of Unfair Import Investigations did not participate as a party in this investigation. *Id.*

The Commission partially terminated the investigation with respect to certain patents and claims that were withdrawn by UEI, including all of the asserted claims of the '514 patent, '325 patent, and '853 patent. *See* Order No. 27 (Dec. 2, 2020), *unreviewed by* Comm'n Notice (Dec. 23, 2020); Order No. 32 (Dec. 21, 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021); Order No. 33 (Dec. 29, 2020), *unreviewed by* Comm'n Notice (Jan. 13, 2021); Order No. 34 (Jan. 4, 2021), *unreviewed by* Comm'n Notice (Jan. 21, 2021); Order No. 44 (Feb. 2, 2021), *unreviewed by* Comm'n Notice

(Feb. 19, 2021); Order No. 49 (Feb. 9, 2021), *unreviewed by* Comm'n Notice (Feb. 24, 2021); Order No. 66 (March 23, 2021), *unreviewed by* Comm'n Notice (April 8, 2021); Order No. 67 (Apr. 6, 2021), *unreviewed by* Comm'n Notice (Apr. 22, 2021).

The Commission also terminated the investigation with respect to the Hisense Respondents, the TCL Respondents, and the Funai Respondents. Order No. 67 (Apr. 6, 2021), *unreviewed by* Comm'n Notice (Apr. 22, 2021).

As a result of these terminations, the only remaining respondent is Roku, and the only claims still at issue for infringement or domestic industry purposes are claim 19 of the '642 patent; claims 3, 6, 9, and 11 of the '317 patent; and claims 1–3, 11, and 13–15 of the '196 patent.

On August 19, 2020, the ALJ held a technology tutorial and *Markman* hearing. The ALJ issued a *Markman* order on October 1, 2020. Order No. 24 (Oct. 1, 2020).

On February 18, 2021, the Commission determined not to review an initial determination (''ID'') granting UEI's motion for summary determination that claim 19 of the '642 patent is practiced by the domestic industry products and infringed by the accused ''Elk'' series of products. Order No. 38 (Jan. 19, 2021), *unreviewed by* Comm'n Notice (Feb. 18, 2021).

On February 24, 2021, the Commission determined to review and reverse an ID granting Roku's motion for summary determination that UEI lacks standing to assert the '196 patent and to remand the standing question to the ALJ for further consideration. Order No. 40 (Jan. 25, 2021), *reviewed by* Comm'n Notice (Feb. 24, 2021); *see also* Comm'n Op. (Mar. 3, 2021).

The ALJ held on evidentiary hearing from April 19–23, 2021.

On July 9, 2021, the ALJ issued a final ID, finding a violation of Section 337 as to the '196 patent because: (i) UEI has standing to assert the '196 patent; (ii) the accused Roku Ultra and Soundbar products infringe claims 1, 3, 11, and 13–15 of the '196 patent but its revised Ultra and Soundbar products do not infringe any asserted claims; (iii) the asserted claims are not invalid as obvious; and (iv) UEI satisfied the technical and economic prongs of the domestic industry requirement with respect to this patent. The ID, however, finds no violation with respect to the '642 patent or the '317 patent because the asserted claims of those patents, though infringed, are invalid.

On July 13, 2021, the Commission issued a notice soliciting public comments on the public interest factors, if any, that may be implicated if a remedy were issued. *See* 86 FR 38126 (July 19, 2021). The Commission did not receive any comments in response to its notice. No party submitted public interest comments pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)).

On July 23, 2021, both UEI and Roku filed petitions for review of certain findings in the final ID, pursuant to Commission Rule 210.43(a) (19 CFR 210.43(a)). On August 2, 2021, the parties filed their respective replies, pursuant to Commission Rule 210.43(c) (19 CFR 210.43(c)).

On September 9, 2021, the Commission determined to review the ID with respect to certain issues, including: (i) All issues in the ID relating to the '196 patent, including claim construction, infringement, and validity (Questions A–D); (ii) whether UEI satisfied the technical prong of the domestic industry requirement with respect to the '317 patent (Question E); and (iii) whether UEI satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(B) for the '196 patent and '317 patent (Question F), as well as the '642 patent. 86 FR 51381, 51382–83 (Sept. 15, 2021). The Commission determined not to review any other issues relating to the '317 patent or '642 patent. *See id.*

On September 24, 2021, UEI and Roku filed their initial responses to the Commission's questions on review and on remedy, the public interest, and bonding. On October 1, 2021, the parties filed their replies to each other's initial submissions to the Commission.

On October 26, 2021, while the investigation was still pending final determination by the Commission, Roku filed a Motion for a Limited Reopening of the Record and for a Shortened Response Time (''Motion'') so that the Commission could consider allegedly contradictory deposition testimony from a certain UEI fact witness taken in another investigation involving the same parties, products, and technology. *See Certain Televisions, Remote Controls, and Components Thereof,* Inv. No. 337–TA–1263 (''the 1263 Investigation''). On the same date, Roku and UEI filed a Joint Motion to Amend the Protective Order to Add Provisions Relating to Materials from Inv. No. 337–TA–1263 (''Joint APO Motion'').

On October 28, 2021, the Commission granted Roku's motion for a shortened response time, directing UEI to file its response by the close of business on November 2, 2021. Comm'n Order (Oct. 28, 2021). The Commission denied the parties' Joint APO Motion as moot. *Id.*

On November 2, 2021, UEI filed its opposition to Roku's Motion, in accordance with the Commission's order.

The Commission, having reviewed the parties' submissions, the ID, and the deposition testimony at issue, has determined to deny Roku's Motion to reopen the record.

Furthermore, the Commission, having reviewed the record in this investigation, including the final ID, the parties' petitions, and responses thereto, has determined that Roku violated section 337 by importing into the United States, selling for importation, or selling in the United States after importation certain electronic devices, including streaming players, televisions, set-top boxes, remote controllers, and components thereof that infringe one or more of claims 1, 3, 11, and 13–15 of the '196 patent. The Commission finds no violation with respect to the '317 patent and '642 patent.

The Commission has determined that the appropriate remedy is: (i) A limited exclusion order prohibiting the importation of certain electronic devices, including streaming players, televisions, set-top boxes, remote controllers, and components thereof that infringe one or more of claims 1, 3, 11, and 13–15 of the '196 patent; and (ii) a cease and desist order against Roku. The Commission has determined that the public interest factors do not preclude issuance of a remedy. The Commission has determined to set a bond in the amount of zero (0) percent (*i.e.,* no bond) of the entered value of the excluded products imported during the period of Presidential review (19 U.S.C. 1337(j)).

The Commission issues its opinion herewith setting forth its determinations on certain issues. This investigation is hereby terminated.

The Commission's orders and opinion were delivered to the President and United States Trade Representative on the day of their issuance.

The Commission voted to approve these determinations on November 10, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 10, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–25062 Filed 11–16–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1242]

Certain IP Camera Systems Including Video Doorbells and Components Thereof; Notice of a Commission Determination To Review an Initial Determination Terminating the Investigation in Its Entirety Due to the Invalidity of the Asserted Patents and on Review To Affirm; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined to review an initial determination (''ID'') (Order No. 16) of the presiding administrative law judge (''ALJ''), terminating the investigation in its entirety due to the invalidity of the asserted patents, and on review to affirm the ID. This investigation is hereby terminated.

FOR FURTHER INFORMATION CONTACT: Ron Traud, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3427. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On January 28, 2021, the Commission instituted this investigation based on a complaint filed by SkyBell Technologies, Inc. of Irvine, California; SB IP Holdings, LLC of Irvine, California; and Eyetalk365, LLC of Cornelius, North Carolina (collectively, ''Complainants''). 86 FR 7412 (Jan. 28, 2021). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, due to the importation into the United States, sale for importation, or sale in the United States after importation of certain IP camera systems including video doorbells and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 9,432,638; 9,485,478; 10,097,796; 10,097,797; 10,200,660; 10,523,906; and 10,674,120. *Id.* The complaint also alleged the existence of a domestic industry. *Id.* The notice of investigation named as respondents Vivint Smart Home, Inc. of Provo, Utah; SimpliSafe, Inc. of Boston, Massachusetts, and Arlo Technologies Inc. of San Jose, California (collectively, ''Respondents''). *Id.* The Office of Unfair Import Investigations was not named as a party. *Id.*

On May 21, 2021, Respondents filed a motion for summary determination that all patent claims asserted in this investigation are invalid as anticipated. On June 3, 2021, Complainants filed a brief in opposition to the motion.

On September 15, 2021, the presiding ALJ issued the subject ID (Order No. 16) granting the motion. The ID found that there was no genuine issue of material fact as to whether the asserted patents are invalid and that Respondents were entitled to a finding of invalidity as a matter of law.

On September 27, 2021, Complainants filed a petition for review. On October 4, 2021, Respondents filed a response thereto.

The Commission has determined to review the subject ID. The Commission notes that the ID applied the current version of 35 U.S.C. 111, as amended by the America Invents Act (''AIA''). Because the claims of United States Patent Application No. 14/338,525 (''the '525 application'') have an effective filing date before March 16, 2013, the pre-AIA statutory provision should have been applied, but that error is harmless and does not change the outcome. On review, the Commission affirms the ID's findings under the pre-AIA version of 35 U.S.C. 111. The Commission also notes that the relevant provision of 35 U.S.C. 120 did not change with the AIA. Vice Chair Stayin joins the Commission's determination to affirm the ID, based on his view that the '525 application was abandoned no later than the expiration of the deadline to request an extension under 37 CFR 1.136(a), *i.e.,* March 4, 2015. The investigation is hereby terminated in its entirety.

The Commission vote for this determination took place on November 10, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 10, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–25061 Filed 11–16–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1071 (Third Review)]

Alloy Magnesium From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on alloy magnesium from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on June 1, 2021 (86 FR 29280) and determined on September 7, 2021 that it would conduct an expedited review (86 FR 55636, October 6, 2021).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on November 10, 2021. The views of the Commission are contained in USITC Publication 5238 (November 2021), entitled *Alloy Magnesium from China: Investigation No. 731–TA–1071 (Third Review).*

By order of the Commission.

Issued: November 10, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–25063 Filed 11–16–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents notice of investigations

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) started during the period of *October 1, 2021 through October 31, 2021.*

This notice includes instituted initial investigations following the receipt of validly filed petitions. Furthermore, if applicable, this notice includes investigations to reconsider negative initial determinations or terminated initial investigations following the receipt of a valid application for reconsideration.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. Any persons showing a substantial interest in the subject matter of the investigations may request a public hearing provided such request is filed in writing with the Administrator, Office of Trade Adjustment Assistance, at the address shown below, no later than ten days after publication in **Federal Register**.

Initial Investigations

The following are initial investigations commenced following the receipt of a properly filed petition.

TA–W No.	Subject firm	Location	Inv start date
98,075	AVX Filters Corporation	Sun Valley, CA	10/6/2021
98,076	Emerson Process Management LLLP	Eden Prairie, MN	10/6/2021
98,077	Melissa and Doug, LLC	Wilton, CT	10/6/2021
98,078	Gannett Co., Inc	Fort Smith, AR	10/7/2021
98,079	Showa Best Glove Inc	Menlo, GA	10/8/2021
98,080	Scema LLC	Mason City, IA	10/12/2021
98,081	Stupp Corporation	Baton Rouge, LA	10/12/2021
98,082	US Well Services, LLC	Pleasanton, TX	10/13/2021
98,083	US Well Services, LLC	San Angelo, TX	10/13/2021
98,084	New York Air Brake, LLC	Watertown, NY	10/14/2021
98,085	Saginaw Metal Casting Operations	Saginaw, MI	10/15/2021
98,086	PGI	Colorado Springs, CO	10/18/2021
98,087	PerkinElmer, Inc	Shelton, CT	10/19/2021
98,088	Caterpillar Inc.,—Logistics	Morton, IL	10/20/2021
98,089	Kemper Valve and Fittings Corp	Island Lake, IL	10/20/2021
98,090	TPI Composites, Inc	Newton, IA	10/21/2021
98,091	Maine Bucket Co./Maine Barrel & Display Company	Lewiston, ME	10/22/2021
98,092	Vistra Corp	Moscow, OH	10/22/2021
98,093	Wells Fargo	Columbia, MD	10/25/2021
98,094	Classic	Jessup, MD	10/26/2021
98,095	Collins Aerospace	Cedar Rapids, IA	10/26/2021
98,096	Pactiv Evergreen	Pine Bluff, AR	10/26/2021
98,097	Verizon Business Network	Irving, TX	10/26/2021
98,098	Micron Technology	Meridian, ID	10/27/2021
98,099	Staffmark Investment LLC	Santa Ana, CA	10/27/2021
98,100	Sulzer Pumps USA Inc	Portland, OR	10/27/2021

A record of these investigations and petitions filed are available, subject to redaction, on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 4th day of November 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–25041 Filed 11–16–21; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Determinations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with Sections 223 and 284 (19 U.S.C. 2273 and 2395) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) issued during the period of *October 1, 2021 through October 31, 2021.*

This notice includes summaries of initial determinations such as Affirmative Determinations of Eligibility, Negative Determinations of Eligibility, and Determinations Terminating Investigations of Eligibility within the period. If issued in the period, this notice also includes summaries of post-initial determinations that modify or amend initial determinations such as Affirmative Determinations Regarding Applications for Reconsideration, Negative Determinations Regarding Applications for Reconsideration, Revised Certifications of Eligibility, Revised Determinations on Reconsideration, Negative Determinations on Reconsideration, Revised Determinations on remand from the Court of International Trade, and Negative Determinations on remand from the Court of International Trade.

Affirmative Determinations for Trade Adjustment Assistance

The following certifications have been issued.

TA–W No.	Subject firm	Location	Reason(s)
96,624	Paulsboro Refining Company, LLC	Paulsboro, NJ	Customer Imports of Articles.

TA–W No.	Subject firm	Location	Reason(s)
98,002	Emerson Automation Solutions Final Control US LP.	Black Mountain, NC	Shift in Production to an FTA Country or Beneficiary.
98,031	Augusta Sportswear	Coburg, OR	Shift in Production to an FTA Country or Beneficiary.

Negative Determinations for Trade Adjustment Assistance

The following investigations revealed that the eligibility criteria for TAA have not been met for the reason(s) specified.

TA–W No.	Subject firm	Location	Reason(s)
97,027	The McCall Pattern Company, Inc	Manhattan, KS	No Shift in Production or Other Basis.
98,055	Woodhead Industries, LLC	El Paso, TX	Workers Do Not Produce an Article.

I hereby certify that the aforementioned determinations were issued during the period of *October 1, 2021 through October 31, 2021.* These determinations are available on the Department's website *https://www.dol.gov/agencies/eta/tradeact* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 4th day of November 2021.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2021–25040 Filed 11–16–21; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[21–075]

Name of Information Collection: NASA Virtual Guest Watch Party Registration

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: Comments are due by January 18, 2022.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Claire Little, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 202–358–2375 or email *claire.a.little@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Aeronautics and Space Administration (NASA) is committed to effectively performing the Agency's communication function in accordance with the Space Act Section 203(a)(3) to ''provide for the widest practicable and appropriate dissemination of information concerning its activities and the results there of,'' and to enhance public understanding of, and participation in, the nation's space program in accordance with the NASA Strategic Plan.

The Space Act of 1958, directs the Agency to expand human knowledge of Earth and space phenomena. The Virtual Guest Program exists to leverage the excitement around launches and milestones to widely disseminate information about Earth and space phenomena through the sharing of information about research on launches, mission objectives, public engagement activities (coloring pages, social media filters) and the like.

The program provides registration opportunities for individuals and watch parties so that NASA may provide them specific information they are interested in receiving and to share a detailed slice of the NASA efforts in carrying out the other portions of the Space Act of 1958. By learning through information submitted of the plans of Watch Party organizers, NASA can best provide appropriate resources and share information about its activities and results.

II. Methods of Collection

Electronic/Online Web Form.

III. Data

Title: NASA Virtual Guest Watch Party Registration.

OMB Number: 2700–xxxx.

Type of Review: New.

Affected Public: Individuals.

Estimated Annual Number of Activities: 1.

Estimated Number of Respondents per Activity: 100,869.

Annual Responses: 100,869.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 5,043.

Estimated Total Annual Cost: $75,652.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection.

They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2021–25029 Filed 11–16–21; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–21–0018; NARA–2022–009]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: NARA must receive responses on the schedules listed in this notice by January 3, 2022.

ADDRESSES: You may submit comments by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule.

Due to COVID–19 building closures, we are currently temporarily not accepting comments by mail. However, if you are unable to comment via *regulations.gov,* you may contact *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at *regulation_comments@nara.gov.* For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov* or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we have made to the proposed records schedule. We will then send the schedule for final approval by the Archivist of the United States. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of the Treasury, Bureau of Engraving and Printing, Banknote Manufacturing Printing Equipment Information System (DAA–0318–2021–0010).

2. Federal Communications Commission, Public Safety and Homeland Security Bureau, Mobile

Device Tracking (DAA–0173–2021–0021).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2021–25022 Filed 11–16–21; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Tuesday, December 7, 2021.

PLACE: Virtual.

STATUS: The one item may be viewed by the public through webcast only.

MATTER TO BE CONSIDERED:

67694 Marine Accident Report—Hazardous Liquid Pipeline Strike and Subsequent Explosion and Fire Aboard Dredging Vessel *Waymon Boyd,* EPIC Marine Terminal, Corpus Christi Ship Channel, Corpus Christi, Texas, August 21, 2020.

CONTACT PERSON FOR MORE INFORMATION: Candi Bing at (202) 590–8384 or by email at *bingc@ntsb.gov.*

Media Information Contact: Jennifer Gabris by email at *jennifer.gabris@ntsb.gov* or at (202) 314–6100.

This meeting will take place virtually. The public may view it through a live or archived webcast by accessing a link under ''Webcast of Events'' on the NTSB home page at *www.ntsb.gov.*

There may be changes to this event due to the evolving situation concerning the novel coronavirus (COVID–19). Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

The National Transportation Safety Board is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b).

Dated: Monday, November 15, 2021.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2021–25158 Filed 11–15–21; 4:15 pm]

BILLING CODE 7533–01–P

OFFICE OF PERSONNEL MANAGEMENT

Civil Service Retirement System and Federal Employees' Retirement System; Notice to Same-Sex Spouses of Deceased Federal Employees or Annuitants Whose Marriages Lasted Less Than Nine Months

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: To establish entitlement to a survivor annuity or basic employee death benefit (''BEDB'') under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS), a ''widow'' or ''widower'' must have been married to a federal employee or annuitant for at least 9 months immediately before the employee or annuitant's death. Same-sex spouses of deceased federal employees or annuitants whose spouse died prior to the time the 9-month marriage requirement could be satisfied may have been prevented or frustrated from satisfying this eligibility requirement as a result of provisions enacted under the Defense of Marriage Act (DOMA) or state laws prohibiting same sex marriages, now understood to have been unconstitutional. Therefore, this notice provides information about when, and under what circumstances, OPM will deem the 9-month marriage requirement satisfied, notwithstanding the actual duration of the marriage, to provide affected applicants with benefits they could have obtained had they been permitted to marry earlier in their states of residence.

DATES: If a same-sex surviving spouse of a deceased federal employee or annuitant is unable to show that the couple was married for at least 9-months immediately before the death of the employee or annuitant, and the marriage occurred *before, on, or within one year after* the Supreme Court issued *Windsor* on June 26, 2013 (or occurred *within one year after* the Supreme Court issued *Obergefell* on June 26, 2015, in circumstances where the couple resided in a jurisdiction that prohibited same-sex marriage at any time after the issuance of *Windsor*), OPM will deem the 9-month marriage requirement satisfied for purposes of establishing entitlement to survivor annuity benefits and/or a BEDB.

FOR FURTHER INFORMATION CONTACT: Alison Pastor, (202) 606–0299.

SUPPLEMENTARY INFORMATION: On June 26, 2013, the U.S. Supreme Court issued *United States* v. *Windsor,*[1] where it struck down section 3 of Defense of Marriage Act (DOMA), 1 U.S.C. 7 (1996), as unconstitutional inasmuch as it required the Federal Government to treat same-sex marriages differently from opposite-sex marriages for purposes of determining entitlement to federal benefits. The *Windsor* decision, however, did not address whether state laws prohibiting the legal recognition of same-sex marriages were similarly unconstitutional. As a result, there was a period after *Windsor* where some jurisdictions allowed for the legal recognition of same-sex marriages and some did not. Thereafter, the U.S. Supreme Court issued *United States* v. *Obergefell* on June 26, 2015[2] striking down state laws that prohibited the legal recognition of same-sex marriages as unconstitutional.

After the U.S. Supreme Court issued *Windsor,* OPM published two **Federal Register** notices. The first notice, 78 FR 47018 (Aug. 2, 2013), informed affected annuitants that they had an extended opportunity, until June 26, 2015—or two years after *Windsor* was issued—to elect a survivor annuity for a same-sex spouse if the couple had married prior to *Windsor* and the annuitant had been prevented by section 3 of DOMA from making a timely election. The second notice, 79 FR 57589 (Sept. 25, 2014), informed same-sex surviving spouses of deceased federal employees or annuitants who died before *Windsor,* that they may apply for survivor benefits or re-apply (if previously denied benefits as a result of DOMA) so that OPM may process their applications in accordance with the *Windsor* decision. In both these notices, OPM indicated that for purposes of determining entitlement to federal retirement benefits, OPM would recognize same-sex marriages legally entered into, whether or not the affected individual's domicile would legally recognize that marriage.

Thus, consistent with OPM's prior **Federal Register** notices and consistent with the holdings in *Windsor* and *Obergefell,* OPM is providing this notice to affected same-sex surviving spouses of deceased Federal employees or annuitants regarding when and under what circumstances OPM will deem the 9-month marriage requirement satisfied under 5 U.S.C. 8341(a), 8441(1)–(2) for purposes of determining an applicant's entitlement to survivor annuity benefits and/or (if applicable) to a BEDB:

If an applicant for survivor annuity benefits and/or a BEDB can show—

- The applicant was in a same-sex marriage with a deceased employee or annuitant; *and*
- But for the 9-month marriage requirement under 5 U.S.C. 8341(a) and 8441(1)–(2), the applicant would be eligible for survivor annuity benefits (and/or a BEDB, if applicable); *and*
- The applicant was married to the deceased employee or annuitant prior to the Supreme Court issuing *Windsor* on June 26, 2013; *or*

[1] *See* 570 U.S. 744 (2013).

[2] *See* 576 U.S. 644 (2015).

• The applicant was married to the deceased employee or annuitant within one year from the date the Supreme Court issued *Windsor* on June 26, 2013; *or*

• The applicant was married to the deceased employee or annuitant within one year *after* the Supreme Court issued *Obergefell* on June 26, 2015, in circumstances where the couple resided in a jurisdiction that prohibited same-sex marriage at any time after *Windsor*

—OPM will deem the 9-month marriage requirement satisfied for purposes of determining entitlement to survivor annuity benefits and/or a BEDB.

Additionally, if an affected applicant (as indicated above) was married to the deceased annuitant *after retirement,* and is additionally unable to show that the annuitant elected a survivor annuity benefit on the applicant's behalf within 2 years of marriage, as required by 5 U.S.C. 8341(b)(3), 8339(j)(5)(C) and (k)(2), 8416(b)–(c), and 8442(a)(2), the applicant may submit evidence to OPM showing that the annuitant intended to elect a survivor annuity for the applicant, and that but for the provisions under DOMA and/or state laws prohibiting same-sex marriage, the annuitant would have timely elected a survivor annuity on the applicant's behalf. OPM will consider any documentary evidence for this purpose, either in its own files or submitted by the applicant, that shows that the annuitant attempted to elect a survivor annuity for the applicant through correspondence with OPM.

Determinations regarding an affected applicant's corresponding entitlement to Federal Employees Health Benefits (FEHB) will be governed by the provisions under chapter 89 of title 5, United States Code; part 890 of title 5, Code of Federal Regulations; and the guidance OPM published in its **Federal Register** notice, Post-DOMA Survivor Annuitant Federal Health Benefit Waiver Criteria, 80 FR 74,817 (Nov. 30, 2015).

How To Apply for Benefits: If you are an affected same-sex spouse of a deceased federal employee or annuitant, you may submit an application for death benefits to OPM, Standard Form (SF) 2800 for CSRS and SF 3104 for FERS (or you may resubmit an application if OPM previously denied you survivor annuity benefits or a BEDB because you could not establish you had met the 9-month marriage requirement). You may download these application forms from OPM's website at *http://www.opm.gov/forms/standard-forms/,* and may submit your applications to this address: Office of Personnel Management, Attention: DOMA–9MMR, P.O. Box 45, Boyers, PA 16017–0045. If, in the alternative, you would prefer OPM mail you an application for benefits or if you have questions regarding submitting your application, you may write OPM using the address provided above, or you may call OPM's Retirement Information Office at 1–888–767–6738 or may send an email to *retire@opm.gov.*

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–24792 Filed 11–16–21; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93556; File No. SR–PEARL–2021–53]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Increase the Monthly Fees for MIAX Express Network Full Service Ports

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'') to amend the fees for the Exchange's MIAX Express Network Full Service (''MEO'')[3] Ports.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''MEO Interface'' or ''MEO'' means a binary order interface for certain order types as set forth in Rule 516 into the MIAX Pearl System. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to increase the fees for its Full Service MEO Ports, Bulk and Single (the ''Proposed Access Fees''), which allow Members[4] to submit electronic orders in all products to the Exchange. The Exchange currently offers different types of MEO Ports depending on the services required by the Member, including a Full Service MEO Port—Bulk,[5] a Full Service MEO Port—Single,[6] and a Limited Service MEO Port.[7] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine[8] and may request Limited Service MEO Ports for which MIAX Pearl will assess Members Limited Service MEO Port fees per matching

[4] ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] ''Full Service MEO Port—Bulk'' means an MEO port that supports all MEO input message types and binary bulk order entry. *See* the Definitions Section of the Fee Schedule.

[6] ''Full Service MEO Port—Single'' means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders. *See* the Definitions Section of the Fee Schedule.

[7] ''Limited Service MEO Port'' means an MEO port that supports all MEO input message types, but does not support bulk order entry and only supports limited order types, as specified by the Exchange via Regulatory Circular. *See* the Definitions Section of the Fee Schedule.

[8] A ''Matching Engine'' is a part of the MIAX Pearl electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol. A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. *See* the Definitions Section of the Fee Schedule.

engine based on a sliding scale for the number of Limited Service MEO Ports utilized each month. The two (2) Full-Service MEO Ports that may be allocated per matching engine to a Member may consist of: (a) Two (2) Full Service MEO Ports—Bulk; (b) two (2) Full Service MEO Ports—Single; or (c) one (1) Full Service MEO Port—Bulk and one (1) Full Service MEO Port—Single.

Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[9] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports (described above) per matching engine to which that Member connects. The Exchange currently has twelve (12) matching engines, which means Members may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on certain volume percentages, as described below. For illustrative purposes and as described in more detail below, the Exchange currently assesses a fee of $5,000 per month for Members that reach the highest Full Service MEO Port—Bulk Tier, regardless of the number of Full Service MEO Ports allocated to the Member. For example, assuming a Member connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports per matching engine, this results in a cost of $208.33 per Full Service MEO Port ($5,000 divided by 24) for the month. This fee has been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[10] The Exchange now proposes to increase Full Service MEO Port fees as further described below, with the highest monthly fee of $10,000 for the Full Service MEO Port—Bulk. Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they connect for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, with two Full Service MEO Ports per matching engine, this would result in a cost of $416.67 per Full Service MEO Port ($10,000 divided by 24).

The Exchange assesses Members Full Service MEO Port Fees, either for a Full Service MEO Port—Bulk and/or for a Full Service MEO Port—Single, based upon the monthly total volume executed by a Member and its Affiliates[11] on the Exchange across all origin types, not including Excluded Contracts,[12] as compared to the Total Consolidated Volume (''TCV''),[13] in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of ''Non-Transaction Fees Volume-Based Tiers'' described in the Definitions section of the Fee Schedule. The Exchange assesses these and other monthly Port fees on Members in each month the market participant is credentialed to use a Port in the production environment.

Current Full Service MEO Port—Bulk Fees. Currently, the Exchange assesses Members monthly Full Service MEO Port—Bulk fees as follows:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $3,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $4,500; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $5,000.

Proposed Full Service MEO Port—Bulk Fees. The Exchange now proposes to assess Members monthly Full Service MEO Port—Bulk fees as follows:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $5,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $7,500; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $10,000.

Current Full Service MEO Port—Single Fees. Currently, the Exchange assesses Members monthly Full Service MEO Port—Single fees as follows:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $3,375; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $3,750.

Proposed Full Service MEO Port—Single Fees. The Exchange now proposes to assess Members monthly Full Service MEO Port—Single fees as follows:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,500;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers,

[9] *See* Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees ($750 per port per month for the first 5 BOE/FIX Logical Ports and $800 per port per month for each port over 5; $1,500 per port per month for the first 5 BOE Bulk Logical Ports, $2,500 per port per month for ports 6–30, and $3,000 per port per month for each port over 30); Cboe BXZ Exchange, Inc. (''BZX'') Options Fee Schedule, Options Logical Port Fees, Logical Ports ($750 per port per month), Ports with Bulk Quoting Capabilities ($1,500 per port per month for the first and second ports, $2,500 per port per month for three or more); Cboe EDGX Exchange, Inc. (''EDGX'') Options Fee Schedule, Options Logical Port Fees, Logical Ports ($500 per port per month), Ports with Bulk Quoting Capabilities ($600 per port per month). *See also* Nasdaq Stock Market LLC, Options 7, Pricing Schedule, Section 3 ($1,500 per port per month for the first 5 SQF ports; $1,000 per port per month for SQF ports 15–20; and $500 per port per month for all SQF ports over 21).

[10] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[11] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Pearl Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Pearl Market Maker) that has been appointed by a MIAX Pearl Market Maker, pursuant to the following process. A MIAX Pearl Market Maker appoints an EEM and an EEM appoints a MIAX Pearl Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the Fee Schedule.

[12] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[13] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the Fee Schedule.

or volume above 0.30% up to 0.60%, $3,500; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $4,500.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, MEO ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers [14] or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Certain Members need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that the System has to assess. Those Members may account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout.

The Exchange now proposes to increase its monthly Full Service MEO Port fees since it has not done so since the fees were adopted in 2018,[15] which are designed to recover a portion of the costs associated with directly accessing the Exchange. The Exchange notes that its affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald''), charge fees for their high throughput, low latency MEI Ports in a similar fashion as the Exchange charges for its MEO Ports—generally, the more active user the Member (*i.e.,* the greater number/greater national ADV of classes assigned to quote on MIAX and MIAX Emerald), the higher the MEI Port fee.[16] This concept is not new or novel. The Exchange also notes that the proposed increased fees for the Exchange's Full Service MEO Ports are in line with, or cheaper than, the similar port fees or similar membership fees charged by other options exchanges.[17]

The Exchange has historically undercharged for Full Service MEO Ports as compared to other options exchanges [18] because the Exchange provides Full Service MEO Ports as a package for a single monthly fee. As described above, this package includes two Full Service MEO Ports for each of the Exchange's twelve (12) matching engines. The Exchange understands other options exchanges charge fees on a per port basis. For example, NYSE American, LLC (''NYSE American'') and NYSE Arca, Inc. (''NYSE Arca'') both charge $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater,[19] all on a per matching engine basis, with NYSE American and NYSE Arca having 17 match engines and 19 match engines, respectively.[20] Similarly, The Nasdaq Stock Market LLC (''NASDAQ'') charges $1,500 per port for Specialized Quote Interface (''SQF'') ports 1–5, $1,000 per SQF port for ports 6–20, and $500 per SQF port for ports 21 and greater,[21] all on a per matching engine basis, with NASDAQ having multiple matching engines.[22] The NASDAQ SQF Interface Specification also provides that NASDAQ's affiliates, Nasdaq PHLX LLC (''Nasdaq Phlx'') and Nasdaq BX, Inc. (''Nasdaq BX''), have trading infrastructures that may consist of multiple matching engines with each matching engine trading only a range of option underlyings.[23] Further, the NASDAQ SQF Interface Specification provides that the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure.[24] Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.[25] The proposed monthly fee increases for Full Service MEO Ports would bring the Exchange's fees more in line with that of other options exchanges, while maintaining a competitive fee structure for Full Service MEO Ports.

Implementation

The proposed fees will become effective on November 1, 2021.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [26] in general, and furthers the objectives of Section 6(b)(4) of the Act [27] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees are reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems the Full Service MEO Port fees to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements. The Exchange believes that it is important to demonstrate that these fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expense the Exchange has and will incur, and that the Exchange is providing sufficient transparency (as described below) into how the Exchange determined to charge such fees. Accordingly, the Exchange is providing an analysis of its revenues, costs, and

[14] The term ''Market Maker'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[15] *See supra* note 10.

[16] *See* MIAX Fee Schedule, Section 5 (d)(ii); MIAX Emerald Fee Schedule, Section 5 (d)(ii).

[17] *See supra* note 9.

[18] *See id.*

[19] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees; NYSE Arca Options Fee Schedule, Port Fees.

[20] *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange).

[21] *See* Nasdaq Stock Market, Nasdaq Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services.

[22] *See* Nasdaq Specialized Quote Interface (SQF) Specification, Version 6.5b (updated February 13, 2020), Section 2, Architecture, *available at https://www.nasdaq.com/docs/2020/02/18/Specialized-Quote-Interface-SQI-6.5b.pdf* (the ''NASDAQ SQF Interface Specification'').

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(4) and (5).

profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees.

In order to determine the Exchange's costs to provide the access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services. The sum of all such portions of expenses represents the total cost of the Exchange to provide the access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice. The Exchange is also providing detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees.

In order to determine the Exchange's projected revenues associated with the Proposed Access Fees, the Exchange analyzed the number of Members currently utilizing Full Service MEO Ports, and, utilizing a recent monthly billing cycle representative of 2021 monthly revenue, extrapolated annualized revenue on a going-forward basis. The Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants, discounts that can be achieved due to lower trading volume and vice versa, market participant consolidation, etc. Additionally, the Exchange similarly does not factor into its analysis future cost growth or decline. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the majority of 2021 (other than July and August 2021), the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit when comparing the Exchange's total annual expense associated with providing the services associated with the Proposed Access Fees versus the total projected annual revenue the Exchange will collect for providing those services. The Exchange notes that this is the same justification process utilized by the Exchange's affiliate, MIAX Emerald, in a filing recently noticed by the Commission when MIAX Emerald adopted MEI Port fees.[28]

* * * * *

On March 29, 2019, the Commission issued its Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network (the ''BOX Order'').[29] On May 21, 2019, the Commission issued the Staff Guidance on SRO Rule Filings Relating to Fees.[30] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange and its affiliates, MIAX and MIAX Emerald, to establish or increase other non-transaction fees. Accordingly, the Exchange believes that the Commission should find that the Proposed Access Fees are consistent with the Act.

* * * * *

Over the course of 2021, the Exchange's market share has fluctuated between approximately 3–6% of the U.S. equity options industry.[31] The Exchange is not aware of any evidence that a market share of approximately 3–6% provides the Exchange with anti-competitive pricing power. If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect.

The Exchange believes the proposed fees are equitable and reasonable because the proposed highest tiered fee is less than or equal to similar fees charged for access on other options exchanges with comparable market shares, some of which charge on a per port basis, unlike the Exchange. For example, NYSE American (equity options market share of 7.73% as of October 27, 2021 for the month of October)[32] charges $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater,[33] all on a per matching engine basis, with NYSE American having 17 match engines.[34] Similarly, NASDAQ (equity options market share of 8.12% as of October 27, 2021 for the month of October)[35] charges $1,500 per port for SQF ports 1–5, $1,000 per SQF port for ports 6–20, and $500 per SQF port for ports 21 and greater,[36] all on a per matching engine basis, with NASDAQ having multiple matching engines.[37] The NASDAQ SQF Interface Specification provides that PHLX/NOM/BX Options trading infrastructures may consist of multiple matching engines with each matching engine trading only a range of option underlyings. Further, the SQF infrastructure is such that the

[28] *See* Securities Exchange Act Release No. 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers) (adopting tiered MEI Port fee structure ranging from $5,000 to $20,500 per month).

[29] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).

[30] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[31] *See* ''The market at a glance,'' *available at https://www.miaxoptions.com/* (last visited October 27, 2021).

[32] *See id.*

[33] *See supra* note 19.

[34] *See supra* note 20.

[35] *See supra* note 21.

[36] *See supra* note 21.

[37] *See supra* note 22.

firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.[38]

In the each of the above cases, the Exchange's highest tiered port fee, as proposed, is similar to or less than the port fees of competing options exchanges with like market share. Further, as described in more detail below, many competing exchanges generate higher overall operating profit margins and higher ''access fees'' than the Exchange, inclusive of the projected revenues associated with the proposed fees. The Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic system, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive access fees. Each of the port fee rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Separately, the Exchange is not aware of any reason why market participants could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such market participant, did not make business or economic sense for such market participant to access such exchange. No options market participant is required by rule, regulation, or competitive forces to be a Member of the Exchange. As evidence of the fact that market participants can and do drop their access to exchanges based on non-transaction fee pricing, R2G Services LLC (''R2G'') filed a comment letter after BOX's proposed rule changes to increase its connectivity fees (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04). The R2G Letter stated, ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' Similarly, the Exchange's affiliate, MIAX Emerald, noted in a recent filing that once MIAX Emerald issued a notice that it was instituting MEI Port fees, among other non-transaction fees, one Member dropped its access to the Exchange as a result of those fees.[39] Accordingly, these examples show that if a market participant believes, based on its business model, that an exchange charges too high of a fee for connectivity and/or other non-transaction fees for its relevant marketplace, market participants can choose to drop their access to such exchange.

The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 10.7 million order messages per second. On an average day, the Exchange handles over approximately 2.7 billion total messages. However, in order to achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall expense for storage and network transport capabilities.

In order to provide more detail and to quantify the Exchange's costs associated with providing access to the Exchange in general, the Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases as the services associated with the Proposed Access Fees increase. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are reasonable in order to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue: Transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. For 2021,[40] the total annual expense for providing the access services associated with the Proposed Access Fees for the Exchange is projected to be approximately $897,084. The $897,084 in projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[41] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[42] The $897,084 in projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any

[38] *See id.*

[39] *See supra* note 28.

[40] The Exchange has not yet finalized its 2021 year end results.

[41] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[42] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87876 (December 31, 2019), 85 FR 757 (January 7, 2020) (SR–PEARL–2019–36). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

other product or service offered by the Exchange. It does not include general costs of operating matching systems and other trading technology, and no expense amount was allocated twice.

As discussed, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees, is projected to be $40,166. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[43] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. Further, the Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with the MIAX Pearl equities market are accounted for separately and are not included within the scope of this filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 1.80% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 0.90% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical

[43] In fact, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. This fee increase by ICE data services, while not subject to Commission review, has material impact on cost to exchanges and other market participants that provide downstream access to other market participants. The Exchange notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

[44] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

[45] *Id.*

components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 0.90% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[46]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 0.90% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[47]

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be $856,918. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions; (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be $783,513, which is only a portion of the $9,163,894 total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 8.55% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[48]

The Exchange's depreciation and amortization expense relating to providing the access services associated with the Proposed Access Fees is projected to be $64,456, which is only a portion of the $2,864,716[49] total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 2.25% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] The Exchange notes that the total depreciation expense is different from the total for the Exchange's filing relating to Trading Permits because the Exchange factors in the depreciation of its own internally developed software when assessing costs for Full Service MEO Ports, resulting in a higher depreciation expense number in this filing.

other service, as supported by its cost review.[50]

The Exchange's occupancy expense relating to providing the access services associated with the Proposed Access Fees is projected to be $8,949, which is only a portion of the $497,180 total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 150 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the Proposed Access Fees. Without this office space, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 1.80% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[51]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees in to recover its costs, thus the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. To illustrate, on a going-forward, fully-annualized basis, the Exchange projects that its annualized revenue for providing the access services associated with the Proposed Access Fees would be approximately $1,476,000 per annum, based on a recent billing cycle. The Exchange projects that its annualized expense for providing the access services associated with the Proposed Access Fees would be approximately $897,084 per annum. Accordingly, on a fully-annualized basis, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit, as the Exchange will make only a 39% profit margin on the Proposed Access Fees ($1,476,000 in revenue minus $897,084 in expense = $578,916 profit per annum). The Exchange notes that the fees charged to each Member for Full Service MEO Ports can vary from month to month depending on the type used and the Non-Transaction Fees Volume-Based Tier that the Member achieves for that month. As such, the revenue projection is not a static number, with monthly Full Service MEO Port fees likely to fluctuate month to month.

For the avoidance of doubt, none of the expenses included herein relating to the access services associated with the Proposed Access Fees relate to the provision of any other services offered by the Exchange. Stated differently, no expense amount of the Exchange is allocated twice. The Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with the MIAX Pearl equities market and the Exchange's affiliate exchanges, MIAX and MIAX Emerald, are accounted for separately and are not included within the scope of this filing. Stated differently, no expense amount of the Exchange is also allocated to MIAX Pearl Equities, MIAX or MIAX Emerald.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the Exchange's costs of providing access to Exchange Systems. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Exchange believes the proposed changes are reasonable, equitably allocated and not unfairly discriminatory, and do not result in a ''supra-competitive''[52] profit. Of note, the Guidance defines ''supra-competitive profit'' as profits that exceed the profits that can be obtained in a competitive market.[53] With the proposed changes, the Exchange anticipates that its profit margin will be

[50] *Id.*

[51] *Id.*

[52] *See supra* note 30.

[53] *See id.*

approximately 39%, inclusive of the Proposed Access Fees. In order to achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange connectivity resources, but also those firms that most heavily consume Exchange resources, network consumers, and Members that use the Full Service MEO ports, which generate billions of messages per day across the Exchange. Such profit margin should enable the Exchange to continue to invest in its network and systems, maintain its current infrastructure, support future enhancements to network access, and continue to offer enhanced customer reporting and monitoring services.

While the proposed fees are similar to or less than that of other options exchanges,[54] as discussed above, the incremental increase in revenue generated from the 39% profit margin for access via Full Service MEO Ports will allow the Exchange to further invest in its system architecture and matching engine functionality to the benefit of all market participants. The revenue generated under the proposed rule change would also provide the Exchange with the resources necessary to further innovate and enhance its systems and seek additional improvements or functionality to offer market participants generally. The Exchange believes that these investments, in turn, will benefit all investors by encouraging other exchanges to further invest, innovate, and improve their own systems in response.

Based on the 2020 Audited Financial Statements of competing options exchanges (since the 2021 Audited Financial Statements will likely not become publicly available until early July 2022, after the Exchange has submitted this filing), the Exchange's revenue that is derived from its access fees is in line with the revenue that is derived from access fees of competing exchanges. For example, the total revenue from ''access fees'' [55] for 2020 for MIAX Pearl was $11,422,000. MIAX Pearl projects that the total revenue from ''access fees'' for 2021 will be $20,001,243, inclusive of the Proposed Access Fees described herein.

The Exchange's projected revenue from access fees is still less than, or similar to, the access fee revenues generated by access fees charged by other U.S. options exchanges. For example, the Cboe Exchange, Inc. (''Cboe'') reported $70,893,000 in ''access and capacity fee'' [56] revenue for 2020. Cboe C2 Exchange, Inc. (''C2'') reported $19,016,000 in ''access and capacity fee'' revenue for 2020.[57] Cboe BZX Exchange, Inc. (''BZX'') reported $38,387,000 in ''access and capacity fee'' revenue for 2020.[58] Cboe EDGX Exchange, Inc. (''EDGX'') reported $26,126,000 in ''access and capacity fee'' revenue for 2020.[59] PHLX reported $20,817,000 in ''Trade Management Services'' revenue for 2019.[60] The Exchange notes it is unable to compare ''access fee'' revenues with Nasdaq Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in Nasdaq Phlx's Form 1, simply titled ''Market services.'' [61]

The Exchange also believes that, based on the 2020 Audited Financial Statements of competing options exchanges, the Exchange's overall operating margin is in line with or less than the operating margins of competing options exchanges, including the revenue and expense associated with the Proposed Access Fees. For example, the 2020 operating margin for MIAX Pearl was −18%. Based on competing exchanges' Form 1 Amendments, Nasdaq ISE, LLC's (''Nasdaq ISE'') operating profit margin for 2020 was approximately 85%; Nasdaq Phlx's operating profit margin for 2020 was approximately 49%; NASDAQ's operating profit margin for 2020 was approximately 62%; NYSE Arca's operating profit margin for 2020 was approximately 55%; NYSE American's operating profit margin for 2020 was approximately 59%; Cboe's operating profit margin for 2020 was approximately 74%; and BZX's operating profit margin for 2020 was approximately 52%. Nasdaq ISE's operating profit margin, for all of 2019, was 83%.[62] Nasdaq ISE's equity options market share for all of 2019 was 8.99% [63] while its access fees are as follows: $500 per month for Electronic Access Members; $5,000 per month for Primary Market Makers; and $2,500 per month for Competitive Market Makers.[64] Nasdaq Phlx's operating profit margin, for all of 2019, was 67%.[65] Nasdaq Phlx's equity options market share for all of 2019 was 15.85% [66] while its permit fees are as follows: $4,000 per month for Floor Brokers; $6,000 per month for Floor Lead Market Makers and Floor Market Makers; and $4,000 per month for Remote Lead Market Makers and Remote Market Makers.[67]

In the Exchange's Initial Proposed Fee Change,[68] the Exchange compared projected profit margins to the 2019 operating profit margin of Nasdaq ISE and Nasdaq Phlx, which were 83% and 67% respectively. The SIG Letter [69] contained the opinion that using the overall operating profit margins of Nasdaq ISE and Nasdaq Phlx was an ''apple to oranges'' comparison because 2019 was a ''record setting year.'' [70] The SIG letter's argument assumes that because 2019 was a record setting year for options volumes, that each options exchange generated above average profits without provided any evidence to support this assumption. The Exchange sought to provide additional data to support a 39% profit margin based on the best, most recent data available. The Exchange did not provide this data to do an ''apple-to-apples'' comparison, but rather to provide

[54] *See supra* notes 9, 19, and 21.

[55] As described in MIAX Pearl's Audited Financial Statements, fees for ''access services'' are assessed to exchange members for the opportunity to trade and use other related functions of the exchanges. *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000460.pdf.*

[56] According to Cboe, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] According to Nasdaq Phlx, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [Nasdaq Phlx's] published fee schedules.'' *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[61] *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[62] *See* Nasdaq Phlx Form 1, Exhibit D, filed June 30, 2020 *available at https://sec.report/Document/9999999997-20-003902/.*

[63] *See https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Exchange.*

[64] *See* Nasdaq ISE LLC Options 7 Pricing Schedule, Section 8.A. Access Services, at *https://listingcenter.nasdaq.com/rulebook/ise/rules/ISE%20Options%207.*

[65] *See* Nasdaq ISE Form 1, filed June 29, 2020 *available at* Form 1—ISE—Final (1).pdf (*sec.gov*).

[66] *See supra* note 31.

[67] *See* Nasdaq Phlx Options 7 Pricing Schedule, Section 8.A. Permit and Registration Fees, at *https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207.*

[68] *See* Securities Exchange Act Release No. 92365 (July 9, 2021), 86 FR 37347 (SR–PEARL–2021–33) (''Initial Proposed Fee Change'').

[69] *See* letter from Richard J. McDonald, Susquehanna International Group, LLP (''SIG'') to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter'').

[70] *See id.*

insight into the profit margins of other exchanges to put the projected profit margin, inclusive of the proposed fees, into perspective. While the Exchange provided a detailed analysis and disclosure of its projected profit margins in this proposed fee change and the Initial Proposed Fee Change, other exchanges are generally not required to disclose profit margins on a more granular, per-product/non-transaction fee basis within their annual Form 1 filings. The Exchange, therefore, used the best, most recent data available to generate percentages of other exchange's profit margins.

The Exchange further believes its proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.

The Exchange believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee, the Exchange provides each Member two (2) Full Service MEO Ports for each matching engine to which that Member is connected. Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[71] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports per matching engine to which it connects. The Exchange currently has twelve (12) matching engines, which means Members may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on certain volume percentages. The Exchange currently assesses Members a fee of $5,000 per month in the highest Full Service MEO Port—Bulk Tier, regardless of the number of Full Service MEO Ports allocated to the Member. Assuming a Member connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports per matching engine, this results in a cost of $208.33 per Full Service MEO Port—Bulk ($5,000 divided by 24) for the month. This fee has been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[72] The Exchange now proposes to increase the Full Service MEO Port fees, with the highest Tier fee for a Full Service MEO Port—Bulk of $10,000 per month. Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they are connected for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, and achieves the highest Tier for that month, with two Full Service MEO Ports—Bulk per matching engine, this would result in a cost of $416.67 per Full Service MEO Port ($10,000 divided by 24).

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees for services and products, in addition to order flow, to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment.

There is also no regulatory requirement that any market participant connect to any one options exchange, that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Sponsored User.[73] Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. Based on a recent analysis conducted by the Cboe Exchange, Inc. (''Cboe''), as of October 21, 2020, only three (3) of the broker-dealers, out of approximately 250 broker-dealers, were members of at least one exchange that lists options for trading and were members of all 16 options exchanges.[74] Additionally, the Cboe Fee Filing found that several broker-dealers were members of only a single exchange that lists options for trading and that the number of members at each exchange that trades options varies greatly.[75]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete.

Intra-Market Competition

The Exchange believes that the Proposed Access Fees do not place certain market participants at a relative disadvantage to other market participants because the Proposed Access Fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the Proposed Access Fees reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange.

Inter-Market Competition

The Exchange believes the Proposed Access Fees do not place an undue burden on competition on other options exchanges that is not necessary or appropriate. In particular, options market participants are not forced to connect to (and purchase MEO Ports from) all options exchanges. The Exchange also notes that it has far less Members as compared to the much greater number of members at other options exchanges. Not only does MIAX Pearl have less than half the number of members as certain other options exchanges, but there are also a number of the Exchange's Members that do not connect directly to MIAX Pearl. There are a number of large users of the MEO Interface and broker-dealers that are members of other options exchange but not Members of MIAX Pearl. The Exchange is also unaware of any assertion that its existing fee levels or the Proposed Access Fees would somehow unduly impair its competition with other options exchanges. To the contrary, if the fees charged are deemed too high by market participants, they can simply disconnect.

The Exchange operates in a highly competitive market in which market participants can readily favor one of the 15 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange

[71] *See supra* notes 19 and 21.

[72] *See supra* note 10.

[73] *See* Exchange Rule 210. The Sponsored User is subject to the fees, if any, of the Sponsoring Member. The Exchange notes that the Sponsoring Member is not required to publicize, let alone justify or file with the Commission its fees, and as such could charge the Sponsored User any fees it deems appropriate, even if such fees would otherwise be considered supra-competitive, or otherwise potentially unreasonable or uncompetitive.

[74] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105) (the ''Cboe Fee Filing''). The Cboe Fee Filing cited to the October 2020 Active Broker Dealer Report, provided by the Commission's Office of Managing Executive, on October 8, 2020.

[75] *Id.*

has more than approximately 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. Over the course of 2021, the Exchange's market share has fluctuated between approximately 3–6% of the U.S. equity options industry.[76] The Exchange is not aware of any evidence that a market share of approximately 3–6% provides the Exchange with anti-competitive pricing power. If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect. The Exchange believes that the ever-shifting market share among exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to fee changes. In such an environment, the Exchange must continually adjust its fees and fee waivers to remain competitive with other exchanges and to attract order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange initially filed this proposed fee change on July 1, 2021 and that proposal was published in the **Federal Register** on July 15, 2021.[77] The Commission received one comment letter on the Initial Proposed Fee Change.[78] The Exchange withdrew Initial Proposed Fee Change on October 12, 2021.[79] The Exchange now responds to the SIG Letter in this filing.

The SIG letter cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [80] The SIG Letter's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the Initial Proposed Fee Change and this filing.

Until recently, the Exchange has operated at a net annual loss since it launched operations in 2017.[81] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and also in the Initial Proposed Fee Change. Similar justifications for the proposed fee change included in the Initial Proposed Fee Change, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX Emerald and MIAX, and SIG did not submit a comment letter on those filings.[82] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[83] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the Initial Proposed Fee Change included the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [84] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [85]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee changes should satisfy, and is not warranted here.

[76] *See supra* note 31.

[77] *See supra* note 68.

[78] *See supra* note 69.

[79] *See* Securities Exchange Act Release No. 93347 (October 15, 2021), 86 FR 58341 (October 21, 2021) (SR–PEARL–2021–33) (Notice of Withdrawal of a Proposed Rule Change to Amend the MIAX Pearl Options Fee Schedule to Increase the Monthly Fees for MIAX Express Network Full Service Ports).

[80] 17 CFR 201.700(b)(3).

[81] The Exchange has incurred a cumulative loss of $86 million since its inception in 2017 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 29, 2021, *available at https://sec.report/Document/9999999997-21-004367/.*

[82] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[83] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17 (the ''First Proposed Rule Change''). On April 22, 2021, the Exchange withdrew the First Proposed Rule Change and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20 (the ''Second Proposed Rule Change''). On May 3, 2021, the Exchange withdrew the Second Proposed Rule Change and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22 (the ''Third Proposed Rule Change''). On May 10, 2021, the Exchange withdrew the Third Proposed Rule Change and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

[84] *See* letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021.

[85] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

In addition, the arguments in the SIG Letter do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the Initial Proposed Fee Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the Initial Proposed to address their concerns and instead chose to submit a comment letter. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. The SIG Letter was submitted in response to six (6) filings submitted by the Exchange and its affiliates, MIAX and MIAX Emerald, and is primarily focused on proposed fee changes concerning 10Gb ULL connectivity.[86] With regards to the Initial Proposed Fee Change, the SIG Letter does not directly address the proposed fees or lay out specific arguments as to why the proposal is not consistent with Section 6(b)(4) of the Act. Rather, it simply describes the proposed fee change and flippantly states that its claims concerning the 10Gb ULL fee change proposals by the Exchange, and its affiliates, apply to the Initial Proposed Fee Change. Nonetheless, the Exchange submits the below response to the SIG Letter concerning the Initial Proposed Fee Change.

General

First, the SIG Letter states that 10Gb ULL ''lines are critical to Exchange members to be competitive *and to provide essential protection from adverse market events*'' (*emphasis added*).[87] The Exchange notes that this statement is generally not true for Full Service MEO Ports as those ports are used primarily for order entry and not risk protection activities like purging quotes resting on the MIAX Pearl Options Book. Full Service MEO Ports are essentially used for competitive reasons and Members may choose to utilize one or two Full Service MEO Ports[88] based on their business needs and desire to attempt to access the market quicker by using one port that may have less latency. For instance, a Member may have just sent numerous messages and/or orders over one of their Full Service MEO Ports that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over another of their other Full Service MEO Ports with less message and/or order traffic or any of their optional additional Limit Service MEO Ports[89] to ensure that their liquidity taking order accesses the Exchange quicker because that port's queue is shorter.

The Tiered Pricing Structure for Full Service MEO Ports Provides for the Equitable Allocation of Reasonable Dues, Fees, and Other Charges

The SIG Letter challenges the below two bases the Exchange set forth in its Initial Proposed Fee Change and herein to support the assertion that the proposal provides for the equitable allocation of reasonable dues, fees, and other charges:

- ''If the Exchanges were to attempt to establish unreasonable pricing, then no market participant would join or connect to the Exchanges, and existing market participants would disconnect.
- The fees will not result in excessive pricing or supra-competitive profit.''[90]

The Exchange responds to each of SIG's challenges in turn below.

If the Exchanges Were To Attempt To Establish Unreasonable Pricing, Then No Market Participant Would Join or Connect to the Exchange, and Existing Market Participants Would Disconnect

The SIG Letter asserts that the prospect that a market participant may withdraw from the Exchange ''if the participant determines that any of their fees are too high is in no way a basis for claiming that a fee increase is reasonable.''[91] The SIG Letter further asserts that the Exchange's ''claim that a market participant would leave the Exchanges, or any of them, if a given fee was felt to be too high is an unsupported claim.''[92] The Exchange, in fact, did support its claim by providing two examples where members chose to depart the Exchange, or a competing exchange, directly due to the specific fee increases. SIG attempts to dismiss the examples provided by the Exchange by implying that the members may have chosen to depart the Exchange, or the competing exchange, for other reasons. In the first example, R2G explicitly stated in their comment letter ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' There is no other way to interpret R2G's statement other than that R2G terminated their access to that particular exchange because of that particular non-transaction fee increase. In the second example, MIAX Emerald, not SIG, is uniquely positioned to know why this Member chose to depart MIAX Emerald as it discussed the issues with the Member at the time of their departure and that Member stated it was related to the imposition of non-transaction fees. The SIG Letter correctly asserts that ''[t]here are many reasons a market participant may join, remain at, or leave an exchange. . . .''[93] However, the members discussed in the examples above terminated their exchange access because of fees alone.

Further, the argument that a Member's ability to terminate access to an exchange based on fees has been used not only in this proposal, but also in other fee filings submitted by the Exchange and its affiliates to justify certain non-transaction fees.[94] The Exchange discussed this basis with Commission Staff as it shows that market participants may choose not to pay a fee where they view that fee as excessive. The ability to terminate access to an exchange shows that if a market participant believes, based on its business model, that an exchange charges too high of a fee for connectivity and/or other non-transaction fees for its relevant marketplace, market participants can choose to drop their access to such exchange. A Member's ability to terminate access to the Exchange where it deems a fee increase too excessive is not the only basis, but one of many, used to support the

[86] *See* Securities Exchange Act Release Nos. 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR–MIAX–2021–35); 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37); 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36); 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23); *and* 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR–EMERALD–2021–25).

[87] *See* SIG Letter at page 2, *supra* note 69.

[88] The rates set forth for Full Service MEO Ports under Section 5(d) of the Exchange's Fee Schedule entitle a Member to two (2) such Ports for each Matching Engine for a single port fee.

[89] Members may be allocated two (2) Full-Service MEO Ports per Matching Engine and may request Limited Service MEO Ports for which the Exchange will assess no fee for the first two Limited Service MEO Ports requested by the Member. *See* Section 5(d) of the Exchange's Fee Schedule.

[90] *See* SIG Letter at page 3, *supra* note 69.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See supra* note 82.

Exchange's justification that the proposal is consistent with the Act.

The Proposed Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

In the Initial Proposed Fee Change, the Exchange provided data that the proposed fee change would not result in excessive pricing or a supra-competitive profit. The Exchange outlined its projected revenues and expense related to the proposed fee change and estimated it would generate a 39% profit margin. The Exchange then compared its projected profit margin to the 2019 operating profit margin of Nasdaq ISE and Nasdaq Phlx, which were 83% and 67%, respectively. SIG opined that a using the overall operating profit margins of Nasdaq ISE and Nasdaq Phlx is an ''apple-to-oranges'' comparison because 2019 was ''record setting year.'' [95] SIG assumes that because 2019 was a record setting year for options volumes, that each options exchange generated above average profits without providing any evidence to support this assumption. Data for 2019 was the most recent data available at the time the Exchange filed the Initial Proposed Fee Change on July 1, 2021. Since that time, data for 2020 became available and the Exchange discusses that data for numerous other options exchanges under Section 3.b. above in this proposed fee change.[96] The Exchange also included in this proposal additional data from its own 2021 Audited Financial Statements and projections of future revenues and costs from the proposed fee change.

The Exchange sought to provide additional data to support a 39% profit margin based on the best, most recent data available. It did not provide this data to do an ''apple-to-apples'' comparison, but rather to provide insight into the profit margins of other exchanges to put the projected profit margin here into perspective. While the Exchange provided a detailed analysis and disclosure of its projected profit margins in this proposed fee change and the Initial Proposed Fee Change, other exchanges are generally not required to disclose profit margins on a more granular, per-product/non-transaction fee basis within their annual Form 1 filings. The Exchange, therefore, used the best, most recent data available to generate percentages of other exchanges' profit margins. SIG has access to the same public data as the Exchange used in making the above projections regarding Nasdaq ISE and Nasdaq Phlx and is free to generate its own assumptions on that data if it believes the Exchange's calculations are wrong or misguided.

As stated above, the Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[97] This work with Commission Staff included thorough reviews of the Exchange's projected revenues and assignment of internal and third party expenses. The SIG Letter simply seeks to ignore the vast amount of disclosure the Exchange provided and kick up some sand in the hopes that raising questions about the analysis with no support on whether the answers to those questions would cause the proposed fee change to be excessive or result in supra-competitive pricing.

Furthermore, the Exchange is beginning to see significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[98] The Exchange has seen price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

The Proposed Tiered Pricing Structure Is Not Part of a Discriminatory Fee Structure and Tiered Fee Structures Are Commonplace Amongst Exchanges

The SIG Letter challenges the below three bases the Exchange set forth in its Initial Proposed Fee Change and herein to support that the proposed tiered pricing structure provides for the equitable allocation of reasonable dues, fees, and other charges:

- ''The Exchanges contend that the proposed structure would encourage firms to be more economical and efficient in the number of connections they purchase. The Exchanges assert that this will enable them to better monitor and provide access to their networks to ensure sufficient capacity and headroom in the System.
- The Exchanges claim that the majority of members and non-members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-pricing structure is implemented.
- The Exchanges contend that it benefits overall competition in the marketplace to allow relatively new entrants like the Exchanges to propose fees that may help these new entrants recoup their infrastructure investments.'' [99]

The SIG Letter's challenges to the first two assertions above are not applicable here as a tiered pricing structure for Full Service MEO Ports is not a new proposal, but was previously in place prior to this proposal and the Initial Proposed Fee Change. The Exchange is therefore only responding to the SIG Letter's challenge to the Exchange's third assertion.

SIG Incorrectly Claims That the Exchange Contends That It Benefits Overall Competition in the Marketplace To Allow Relatively New Entrants Like the Exchange To Propose Fees That May Help These New Entrants Recoup Their Infrastructure Investments

Nowhere in this proposal or in the Initial Proposed Fee change did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' As stated above, the Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[100] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the Initial Proposed Fee Change included the same level of detail as those past proposed fee changes that previously survived Commission scrutiny. Asserting that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because

[95] *See* SIG Letter at page 6, *supra* note 69.

[96] *See supra* notes 60, 61, 62, and 65 and accompanying text.

[97] *See supra* note 83.

[98] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[99] *See* SIG Letter at page 4, *supra* note 69.

[100] *See supra* note 83.

the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems is one of many justifications for the proposed fees and not a cornerstone of the Exchange's proposal.

As stated above, until recently, the Exchange has operated at a net annual loss since it launched operations in 2017.[101] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. To do so, the Exchange chose to offer some non-transaction related services for little to no cost. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees and then use that revenue to more quickly recover its initial capital expenditures. Further, a vast majority of the Exchange's Members, if not all, benefited from these lower fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues and extending the duration during which it would recoup its initial capital expenditures. The SIG Letter chose to ignore this reality and instead criticize the Exchange for initially charging lower fees or providing a moratorium on certain non-transaction fees to the benefit of all market participants. The Exchange is now trying to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace.

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,[102] and Rule 19b–4(f)(2) [103] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2021–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2021–53. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2021–53 and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[104]

J. Matthew DeLesDernier,

Assistant Secretary.

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[101] *See supra* note 81.

[102] 15 U.S.C. 78s(b)(3)(A)(ii).

[103] 17 CFR 240.19b–4(f)(2).

[104] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93554; File No. SR–MEMX–2021–16]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

November 10, 2021.

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 October 29, 2021, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members [3] (the ''Fee Schedule'') pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on November 1, 2021. The text of the proposed rule change is provided in Exhibit 5.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1.5(p).

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to: (i) Adopt a new Targeted Step-Up Tier to provide an additive rebate applicable to executions of orders (other than displayed Retail Orders [4]) in securities priced at or above $1.00 per share that add liquidity to the Exchange (such orders, ''Added Volume''); (ii) modify the required criteria under Liquidity Removal Tier 1; (iii) reduce the rebates provided under DLI Tier 1 and DLI Tier 2 for executions of displayed orders in securities priced at or above $1.00 per share that add liquidity to the Exchange (such orders, ''Added Displayed Volume''); and (iv) increase the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity from the Exchange (such orders, ''Removed Volume'').

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 15% of the total market share of executed volume of equities trading.[5] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 4% of the overall market share.[6] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Adoption of Targeted Step-Up Tier 1

The Exchange proposes to adopt a new volume-based tier, referred to by the Exchange as Targeted Step-Up Tier 1, in which the Exchange will provide an additive rebate applicable to executions of orders (other than displayed Retail Orders) in securities priced at or above $1.00 per share that add liquidity to the Exchange (*i.e.,* Added Volume) for Members that meet at least one of two specified volume thresholds across a specified list of securities, referred to by the Exchange as the Targeted Step-Up Securities,[7] as further described below.

Currently, the Exchange provides various rebates to Members for executions of Added Volume ranging from $0.0020 per share to $0.0036 per share based on the type of order (*e.g.,* displayed, non-displayed, midpoint peg) and whether a Member qualifies for one of the Exchange's existing pricing tiers.[8] The Exchange now proposes to adopt Targeted Step-Up Tier 1 in which it will provide an additive rebate of $0.0002 per share for all executions of Added Volume in a particular month for a Member that qualifies for such tier in that month by achieving: (1) A Step-Up ADAV [9] from October 2021 that is equal to or greater than 0.05% of the TCV [10] in the Targeted Step-Up Securities; or (2) an ADAV that is equal to or greater than 0.08% of the TCV in the Targeted Step-Up Securities.[11] To determine if a Member meets either of these volume thresholds, the Exchange will aggregate a Member's ADAV across all Targeted Step-Up Securities for a given month.[12] The $0.0002 per share additive rebate will be provided in addition to the rebate that is otherwise applicable to each of a qualifying Member's orders that constitutes Added Volume (including a rebate provided under another pricing tier).[13]

The purpose of the proposed Targeted Step-Up Tier 1 is to encourage Members to increase their volume on the Exchange in certain specified securities for which the Exchange seeks to become a more competitive trading venue (*i.e.,* the Targeted Step-Up Securities). As a

[4] A ''Retail Order'' means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Exchange Rule 11.21(a).

[5] Market share percentage calculated as of October 28, 2021. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[6] *Id.*

[7] As proposed, the term ''Targeted Step-Up Securities'' means a list of securities designated as such, the universe of which will be determined by the Exchange and published on the Exchange's website. The Exchange anticipates that the initial Targeted Step-Up Securities list will include between 30 and 50 securities. The Exchange will not remove a security from the Targeted Step-Up Securities list without at least 30 days' prior notice to Members as published on the Exchange's website (unless the security is no longer eligible for trading on the Exchange).

[8] The Exchange notes that it is proposing herein to reduce the rebate of $0.0036 per share provided under DLI Tier 1 to $0.0035 per share, as further described below, so after giving effect to the changes proposed herein the range of rebates provided for executions of Added Volume would be from $0.0020 per share to $0.0035 per share.

[9] As set forth on the Fee Schedule, ''ADAV'' means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and ''Step-Up ADAV'' means ADAV in the relevant baseline month subtracted from current ADAV.

[10] As set forth on the Fee Schedule, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[11] This proposed pricing is referred to by the Exchange on the Fee Schedule under the new description ''Targeted Step-Up Tier 1'' with a Fee Code of ''X'' to be appended to the otherwise applicable Fee Code for qualifying executions (which include Fee Codes ''B'', ''D'', ''J'', ''B1'', ''D1'', ''J1'', ''B2'', ''D2'', ''J2'', ''Bq1'', ''Dq1'', ''Jq1'', ''Bq2'', ''Dq2'', ''Jq2'', ''H'' and ''M''). The Exchange notes that because the determination of whether a Member qualifies for a certain pricing tier (including the Targeted Step-Up Tier 1) for a particular month will not be made until after the month-end, the Exchange will provide the Fee Codes otherwise applicable to such transactions on the execution reports provided to Members during the month and will only designate the Fee Codes applicable to the achieved pricing tier on the monthly invoices, which are provided after such determination has been made, as the Exchange does for its tier-based pricing today.

[12] For example, if a Member achieved an ADAV of 0.01% of the TCV in each of eight different Targeted Step-Up Securities in a particular month, such Member would qualify for the Targeted Step-Up Tier in that month because it would have achieved an ADAV that is equal to 0.08% of the TCV in the Targeted Step-Up Securities.

[13] As defined above, Added Volume does not include executions of displayed Retail Orders in securities priced at or above $1.00 per share that add liquidity to the Exchange (such orders, ''Added Displayed Retail Volume''). The Exchange notes that the highest rebate that it currently provides with respect to any transaction effected on the Exchange is $0.0037 per share, which is for executions of Added Displayed Retail Volume. The Exchange is not seeking with this proposal to provide a rebate that is higher than such current maximum rebate, and thus, as proposed, the additive rebate provided under the Targeted Step-Up Tier would not apply to executions of Added Displayed Retail Volume as such transactions already receive a rebate of $0.0037 per share.

general matter, the Targeted Step-Up Securities are higher-priced and actively-traded names, many of which are actively-traded ETPs or components thereof, and the Exchange believes that increased participation in the trading of these securities would increase the diversity of securities actively traded on the Exchange as well as the notional market share traded on the Exchange, which would accrue benefits to all Members through deeper and more diversified liquidity on the Exchange. As such, the Exchange is seeking to improve its market quality, and thus increase its attractiveness as a trading venue, with respect to the Targeted Step-Up Securities by providing an incentive to Members to increase their order flow in such securities to the Exchange. Through the proposed additive rebate for executions of Added Volume for Members that qualify for the Targeted Step-Up Tier 1, the Exchange hopes to provide improved trading conditions on the Exchange with respect to the Targeted Step-Up Securities through increased execution opportunities and deeper liquidity in such securities resulting from such increased order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members.

The Exchange notes that the Targeted Step-Up Tier 1 is similar to other volume-based incentives and discounts, which have been widely adopted by exchanges, including the Exchange. More specifically, the Exchange believes the Targeted Step-Up Tier 1 is comparable to the Exchange's Displayed Liquidity Incentive (''DLI'') Tiers [14] as well as other pricing tiers adopted by other exchanges that provide an enhanced rebate or supplemental incentive for firms that achieve a specified volume threshold in a specified group of securities.[15]

Modified Criteria Under Liquidity Removal Tier 1

The Exchange is also proposing to modify the required criteria under Liquidity Removal Tier 1. Currently, the Exchange charges a standard fee of $0.0028 per share for executions of orders in securities priced at or above $1.00 per share that remove liquidity from the Exchange (*i.e.,* Removed Volume), which the Exchange is proposing to increase to $0.0029 per share, as further described below. The Exchange also currently offers a Liquidity Removal Tier 1 in which qualifying Members are charged a lower fee of $0.0027 per share for executions of Removed Volume by achieving: (1) A Step-Up ADAV from July 2021 that is equal to or greater than 0.05% of the TCV; or (2) an ADV [16] that is equal to or greater than 0.30% of the TCV. Thus, Liquidity Removal Tier 1 provides an opportunity for a Member to qualify for a lower fee for executions of Removed Volume where such Member either increases its ADAV on the Exchange by a specified amount over a baseline month or achieves a specified ADV on the Exchange. The Exchange notes that Liquidity Removal Tier 1 is designed to encourage Members that add liquidity on the Exchange to increase their order flow, which benefits all Members by providing greater execution opportunities on the Exchange.

Now, the Exchange proposes to modify the required criteria under Liquidity Removal Tier 1 such that a Member would now qualify by achieving: (1) A Step-Up ADAV from October 2021 that is equal to or greater than 0.05% of the TCV; or (2) an ADV that is equal to or greater than 0.55% of the TCV. Thus, such proposed changes would update the Step-Up ADAV threshold to reference a more recent baseline month (but keep the volume threshold the same) and modestly increase the ADV threshold, each of which is designed to encourage additional order flow to the Exchange. The Exchange is not proposing to modify the fees associated with Liquidity Removal Tier 1. The Exchange believes that the tier, as proposed, would further incentivize increased order flow to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue. The Exchange notes that Liquidity Removal Tier 1, as modified, would continue to be available to all Members and provide Members an opportunity to pay a lower fee for executions of Removed Volume. Additionally, the Exchange believes that several Members that currently qualify for Liquidity Removal Tier 1 would continue to qualify under the proposed new criteria, which the Exchange believes does not represent a significant departure from the criteria currently required under such tier.

Reduced Rebates Under DLI Tiers

The Exchange is also proposing to reduce the rebates provided under DLI Tier 1 and DLI Tier 2. The DLI Tiers are designed to encourage Members to promote price discovery and market quality by quoting at the NBBO for a significant portion of each day in a large number of securities, generally, and in the DLI Target Securities,[17] in particular, thereby benefitting the Exchange and investors by providing improved trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the NBBO in a broad base of securities, including the DLI Target Securities specifically, and committing capital to support the execution of orders.

Currently, the Exchange provides enhanced rebates of $0.0036 per share under DLI Tier 1 and $0.0035 per share under DLI Tier 2 for executions of Added Displayed Volume for Members that qualify for such tiers.[18] Now, the Exchange proposes to reduce the rebate provided under DLI Tier 1 to $0.0035 per share and the rebate provided under DLI Tier 2 to $0.0034 per share. The Exchange is not proposing to modify the

[14] The Exchange's DLI Tiers provide an enhanced rebate for executions of Added Displayed Volume for Members that promote price discovery and market quality by quoting at the NBBO for a significant portion of each day in a broad base of securities, generally, and in a targeted group of securities (the ''DLI Target Securities''), in particular. *See* the Exchange's Fee Schedule (available at *https://info.memxtrading.com/fee-schedule/*) for additional details regarding the Exchange's DLI Tiers. *See also* Securities Exchange Act Release No. 92150 (June 10, 2021), 86 FR 32090 (June 16, 2021) (SR–MEMX–2021–07) (notice of filing and immediate effectiveness of fee changes adopted by the Exchange, including the adoption of DLI).

[15] Cboe BZX Exchange, Inc. (''Cboe BZX'') currently provides an additive rebate of $0.0001 or $0.0002 per share for executions of Tape B securities for market participants that meet certain quoting and trading requirements in a specified number of securities included on a list of securities determined by Cboe BZX, including both Cboe BZX listed securities and non-Cboe BZX listed securities for which Cboe BZX wants to incentivize additional participation. *See* the Cboe BZX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*); *see also* Securities Exchange Act Release No. 93405 (October 22, 2021), 86 FR 59763 (October 28, 2021) (SR–BX–2021–047) (notice of filing and immediate effectiveness of fee changes adopted by Nasdaq BX, Inc., including the adoption of an enhanced market quality program focused on specified Tape A and Tape B securities).

[16] As set forth on the Fee Schedule, ''ADV'' means average daily volume calculated as the number of shares added or removed, combined, per day, which is calculated on a monthly basis.

[17] As set forth on the Fee Schedule, ''DLI Target Securities'' means a list of securities designated as such, the universe of which will be determined by the Exchange and published on the Exchange's website.

[18] The pricing for DLI Tier 1 is referred to by the Exchange on the Fee Schedule under the description ''Added displayed volume, DLI Tier 1'' with a Fee Code of ''Bq1'', ''Bq1'' or ''Jq1'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members. The pricing for DLI Tier 2 is referred to by the Exchange on the Fee Schedule under the description ''Added displayed volume, DLI Tier 2'' with a Fee Code of ''Bq2'', ''Dq2'' or ''Jq2'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

required criteria for a Member to qualify for DLI Tier 1 or DLI Tier 2, nor is the Exchange proposing to change the rebates provided under such tiers for executions of orders in securities priced below $1.00 per share that add displayed liquidity to the Exchange. The purpose of reducing the enhanced rebates provided under DLI Tier 1 and DLI Tier 2 for executions of Added Displayed Volume is for business and competitive reasons, as the Exchange believes the reduction of such rebates would decrease the Exchange's expenditures with respect to the Exchange's transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity and promoting the price discovery and market quality objectives of the DLI Tiers described above.

Increased Standard Fee for Removed Volume

Lastly, the Exchange proposes to increase the standard fee charged for executions of Removed Volume. Currently, the Exchange charges a standard fee of $0.0028 per share for executions of Removed Volume.[19] The Exchange now proposes to increase the standard fee charged for executions of Removed Volume to $0.0029 per share. The purpose of increasing the standard fee for executions of Removed Volume is also for business and competitive reasons, as the Exchange believes that increasing such fee as proposed would generate additional revenue to offset some of the costs associated with the Exchange's transaction pricing, which provides various rebates for liquidity-adding orders (including the additive rebate for executions of Added Volume under the Targeted Step-Up Tier 1 proposed herein), and the Exchange's operations generally, in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite the modest increase proposed herein, the Exchange's standard fee for executions of Removed Volume remains lower than, and competitive with, the standard fee to remove liquidity in securities priced at or above $1.00 per share charged by several other exchanges.[20]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[21] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[22] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [23]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow to the Exchange in the Targeted Step-Up Securities and more generally, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members.

The Exchange believes that the proposed Targeted Step-Up Tier 1 is reasonable because it would provide Members with an additional incentive to achieve certain volume thresholds on the Exchange. As noted above, volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are equitable and not unfairly discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes the proposed Targeted Step-Up Tier 1 is equitable and not unfairly discriminatory for these same reasons, as it is available to all Members and is designed to encourage Members to increase their order flow in the Targeted Step-Up Securities to the Exchange, thereby contributing to a deeper and more liquid market in such securities and a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, as described above.

The Exchange also believes that including qualification criteria for Targeted Step-Up Tier 1 that is based on achieving a volume threshold in certain specified securities (*i.e.,* the Targeted Step-Up Securities) is reasonable, equitable, and non-discriminatory because, as noted above, the Exchange is seeking to improve its market quality, and thus increase its attractiveness as a trading venue, with respect to such securities by incentivizing Members to increase their order flow in such securities to the Exchange. In turn, the Exchange believes such increased order flow would provide increased execution opportunities and deeper liquidity in such securities and that the resulting increased participation in the trading of these securities would increase the diversity of securities actively traded on the Exchange as well as the notional market share traded on the Exchange, thereby contributing to a more robust

[19] The standard fee for Removed Volume is referred to by the Exchange on the Fee Schedule under the description ''Removed volume from MEMX Book'' with a Fee Code of ''R'' assigned by the Exchange.

[20] *See, e.g.,* the Cboe BZX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*), which reflects a standard fee of $0.0030 per share to remove liquidity in securities priced at or above $1.00 per share; the Cboe EDGX Exchange, Inc. equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/edgx/*), which reflects a standard fee of $0.0030 per share to remove liquidity in securities priced at or above $1.00 per share; The Nasdaq Stock Market LLC price list on its public website (available at *http://www.nasdaqtrader.com/Trader.aspx?id=PriceList Trading2*), which reflects a standard fee of $0.0030 per share to remove liquidity in securities priced at or above $1.00 per share.

[21] 15 U.S.C. 78f.

[22] 15 U.S.C. 78f(b)(4) and (5).

[23] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

and well-balanced market ecosystem on the Exchange to the benefit of all Members and market participants. Additionally, the Exchange notes that the Targeted Step-Up Tier 1 is comparable to the Exchange's DLI Tiers, as well as other pricing tiers adopted by other exchanges that provide an enhanced rebate or supplemental incentive for firms that achieve a specified volume threshold in a specified group of securities.[24]

The Exchange believes the required criteria for the Targeted Step-Up Tier 1 are reasonable, as they provide two different types of volume thresholds that a Member may choose from in order to receive the corresponding additive rebate (*i.e.,* a Step-Up ADAV threshold and an ADAV threshold), and the Exchange believes such criteria are attainable for many market participants and are reasonably related to the enhanced market quality that the Targeted Step-Up Tier 1 is designed to promote, as described above. The Exchange also notes that the proposed tier/rebate would not adversely impact any Member's ability to qualify for other reduced fee or enhanced rebate tiers. Should a Member not meet the proposed criteria under the proposed tier, the Member would merely not receive the corresponding proposed additive rebate.

The Exchange also believes the proposed additive rebate for executions of Added Volume under Targeted Step-Up Tier 1 (*i.e.,* $0.0002 per share) is reasonable, in that it represents only a modest addition to the rebates otherwise applicable to executions of Added Volume and, in conjunction with the other changes proposed herein, would not provide for a rebate that is higher than the current maximum rebate provided by the Exchange. Thus, the Exchange believes that it is reasonable, consistent with an equitable allocation of fees, and not unfairly discriminatory to provide such additive rebate for executions of Added Volume to Members that qualify for the Targeted Step-Up Tier 1 in recognition of the benefits that such Members provide to the market quality in the Targeted Step-Up Securities and more generally on the Exchange, as described above, particularly as the magnitude of the additive rebate is not unreasonably high and is, instead, reasonably related to the enhanced market quality it is designed to achieve. Additionally, the Exchange believes it is reasonable, equitable, and non-discriminatory to provide the additive rebate for executions of all Added Volume but not for executions of Added Displayed Retail Volume because, as noted above, the Exchange currently provides its maximum enhanced rebate of $0.0037 per share for executions of Added Displayed Retail Volume, and the Exchange does not seek to provide for a rebate that is higher than such current maximum with this proposal.[25]

The Exchange believes the proposed changes to modify the required criteria under Liquidity Removal Tier 1 are reasonable because, as noted above, such changes are intended to update the Step-Up ADAV threshold to reference a more recent baseline month and to modestly increase the ADV threshold, each of which is designed to encourage the submission of additional order flow to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue. The Exchange also believes the proposed new criteria are equitable and non-discriminatory because all Members will continue to be eligible to meet such criteria and qualify for Liquidity Removal Tier 1, and therefore, have the opportunity to pay a lower fee for executions of Removed Volume. Additionally, as noted above, the Exchange believes that several Members that currently qualify for Liquidity Removal Tier 1 would continue to qualify under the proposed new criteria, which the Exchange believes does not represent a significant departure from the criteria currently required under such tier. The Exchange also believes that the lower fee charged under Liquidity Removal Tier 1, which the Exchange is not proposing to change, continues to be commensurate with the proposed new criteria. That is, such discounted fee reasonably reflects the difficulty in achieving the corresponding criteria as modified.

The Exchange believes that the proposed changes to reduce the enhanced rebates provided for executions of Added Displayed Volume under DLI Tier 1 and DLI Tier 2 and to increase the standard fee charged for executions of Removed Volume are reasonable, equitable, and consistent with the Act because such changes are designed to generate additional revenue and decrease the Exchange's expenditures with respect to its transaction pricing in order to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity, as described above.

The Exchange believes that the proposed reduced rebates for executions of Added Displayed Volume provided under DLI Tier 1 and DLI Tier 2 (*i.e.,* $0.0035 per share and $0.0034 per share, respectively) are reasonable and appropriate because such rebates represent only a modest reduction (*i.e.,* $0.0001 per share) from the current enhanced rebates provided under such tiers (*i.e.,* $0.0036 per share and $0.0035 per share, respectively). Additionally, the Exchange believes that such rebates are equitably allocated and not unfairly discriminatory because they will continue to apply equally to all Members, in that all Members will continue to have the opportunity to achieve the required criteria under the DLI Tiers, which the Exchange is not proposing to modify with this proposal, and in turn, qualify for an enhanced rebate for executions of Added Displayed Volume. The Exchange further believes that such rebates are reasonable and equitably allocated, in that the rebate provided under DLI Tier 1 will remain higher than the rebate provided under DLI Tier 2 commensurate with the more stringent criteria of DLI Tier 1 than of DLI Tier 2.

Similarly, the Exchange believes that the proposed increased standard fee charged for executions of Removed Volume (*i.e.,* $0.0029 per share) is reasonable and appropriate because it represents only a modest increase (*i.e.,* $0.0001 per share) from the current standard fee charged for executions of Removed Volume (*i.e.,* $0.0028 per share) and, as noted above, remains lower than, and competitive with, the standard fee to remove liquidity in securities priced at or above $1.00 per share charged by several other exchanges.[26] The Exchange further believes that the proposed increased standard fee charged for executions of Removed Volume is equitably allocated and not unfairly discriminatory because it will apply equally to all Members.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act[27] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or

[24] *See* supra notes 14–15.

[25] *See* supra note 13.

[26] *See supra* note 20.

[27] 15 U.S.C. 78f(b)(4) and (5).

dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to enhance market quality on the Exchange in the Targeted Step-Up Securities, and to encourage Members to maintain or increase their order flow on the Exchange, thereby promoting price discovery and contributing to a deeper and more liquid market to the benefit of all market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders in the Targeted Step-Up Securities and more generally, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [28]

Intramarket Competition

The Exchange believes that the proposal would incentivize Members to promote price discovery and market quality by increasing their participation in the Targeted Step-Up Securities on the Exchange, and to and maintain or increase their order flow on the Exchange generally, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the Targeted Step-Up Tier 1, and thus receive the corresponding additive rebate for executions of Added Volume, or to qualify for the Liquidity Removal Tier, and thus receive the corresponding reduced fee for executions of Removed Volume, would be available to all Members that meet the associated requirements in any month. As noted above, the Exchange believes the criteria under Targeted Step-Up Tier 1 are attainable for many market participants and are reasonably related to the enhanced market quality that such tier is designed to promote. Further, as noted above, the Exchange also believes that the proposed new criteria for Liquidity Removal Tier 1 are attainable for several Members and that the respective current reduced fee charged under such tier is reasonably related to the enhanced market quality that such tier is designed to promote. As such, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 15% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to executions of Added Volume, Added Displayed Volume, and Removed Volume, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes are competitive proposals through which the Exchange is seeking to encourage additional order flow on the Exchange and to promote market quality through pricing incentives that are comparable to, and competitive with, pricing programs in place at other exchanges,[29] as well as to generate additional revenue to offset some of the costs associated with the Exchange's current pricing structure and its operations generally. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar incentives to market participants that enhance market quality and/or achieve certain volume criteria and thresholds.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [30] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *SEC,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[31] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[28] *See supra* note 23.

[29] *See supra* notes 15 and 20.

[30] *See supra* note 23.

[31] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSE–2006–21)).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [32] and Rule 19b–4(f)(2) [33] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MEMX–2021–16 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–MEMX–2021–16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MEMX–2021–16 and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

J. Matthew DeLesDernier,

Assistant Secretary.

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[32] 15 U.S.C. 78s(b)(3)(A)(ii).

[33] 17 CFR 240.19b–4(f)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93555; File No. SR–PEARL–2021–54]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Remove Certain Credits and Increase Trading Permit Fees

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 29, 2021, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'') to remove certain credits and amend the monthly Trading Permit [3] fees for Exchange Members.[4]

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to remove certain credits and amend the monthly Trading Permit fees (the ''Proposed Access Fees'') for Exchange Members.

Removal of the ''Monthly Volume Credit''

The Exchange proposes to amend the Definitions section of the Fee Schedule to delete the definition and remove the credits applicable to the Monthly Volume Credit for Members. The Exchange established the Monthly Volume Credit in 2018 [5] to encourage Members to send increased Priority

[3] The term ''Trading Permit'' means a permit issued by the Exchange that confers the ability to transact on the Exchange. *See* Exchange Rule 100.

[4] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100 and the Definitions Section of the Fee Schedule.

[5] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

Customer[6] order flow to the Exchange, which the Exchange applied to the assessment of certain non-transaction rebates and fees for that Member. The Exchange applies a different Monthly Volume Credit depending on whether the Member connects to the Exchange via the FIX Interface[7] or MEO Interface.[8] Currently, the Exchange assesses the Monthly Volume Credit to each Member that has executed Priority Customer volume along with that of its Affiliates,[9] not including Excluded Contracts,[10] of at least 0.30% of MIAX Pearl-listed Total Consolidated Volume (''TCV''),[11] as set forth in the following table:

Type of member connection	Monthly volume credit
Member that connects via the FIX Interface	$250
Member that connects via the MEO Interface	1,000

If a Member connects via both the MEO Interface and FIX Interface and qualifies for the Monthly Volume Credit based upon its Priority Customer volume, the greater Monthly Volume Credit shall apply to such Member. The Monthly Volume Credit is a single, once-per-month credit towards the aggregate monthly total of non-transaction fees assessable to a Member.

The Exchange now proposes to amend the Definitions section of the Fee Schedule to delete the definition and remove the Monthly Volume Credit. The Exchange established the Monthly Volume Credit when it first launched operations to attract order flow by lowering the initial fixed cost for Members. The Monthly Volume Credit has achieved its purpose and the Exchange now believes it is appropriate to remove this credit. The Exchange believes that the Exchange's existing Priority Customer rebates and fees will continue to allow the Exchange to remain highly competitive and continue to attract order flow and maintain market share.

Removal of the Trading Permit Fee Credit

The Exchange proposes to amend Section 3)b) of the Fee Schedule to remove the Trading Permit fee credit that is denoted in footnote ''*'' below the Trading Permit fee table. The Trading Permit fee credit is applicable to Members that connect via both the MEO and FIX Interfaces. Currently, Members who connect via both the MEO and FIX Interfaces are assessed the rates for both types of Trading Permits, but these Members receive a $100 monthly credit towards the Trading Permit fees applicable to the MEO Interface. The Exchange now proposes to remove the Trading Permit fee credit and delete footnote ''*'' from Section 3)b) of the Fee Schedule.

The Exchange established the Trading Permit fee credit when it first launched operations to attract order flow and increase membership by lowering the costs for Members that connect via both the MEO Interface and FIX Interface. The Trading Permit fee credit has achieved its purpose and the Exchange now believes that it is appropriate to remove this credit in light of the current operating conditions and membership population on the Exchange.

Amendment of Trading Permit Fees

The Exchange proposes to amend Section 3)b) of the Fee Schedule to increase the amount of the monthly Trading Permit fees. The Exchange issues Trading Permits to Members who are either Electronic Exchange Members[12] (''EEMs'') or Market Makers.[13] The Exchange assesses Trading Permit fees based upon the monthly total volume executed by the Member and its Affiliates on the Exchange across all origin types, not including Excluded Contracts, as compared to the total TCV in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of ''Non-Transaction Fees Volume-Based Tiers''[14] in the Definitions section of the Fee Schedule. The Exchange also assesses Trading Permit fees based upon the type of interface used by the Member to connect to the Exchange—the FIX Interface and/or the MEO Interface.

Current Trading Permit Fees. Currently, each Member who connects to the System[15] via the FIX Interface is assessed the following monthly Trading Permit fees:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $250;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers,

[6] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The number of orders shall be counted in accordance with Interpretation and Policy .01 of Exchange Rule 100. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100, including Interpretation and Policy .01.

[7] The term ''FIX Interface'' means the Financial Information Exchange interface for certain order types as set forth in Exchange Rule 516. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[8] The term ''MEO Interface'' or ''MEO'' means a binary order interface for certain order types as set forth in Rule 516 into the MIAX Pearl System. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[9] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Pearl Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Pearl Market Maker) that has been appointed by a MIAX Pearl Market Maker, pursuant to the following process. A MIAX Pearl Market Maker appoints an EEM and an EEM appoints a MIAX Pearl Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the Fee Schedule.

[10] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[11] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the Fee Schedule.

[12] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule.

[13] The term ''Market Maker'' or ''MM'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of these Rules. *See* the Definitions Section of the Fee Schedule.

[14] *See* the Definitions Section of the Fee Schedule for the monthly volume thresholds associated with each Tier.

[15] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

or volume above 0.30% up to 0.60%, $350; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $450.

Each Member who connects to the System via the MEO Interface is assessed the following monthly Trading Permit fees:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $300;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $400; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $500.

Proposed Trading Permit Fees. The Exchange now proposes to amend its Trading Permit fees as follows. Each Member who connects to the System via the FIX Interface will be assessed the following monthly Trading Permit fees:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, $500;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, $1,000; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, $1,500.

Each Member who connects to the System via the MEO Interface will be assessed the following monthly Trading Permit fees:

(i) If its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, $2,500;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, $4,000; and

(iii) if its volume falls with the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, $6,000.

Members who use the MEO Interface may also connect to the System through the FIX Interface as well, and vice versa. The Exchange notes that the Trading Permit fees for Members who connect through the MEO Interface are higher than the Trading Permit fees for Members who connect through the FIX Interface, since the FIX Interface utilizes less capacity and resources of the Exchange. The MEO Interface offers lower latency and higher throughput, which utilizes greater capacity and resources of the Exchange. The FIX Interface offers lower bandwidth requirements and an industry-wide uniform message format. Both EEMs and Market Makers may connect to the Exchange using either interface.

Trading Permits grant access to the Exchange, thus providing the ability to submit orders and trade on the Exchange, in the manner defined in the relevant Trading Permit. Without a Trading Permit, a Member cannot directly trade on the Exchange. Therefore, a Trading Permit is a means to directly access the Exchange (which offers meaningful value), and the Exchange now proposes to increase its monthly fees since it has not done so since the fees were first adopted in 2018 [16] and are designed to recover a portion of the costs associated with directly accessing the Exchange. The Exchange notes that the its affiliates, Miami International Securities Exchange, LLC (''MIAX'') and MIAX Emerald, LLC (''MIAX Emerald''), charge a similar, fixed trading permit fee to certain users, and a similar, varying trading permit fee to other users, based upon the number of assignments of option classes or the percentage of volume in option classes.[17] The Exchange notes that other options exchanges assess certain of their membership fees at different rates, based upon a member's participation on that exchange,[18] and, as such, this concept is not new or novel. The Exchange also notes that the proposed increased Trading Permit fees are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges.[19]

Implementation

The proposed rule change will be effective beginning November 1, 2021.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [20] in general, and furthers the objectives of Section 6(b)(4) of the Act [21] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems Trading Permit fees to be Access Fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements. The Exchange believes that it is important to demonstrate that these fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access Fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange is providing sufficient transparency (as described below) into how the Exchange determined to charge such fees. Accordingly, the Exchange is providing an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs

[16] *See supra* note 5.

[17] *See* the MIAX Fee Schedule, Section 3)b); MIAX Emerald Fee Schedule, Section 3)b).

[18] *See e.g.,* NYSE Arca Options Fees and Charges, OTP Trading Participant Rights, p.1 (assessing market makers an options trading permit (''OTP'') monthly fee of $6,000 for up to 175 option issues, an additional $5,000 for up to 350 option issues, an additional $4,000 for up to 1,000 option issues, an additional $3,000 for all option issues on the exchange, and an additional $1,000 for the fifth OTP and for each OTP thereafter); NYSE American Options Fee Schedule, Section III, Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, p. 23 (assessing market makers an ATP monthly fee of $8,000 for up to 60 plus the bottom 45% of option issues, an additional $6,000 for up to 150 plus the bottom 45% of option issues, an additional $5,000 for up to 500 plus the bottom 45% of option issues, and additional $4,000 for up to 1,100 plus the bottom 45% of option issues, an additional $3,000 for all issues traded on the exchange, and an additional $2,000 for 6th to 9th ATPs; plus an addition fee for premium products). *See also* Cboe BZX Options Exchange (''BZX Options''), which assesses the Participant Fee, a type of membership fee, according to a member's average daily volume (''ADV''). *See* Cboe BZX Options Exchange Fee Schedule, Membership Fees. The monthly Participant Fee for BZX Options is $500 if the member's ADV is less than 5,000 contracts and $1,000 if the member's ADV is equal to or greater than 5,000 contracts. *Id.*

[19] *See id.*

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(4) and (5).

and revenues associated with the Proposed Access Fees.

In order to determine the Exchange's costs to provide the access services associated with the Proposed Access Fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services. The sum of all such portions of expenses represents the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice. The Exchange is also providing detailed information regarding the Exchange's cost allocation methodology—namely, information that explains the Exchange's rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the access services associated with the Proposed Access Fees.

In order to determine the Exchange's projected revenues associated with the Proposed Access Fees, the Exchange analyzed the number of Members currently utilizing the Trading Permits, and, utilizing a recent monthly billing cycle representative of 2021 monthly revenue, extrapolated annualized revenue on a going-forward basis. The Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access needs of market participants, discounts that can be achieved due to lower trading volume and vice versa, market participant consolidation, etc. Additionally, the Exchange similarly does not factor into its analysis future cost growth or decline. The Exchange is presenting its revenue and expense associated with the Proposed Access Fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the Proposed Access Fees were not in place in 2020 or for the majority of 2021 (other than July and August 2021), the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the Proposed Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit when comparing the Exchange's total annual expense associated with providing the services associated with the Proposed Access Fees versus the total projected annual revenue the Exchange will collect for providing those services. The Exchange notes that this is the same justification process utilized by the Exchange's affiliate, MIAX Emerald, in a filing recently noticed by the Commission when MIAX Emerald adopted its own trading permit fees.[22]

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On March 29, 2019, the Commission issued its Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network (the ''BOX Order'').[23] On May 21, 2019, the Commission issued the Staff Guidance on SRO Rule Filings Relating to Fees.[24] Accordingly, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX and MIAX Emerald, to establish or increase other non-transaction fees. Accordingly, the Exchange believes that the Commission should find that the Proposed Access Fees are consistent with the Act.

* * * * *

Over the course of 2021, the Exchange's market share has fluctuated between approximately 3–6% of the U.S. equity options industry.[25] The Exchange is not aware of any evidence that a market share of approximately 3–6% provides the Exchange with anti-competitive pricing power. If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect.

Removal of Monthly Volume Credit and Trading Permit Fee Credit

The Exchange believes its proposal to remove the Monthly Volume Credit is reasonable, equitable and not unfairly discriminatory because all market participants will no longer be offered the ability to achieve the extra credits associated with the Monthly Volume Credit for submitting Priority Customer volume to the Exchange and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes it is equitable and not unfairly discriminatory to remove the Monthly Volume Credit from the Fee Schedule for business and competitive reasons because, in order to attract order flow when the Exchange first launched operations, the Exchange established the Monthly Volume Credit to lower the initial fixed cost for Members. The Exchange now believes that it is appropriate to remove this credit in light of the current operating conditions and the current type and amount of Priority Customer volume executed on the Exchange. The Exchange believes that the Exchange's Priority Customer rebates and fees will still allow the Exchange to remain highly competitive such that the Exchange should continue to attract order flow and maintain market share.

The Exchange believes its proposal to remove the Trading Permit fee credit for Members that connect via both the MEO Interface and FIX Interface is reasonable, equitable and not unfairly discriminatory because all market participants will no longer be offered the ability to receive the credit and access to the Exchange is offered on terms that are not unfairly

[22] *See* Securities Exchange Act Release No. 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Monthly Trading Permit Fees).

[23] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04).

[24] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Guidance'').

[25] *See* ''The market at a glance'', *available at www.miaxoptions.com* (last visited October 29, 2021).

discriminatory. The Exchange believes it is equitable and not unfairly discriminatory to remove the Trading Permit fee credit for business and competitive reasons because, in order to attract order flow and membership after the Exchange first launched operations, the Exchange established the Trading Permit fee credit to lower the costs for Members that connect via both the MEO Interface and FIX Interface. The Exchange now believes that it is appropriate to remove this credit in light of the current operating conditions and membership on the Exchange.

Trading Permit Fee Increase

The Exchange believes the proposed Trading Permit fees are equitable and reasonable because the proposed highest tiered fee is less than or equal to similar fees charged for access on other options exchanges with comparable market shares. For example, Nasdaq ISE, LLC (''ISE'') (equity options market share of approximately 5–7% throughout 2021) charges the following access fees: $500 per month for Electronic Access Members; $5,000 per month for Primary Market Makers; and $2,500 per month for Competitive Market Makers.[26] Additionally, Cboe C2 Exchange, Inc. (''C2'') (equity options market share of approximately 3–4% throughout 2021), charges the following access permit fees: $5,000 per month for market makers; and $1,000 per month for electronic access permits.[27] NYSE American LLC (''NYSE American'') (equity options market share of approximately 7–8% throughout 2021), charges the following range of trading permit and access fees, which are dependent upon the number of issues permitted in market makers' quoting assignments: $8,000 per month for the first ATP;[28] $6,000 per month for the second ATP; $5,000 per month for the third ATP; $4,000 per month for the fourth ATP; $3,000 per month for the sixth ATP; $2,000 per month for the seventh to the ninth ATP; and $500 per month for the tenth ATP and each one thereafter.[29]

In the each of the above cases, the Exchange's highest tiered fee, as proposed, is similar to or less than the similar access/membership fees of competing options exchanges with like market share. Further, as described in more detail below, many of those exchanges generate higher overall operating profit margins and higher ''access fees'' than the Exchange, inclusive of the projected revenues associated with the proposed fees. The Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic system, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive access fees. Each of the access fee rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

The Exchange also notes that the higher (or similar) trading permit fees described above for competing exchanges have been in place for years (over 8 years in some cases), allowing those exchanges to derive significantly more revenue from their access or membership fees. For example, in 2012, NYSE American adopted the sliding scale pricing that ranges from $8,000 to $3,000 per month for NYSE American trading permits.[30] In that filing, NYSE American also noted that prior to introducing the sliding scale pricing, each NYSE American market maker was charged $5,000 per month per trading permit (similar to the Exchange's proposed highest tier for MEO interface users, nearly a decade later).[31] NYSE American received no comment letters on their proposal to institute trading permit fees that were higher 8 years ago as compared to the Exchange's current proposal. Similarly, C2 adopted the pricing for its access permits in 2010 of $5,000 per month for market makers and $1,000 per month for electronic access members.[32]

Separately, the Exchange is not aware of any reason why market participants could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such market participant, did not make business or economic sense for such market participant to access such exchange. No options market participant is required by rule, regulation, or competitive forces to be a Member of the Exchange. As evidence of the fact that market participants can and do drop their access to exchanges based on non-transaction fee pricing, R2G Services LLC (''R2G'') filed a comment letter after BOX's proposed rule changes to increase its connectivity fees (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04). The R2G Letter stated, ''[w]hen BOX instituted a $10,000/month price increase for connectivity; we had no choice but to terminate connectivity into them as well as terminate our market data relationship. The cost benefit analysis just didn't make any sense for us at those new levels.'' Similarly, the Exchange's affiliate, MIAX Emerald, noted in a recent filing that once MIAX Emerald issued a notice that it was instituting Trading Permit fees, among other non-transaction fees, one Member dropped its access to the Exchange as a result of those fees.[33] Accordingly, these examples show that if a market participant believes, based on its business model, that an exchange charges too high of a fee for connectivity and/or other non-transaction fees for its relevant marketplace, market participants can choose to drop their access to such exchange.

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act because the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. The Proposed Access Fees are also reasonable and equitable because they are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges.[34] The costs associated with providing access to Exchange Members and non-Members, as well as the general expansion of a state-of-the-art infrastructure, are extensive, have increased year-over-year, and are projected to increase year-over-year in the future.

The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 10.7 million order messages per second. On an average day, the Exchange handles over approximately 2.7 billion total messages. However, in order to achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network

[26] *See* Nasdaq ISE LLC Options 7 Pricing Schedule, Section 8.A. Access Services, at *https://listingcenter.nasdaq.com/rulebook/ise/rules/ISE%20Options%207.*

[27] *See* C2 Fee Schedule, Access Fees, at *https://www.cboe.com/us/options/membership/fee_schedule/ctwo/.*

[28] An ''ATP'' or ''ATP Holder'' is a registered Broker-Dealer who is a permit holder on Amex, per Amex Rule 900.2NY(4),(5). *See* Amex Fee Schedule, Section III, Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, at *https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.*

[29] *See id.*

[30] *See* Securities Exchange Act Release No. 67634 (August 9, 2012), 77 FR 49038 (August 15, 2012) (SR–NYSEMKT–2012–33).

[31] *See id.*

[32] *See* Securities Exchange Act Release No. 63175 (October 25, 2010), 75 FR 66813 (October 29, 2010) (SR–C2–2010–006).

[33] *See supra* note 22.

[34] *See supra* notes 26, 27 and 28.

consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall expense for storage and network transport capabilities.

In order to provide more detail and to quantify the Exchange's costs associated with providing access to the Exchange in general, the Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases as the services associated with the Proposed Access Fees increase. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number of Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide access to its Members is not fixed. The Exchange believes the Proposed Access Fees are reasonable in order to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue: transaction fees, access fees (which includes the Proposed Access Fees), regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue.

The Exchange believes that the Proposed Access Fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. For 2021,[35] the total annual expense for providing the access services associated with the Proposed Access Fees for the Exchange is projected to be approximately $844,741. The $844,741 in projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees.[36] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access Fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.[37] The $844,741 in projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching systems and other trading technology, and no expense amount was allocated twice.

As discussed, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the access services associated with the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access Fees.

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees, is projected to be $188,815. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[38] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. Further, the Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with the MIAX Pearl equities market are accounted for separately and are not included within the scope of this

[35] The Exchange has not yet finalized its 2021 year end results.

[36] The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

[37] For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled ''Operating Expenses Incurred Directly or Allocated From Parent,'' in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. *See* Securities Exchange Act Release No. 87876 (December 31, 2019), 85 FR 757 (January 7, 2020) (SR–PEARL–2019–36). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

[38] In fact, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their SFTI network, which is relied on by a majority of market participants, including the Exchange. *See* email from ICE Data Services to the Exchange, dated October 20, 2021. This fee increase by ICE data services, while not subject to Commission review, has a material impact on costs to exchanges and other market participants that provide downstream access to other market participants. The Exchange notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 8% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[39]

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 4% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[40]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 3% of the total applicable SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[41]

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 5% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[42]

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be $655,925. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions; (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the access services associated with the Proposed Access Fees.

[39] As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

[40] *Id.*

[41] *Id.*

[42] *Id.*

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be $549,834, which is only a portion of the $9,163,894 total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 6% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[43]

The Exchange's depreciation and amortization expense relating to providing the access services associated with the Proposed Access Fees is projected to be $66,316, which is only a portion of the $1,326,325 total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 5% of the total applicable depreciation and amortization expense, as these access services would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[44]

The Exchange's occupancy expense relating to providing the access services associated with the Proposed Access Fees is projected to be $39,775, which is only a portion of the $497,180 total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 150 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the access services associated with the proposed Trading Permit fees. Without this office space, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 8% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[45]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover its costs, thus the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit. To illustrate, on a going-forward, fully-annualized basis, the Exchange projects that its annualized revenue for providing the access services associated with the Proposed Access Fees would

[43] *Id.*

[44] *Id.*

[45] *Id.*

be approximately $1,170,000 per annum, based on a recent billing cycle. The Exchange projects that its annualized expense for providing the access services associated with the Proposed Access Fees would be approximately $844,741 per annum. Accordingly, on a fully-annualized basis, the Exchange believes its total projected revenue for providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit, as the Exchange will make only a 28% profit margin on the Proposed Access Fees ($1,170,000 in revenue minus $844,741 in expense = $325,259 profit per annum). The Exchange notes that the fees charged for Trading Permits can vary from month to month depending on the type of interface used and the Non-Transaction Fees Volume-Based Tier that is achieved for that month. As such, the revenue projection is not a static number, with monthly Trading Permit fees likely to fluctuate month to month.

For the avoidance of doubt, none of the expenses included herein relating to the access services associated with the Proposed Access Fees relate to the provision of any other services offered by the Exchange. Stated differently, no expense amount of the Exchange is allocated twice. The Exchange notes that, with respect to the MIAX Pearl expenses included herein, those expenses only cover the MIAX Pearl options market; expenses associated with the MIAX Pearl equities market and the Exchange's affiliate exchanges, MIAX and MIAX Emerald, are accounted for separately and are not included within the scope of this filing. Stated differently, no expense amount of the Exchange is also allocated to MIAX Pearl Equities, MIAX or MIAX Emerald.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the access services associated with the Proposed Access Fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access to the Exchange. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing access services. The Proposed Access Fees are intended to recover the Exchange's costs of providing access to Exchange Systems. Accordingly, the Exchange believes that the Proposed Access Fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the Proposed Access Fees.

The Exchange believes the proposed changes are reasonable, equitably allocated and not unfairly discriminatory, and do not result in a ''supra-competitive'' [46] profit. Of note, the Guidance defines ''supra-competitive profit'' as profits that exceed the profits that can be obtained in a competitive market.[47] With the proposed changes, the Exchange anticipates that its profit margin will be approximately 28%, inclusive of the Proposed Access Fees. In order to achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange connectivity resources, but also those firms that most heavily consume Exchange resources, network consumers, and Members that use the MEO and FIX interfaces, which generate billions of messages per day across the Exchange.[48] Such profit margin should enable the Exchange to continue to invest in its network and systems, maintain its current infrastructure, support future enhancements to network access, and continue to offer enhanced customer reporting and monitoring services.

While the proposed fees are similar to or less than that of other options exchanges,[49] as discussed above, the incremental increase in revenue generated from the 28% profit margin for trading permits will allow the Exchange to further invest in its system architecture and matching engine functionality to the benefit of all market participants. The revenue generated under the proposed rule change would also provide the Exchange with the resources necessary to further innovate and enhance its systems and seek additional improvements or functionality to offer market participants generally. The Exchange believes that these investments, in turn, will benefit all investors by encouraging other exchanges to further invest, innovate, and improve their own systems in response.

Based on the 2020 Audited Financial Statements of competing options exchanges (since the 2021 Audited Financial Statements will likely not become publicly available until early July 2022, after the Exchange has submitted this filing), the Exchange's revenue that is derived from its access fees is in line with the revenue that is derived from access fees of competing exchanges. For example, the total revenue from ''access fees'' [50] for 2020 for MIAX Pearl was $11,422,000. MIAX Pearl projects that the total revenue from ''access fees'' for will be $20,001,243, inclusive of the Proposed Access Fees described herein.

The Exchange's projected revenue from access fees is still less than, or similar to, the access fee revenues generated by access fees charged by other U.S. options exchanges. For example, the Cboe Exchange, Inc. (''Cboe'') reported $70,893,000 in ''access and capacity fee'' [51] revenue for 2020. Cboe C2 Exchange, Inc. (''C2'') reported $19,016,000 in ''access and capacity fee'' revenue for 2020.[52] Cboe BZX Exchange, Inc. (''BZX'') reported $38,387,000 in ''access and capacity

[46] *See supra* note 24.

[47] *See id.*

[48] Over the period from April 2021 until September 2021, the Exchange processed 3.15 billion messages via the FIX interface (0.43% of total messages received). Over that same time period, the Exchange processed 731.4 billion messages (99.57% of total messages received) over the MEO interface. This marked difference between the number of FIX and MEO messages processed, when mapped to servers, software, storage, and networking results in a much higher allocation of total capital and operational expense to support the MEO interface. For one, the Exchange incurs greater expense in maintaining the resilience of the MEO interface to ensure its ongoing operation in accordance with Regulation SCI. Another, the Exchange must purchase and expand its storage capacity to retain these increased messages in compliance with its record keeping obligations. The Exchange has also seen significant inflationary pressure on capital items that it needs to purchase to maintain its technology. The Exchange has seen pricing increases upwards of 30% on network equipment due to supply chain shortages.

[49] *See supra* notes 26, 27 and 28.

[50] As described in MIAX Pearl's Audited Financial Statements, fees for ''access services'' are assessed to exchange members for the opportunity to trade and use other related functions of the exchanges. *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000460.pdf.*

[51] According to Cboe, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[52] *See id.*

fee'' revenue for 2020.[53] Cboe EDGX Exchange, Inc. (''EDGX'') reported $26,126,000 in ''access and capacity fee'' revenue for 2020.[54] Nasdaq PHLX LLC (''PHLX'') reported $20,817,000 in ''Trade Management Services'' revenue for 2019.[55] The Exchange notes it is unable to compare ''access fee'' revenues with PHLX (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[56]

The Exchange also believes that, based on the 2020 Audited Financial Statements of competing options exchanges, the Exchange's overall operating margin is in line with or less than the operating margins of competing options exchanges, including the revenue and expense associated with the Proposed Access Fees. For example, the 2020 operating margin for MIAX Pearl was −18%. Based on competing exchanges' Form 1 Amendments, ISE's operating profit margin for 2020 was approximately 85%; PHLX's operating profit margin for 2020 was approximately 49%; NASDAQ's operating profit margin for 2020 was approximately 62%; Arca's operating profit margin for 2020 was approximately 55%; NYSE American's operating profit margin for 2020 was approximately 59%; Cboe's operating profit margin for 2020 was approximately 74%; and BZX's operating profit margin for 2020 was approximately 52%. ISE's operating profit margin, for all of 2019, was 83%.[57] ISE's equity options market share for all of 2019 was 8.99%[58] while its access fees are as follows: $500 per month for Electronic Access Members; $5,000 per month for Primary Market Makers; and $2,500 per month for Competitive Market Makers.[59] PHLX's operating profit margin, for all of 2019, was 67%.[60] PHLX's equity options market share for all of 2019 was 15.85%[61] while its permit fees are as follows: $4,000 per month for Floor Brokers; $6,000 per month for Floor Lead Market Makers and Floor Market Makers; and $4,000 per month for Remote Lead Market Makers and Remote Market Makers.[62]

In the Initial Proposed Fee Change,[63] the Exchange compared projected profit margins to the 2019 operating profit margin of ISE and PHLX, which were 83% and 67% respectively. The SIG Letter[64] contained the opinion that a using the overall operating profit margins of ISE and PHLX was an ''apple to oranges'' comparison because 2019 was a ''record setting year.''[65] The SIG Letter's argument assumes that because 2019 was a record setting year for options volumes, that each options exchange generated above average profits without provided any evidence to support this assumption. The Exchange sought to provide additional data to support a 28% profit margin based on the best, most recent data available. The Exchange did not provide this data to do an ''apple-to-apples'' comparison, but rather to provide insight into the profit margins of other exchanges to put the projected profit margin, inclusive of the proposed fees, into perspective. While the Exchange provided a detailed analysis and disclosure of its projected profit margins in this proposed fee change and the Initial Proposed Fee Change, other exchanges are generally not required to disclose profit margins on a more granular, per-product/non-transaction fee basis within their annual Form 1 filings. The Exchange, therefore, used the best, most recent data available to generate percentages of other exchange's profit margins.

The Exchange further believes its proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.

The Exchange believes that the Proposed Access Fees are reasonable, equitable and not unfairly discriminatory because they are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges.[66]

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees for services and products, in addition to order flow, to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment.

There is also no regulatory requirement that any market participant connect to any one options exchange, that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Sponsored User.[67] Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. Based on a recent analysis conducted by the Cboe Exchange, Inc. (''Cboe''), as of October 21, 2020, only three (3) of the broker-dealers, out of approximately 250 broker-dealers, were members of at least one exchange that lists options for trading and were members of all 16 options exchanges.[68] Additionally, the Cboe Fee Filing found that several broker-dealers were members of only a single exchange that lists options for trading and that the number of members at each exchange that trades options varies greatly.[69]

[53] *See id.*

[54] *See id.*

[55] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[56] *See* Form 1 Amendment, at *https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[57] *See* PHLX Form 1, Exhibit D, filed June 30, 2020 *available at https://sec.report/Document/9999999997-20-003902/.*

[58] *See https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Exchange.*

[59] *See* Nasdaq ISE LLC Options 7 Pricing Schedule, Section 8.A. Access Services, at *https://listingcenter.nasdaq.com/rulebook/ise/rules/ISE%20Options%207.*

[60] *See* ISE Form 1, filed June 29, 2020 *available at* Form 1 - ISE - Final (1).pdf (*sec.gov*).

[61] *See supra* note 58.

[62] *See* Nasdaq PHLX Options 7 Pricing Schedule, Section 8.A. Permit and Registration Fees, at *https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207.*

[63] *See* Securities Exchange Act Release No. 92366 (July 9, 2021), 86 FR 37379 (SR–PEARL–2021–32) (''Initial Proposed Fee Change'').

[64] *See* letter from Richard J. McDonald, Susquehanna International Group, LLP (''SIG'') to Vanessa Countryman, Secretary, Commission, dated September 28, 2021 (''SIG Letter'').

[65] *See id.*

[66] *See supra* notes 26, 27 and 28.

[67] *See* Exchange Rule 210. The Sponsored User is subject to the fees, if any, of the Sponsoring Member. The Exchange notes that the Sponsoring Member is not required to publicize, let alone justify or file with the Commission its fees, and as such could charge the Sponsored User any fees it deems appropriate, even if such fees would otherwise be considered supra-competitive, or otherwise potentially unreasonable or uncompetitive.

[68] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105) (the ''Cboe Fee Filing''). The Cboe Fee Filing cited to the October 2020 Active Broker Dealer Report, provided by the Commission's Office of Managing Executive, on October 8, 2020.

[69] *Id.*

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.

Intra-Market Competition

The Exchange believes that the Proposed Access Fees do not place certain market participants at a relative disadvantage to other market participants because the Proposed Access Fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the fee rates are designed in order to provide objective criteria for users that connect via the MEO Interface of different sizes and business models that best matches their activity on the Exchange.

The Exchange believes the removal of the Monthly Volume Credit and Trading Permit fee credit will not place certain market participants at a relative disadvantage to other market participants because, in order to attract order flow when the Exchange first launched operations, the Exchange established these credits to lower the initial fixed cost for Members. The Exchange now believes that it is appropriate to remove this credit in light of the current operating conditions, including the Exchange's overall membership and the current type and amount of volume executed on the Exchange. The Exchange believes that the Exchange's rebates and fees will still allow the Exchange to remain highly competitive such that the Exchange should continue to attract order flow and maintain market share.

Inter-Market Competition

The Exchange believes the Proposed Access Fees do not place an undue burden on competition on other options exchanges that is not necessary or appropriate. In particular, options market participants are not forced to become members of all options exchanges. The Exchange notes that it has far less Members as compared to the much greater number of members at other options exchanges. There are a number of large users that connect via the MEO Interface and broker-dealers that are members of other options exchange but not Members of the Exchange. The Exchange is also unaware of any assertion that its existing fee levels or the Proposed Access Fees would somehow unduly impair its competition with other options exchanges. To the contrary, if the fees charged are deemed too high by market participants, they can simply discontinue their membership with the Exchange.

The Exchange operates in a highly competitive market in which market participants can readily favor one of the 15 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. Over the course of 2021, the Exchange's market share has fluctuated between approximately 3–6% of the U.S. equity options industry.[70] The Exchange is not aware of any evidence that a market share of approximately 3–6% provides the Exchange with anti-competitive pricing power. The Exchange believes that the ever-shifting market share among exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to fee changes. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange initially filed this proposed fee change on July 1, 2021 and that proposal was published in the **Federal Register** on July 15, 2021.[71] The Commission received one comment letter on the Initial Proposed Fee Change.[72] The Exchange withdrew Initial Proposed Fee Change on October 12, 2021.[73] The Exchange now responds to the SIG Letter in this filing.

The SIG letter cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.'' [74] The SIG Letter's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the Initial Proposed Fee Change and this filing.

Until recently, the Exchange has operated at a net annual loss since it launched operations in 2017.[75] As stated above, the Exchange believes that exchanges in setting fees of all types should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and also in the Initial Proposed Fee Change. A similar justification for the proposed fee change included in the Initial Proposed Fee Change, but also in this filing, was previously included in a similar proposed fee change filed by the Exchange's affiliate, MIAX Emerald, and SIG did not submit a comment letter on that filing.[76] Nor was that filing suspended by the Commission and continues to remain in effect. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[77]

[70] *See* ''The market at a glance'', *available at www.miaxoptions.com* (last visited October 19, 2021).

[71] *See supra* note 63.

[72] *See supra* note 64.

[73] *See* Securities Exchange Act Release No. 93346 (October 15, 2021), 86 FR 58367 (October 21, 2021) (SR–PEARL–2021–32) (Notice of Withdrawal of a Proposed Rule Change to Amend the MIAX Pearl Options Fee Schedule to Remove Certain Credits and Increase Trading Permit Fees).

[74] 17 CFR 201.700(b)(3).

[75] The Exchange has incurred a cumulative loss of $86 million since its inception in 2017 to 2020, the last year for which the Exchange's Form 1 data is available. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 29, 2021, *available at https://sec.report/Document/9999999997-21-004367/*.

[76] *See* Securities Exchange Act Release No. 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule To Adopt Monthly Trading Permit Fees).

[77] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail

The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the Initial Proposed Fee Change included the same level of detail (or more) as those past proposed fee changes that previously survived Commission scrutiny. Further, as stated above, the Exchange notes that the justification and process included in this filing and the Initial Proposed Fee Change was utilized by the Exchange's affiliate, MIAX Emerald, in a filing to adopt Trading Permit fees for MIAX Emerald, which filing was recently noticed by the Commission and remains in effect.[78] Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee changes should satisfy, and is not warranted here.

In addition, the arguments in the SIG Letter do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to and after submitting the Initial Proposed Fee Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the Initial Proposed to address their concerns and instead chose to submit a comment letter. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. Nonetheless, the Exchange submits the below response to the SIG Letter.

MIAX Pearl Provided More Than Sufficient Justification for the Proposed Fees

The SIG Letter asserts that the Exchange provided ''no affirmative justifiable reason that its legacy fees are no longer sufficient.'' [79] This statement assumes that the previous fees were ''sufficient'' and does not state how the legacy fees might have been sufficient to cover the Exchange's expenses. To clarify, the previous fees were not sufficient to cover the costs the Exchange incurred in providing access to the Exchange. However, the previous fees were sufficient to attract order flow as the pricing was set to not discourage participation on the Exchange. The Exchange is relatively new as it only began operations in 2017.[80] Like other new exchange entrants, the Exchange chose to charge lower fees than other more established exchanges to attract order flow and increase membership.[81] The Exchange chose that approach by setting the price of its Trading Permits (as well as other access-type fees) below market rates. SIG's statement assumes that exchanges should charge at market rates that are sufficient to cover its costs. This statement ignores pricing incentives exchanges may offer to attract order flow and that exchanges, like many businesses including SIG, may make a business decision to price certain offerings at a loss or ''on sale'' as they build their business. Further, a vast majority of the Exchange's Members, if not all, benefited from these lower fees.

As a new entrant in the market, the Exchange chose to forgo any potential additional revenue that may have been generated by higher Trading Permit fees to encourage participation on the new platform. This served to attract participation on the Exchange so market participants could evaluate the Exchange's quality, technology and the quality of their overall customer/user experience. Setting higher rates for non-transaction fees could have served to dissuade market participants from trading on the Exchange and not experiencing the high quality technological system the Exchange built.

Nonetheless, the Exchange provided significant cost based justification for the proposed fees not only in this filing, but also in the Initial Proposed Fee Change. The SIG Letter conveniently ignores this fact. In fact, the level of disclosure by the Exchange provided in this filing and the Initial Proposed Fee Change has been worked on with Commission Staff over numerous past filings that have been published for comment and remain effect.[82] The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [83] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [84]

The Exchange believes the proposed fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provided sufficient transparency into how the Exchange determined to charge such fees. Accordingly, the Exchange provided an analysis of its revenues, costs, and profitability associated with

added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. *See* SR–PEARL–2021–17 (the ''First Proposed Rule Change''). On April 22, 2021, the Exchange withdrew the First Proposed Rule Change and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20 (the ''Second Proposed Rule Change''). On May 3, 2021, the Exchange withdrew the Second Proposed Rule Change and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22 (the ''Third Proposed Rule Change''). On May 10, 2021, the Exchange withdrew the Third Proposed Rule Change and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021).

[78] *See supra* note 76.

[79] *See* SIG Letter at page 3, *supra* note 64.

[80] *See* ''Miami International Holdings Receives Approval from SEC to Launch MIAX PEARL; Targets February 6, 2017 Launch'' (December 14, 2016) *available at https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_12142016.pdf* (last visited October 18, 2021) (stating that the Exchange ''plans to launch with an initial moratorium on most non-transaction fees.'')

[81] *See, e.g.,* ''Members Exchange Unveils Transaction Pricing'' (September 10, 2020), *available at https://www.businesswire.com/news/home/20200910005183/en/Members-Exchange-Unveils-Transaction-Pricing* (last visited October 18, 2021) (quoting Jonathan Kellner, CEO of Members Exchange, ''[t]o further incentivize participants to connect to a new destination, we are implementing initial pricing that generates a net loss for the exchange on each transaction. We are confident that as participants experience the benefits of our platform, they will continue to incorporate MEMX in their routing strategies.''); *and* ''Miami International Holdings Announces Fully Subscribed Strategic Equity Rights Transaction with Leading Equities Firms to Trade on MIAX PEARL Equities Trading to Begin September 25, 2020'' *available at https://www.miaxoptions.com/sites/default/files/press_release-files/Press_Release_09142020.pdf* (last visited October 18, 2021) (quoting Douglas M. Schafer, Jr., Executive Vice President and Chief Information Officer of MIH, MIAX PEARL Equities, ''[w]e are excited to be offering a simpler, transparent, low cost venue to market participants and have no doubt that MIAX PEARL Equities will become a competitive alternative venue following our launch on September 25th.'')

[82] *See supra* note 77.

[83] *See* letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021.

[84] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

the proposed fees. This analysis included information regarding its methodology for determining the costs and revenues associated with the proposal.

To determine the Exchange's costs to provide the access services associated with the proposed fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the proposed fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services. The sum of all such portions of expenses represents the total cost of the Exchange to provide the access services associated with the proposed fees.

Furthermore, the Exchange is beginning to see significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems.[85] The Exchange has seen pricing increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

The Proposed Fee Increases Are Not Part of a Discriminatory Fee Structure and Tiered Fee Structures Are Commonplace Amongst Exchanges

The SIG Letter correctly notes that the proposed Trading Permit fees are higher for Members who connect through the MEO Interface than for Members who connect through the FIX Interface. Members who use the MEO Interface may also connect to the System through the FIX Interface as well, and vice versa. The Exchange notes that the Trading Permit fees for Members who connect through the MEO Interface are higher than the Trading Permit fees for Members who connect through the FIX Interface, since the FIX Interface utilizes less capacity and resources of the Exchange. The MEO Interface offers lower latency and higher throughput, which utilizes greater capacity and resources of the Exchange. The FIX Interface offers lower bandwidth requirements and an industry-wide uniform message format. Both EEMs and Market Makers may connect to the Exchange using either interface.

The SIG Letter asserts that the Exchange ''provides no description of the 'capacity and resources' being utilized, and no information on the nature or extent of the disparity in such utilization between the two Interface types.'' As a MEO user, SIG is uniquely positioned to understand and appreciate the differences between the MEO and FIX interfaces and why rates for the MEO interface are justifiably higher. Nonetheless, the Exchange is providing the below additional data to address the statements made in the SIG Letter.

Orders on the Exchange are supplied by Members via two different interfaces, FIX and MEO. MEO is the Exchange's proprietary binary order interface. Over the period from April 2021 until September 2021, 3.15 billion messages were processed via the FIX interface (0.43% of total messages received). Over that same time period, 731.4 billion messages (99.57% of total messages received) were processed over the MEO interface. Also, the MEO interface allows for mass purging of orders which has a significant impact on the number of messages processed. This marked difference between the number of FIX and MEO messages processed, when mapped to servers, software, storage, and networking results in a much higher allocation of total capital and operational expense to support the MEO interface. For one, the Exchange incurs greater expense in maintaining the resilience of the MEO interface to ensure its ongoing operation in accordance with Regulation SCI. Another, the Exchange must purchase and expand its storage capacity to retain these increased messages in compliance with its record keeping obligations. As noted above, the Exchange has seen significant inflationary pressure on capital items that it needs to purchase to maintain its technology.[86] The Exchange has seen pricing increases upwards of 30% on network equipment due to supply chain shortages.

SIG is also uniquely positioned to know that the fee structure utilized by the Exchange, which charges different Trading Permit fees for MEO interface users than FIX interface users is not a new proposal. In fact, it was first adopted by the Exchange over 3½ years ago in March 2018, published by the Commission and received no comment letters, not even by SIG.[87] SIG claims a fee structure that they have been subject to for years as an MEO interface user is just now unfairly discriminatory.

The Proposed Fees Are in Line With, or Cheaper Than, the Trading Permit Fees or Similar Membership/Access Fees Charged by Other Options Exchanges

The Exchange correctly asserts herein and in the Initial Proposed Fee Change that it's proposed Trading Permit fees ''are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges.'' The SIG letter challenges this assertion is an ''apples to oranges'' comparison because NYSE American and NYSE Arca based their rates on the number of options issued to the member and not trading volume, like the exchange does. In fact, the number of options traded by a member of NYSE American or NYSE Arca is an appropriate proxy for trading volume as the more options issued to the member would result in higher volumes traded by that member. Firms that trade more liquid options generate increased message traffic and greater pull on exchange resources. Therefore, comparing options traded to trading volume is an ''apples to apples'' comparison.

The Exchange proposes a range of fees from $500 to $6,000 per month depending on trading volume and the type of interface that is utilized by the Member. These rates are undoubtedly similar to or lower than the rates charged by NYSE Arca and NYSE American. As of October 14, 2021, the Exchange maintained a market share of approximately 3.95%.[88] Among Exchanges with similar market share, the Exchange's proposed Trading Permit Fees remain similar to or lower than fees charged by other options exchanges with comparable market share for access/membership fees.[89] The

[85] *See* ''Supply chain chaos is already hitting global growth. And it's about to get worse'', by Holly Ellyatt, CNBC, *available at https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html* (October 18, 2021); *and* ''There will be things that people can't get, at Christmas, White House warns'' by Jarrett Renshaw and Trevor Hunnicutt, Reuters, *available at https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/* (October 12, 2021).

[86] *See id.*

[87] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[88] *See* ''The Market at a Glance'' *available at https://www.miaxoptions.com/* (last visited October 4, 2021).

[89] *See supra* notes 26, 27 and 28 and accompanying text. The below market share numbers are as of October 14, 2021. *Id.* C2 had a market share of 4.44% and charges a monthly Access Fee of $5,000 for market makers and $1,000 per month for an additional Electronic Access Permit regardless of trading volume or options traded. *See* the C2 fee schedule *available at https://www.cboe.com/us/options/membership/fee_schedule/ctwo/* (last visited October 14, 2021). ISE had a market share of 6.74% and charges a monthly Access Fee to Primary Market Makers of $5,000 and Competitive Market Maker of $2,500 regardless of

proposed rates are also lower than those of its affiliates, MIAX and Emerald, which remain in effect today.[90]

The SIG Letter states that ''[the Exchange] offers no information about the capacity and resource costs of access to the other exchanges or any other basis to support the reasonability of those fees, let alone compare such costs to those of MIAX Pearl.'' [91] This statement is misleading as SIG should be aware that the Exchange does not have access to this information and when it asked SIG to assist the Exchange in better understanding the access structure of other exchanges, SIG refused.

The SIG Letter further asserts that the Exchange ''has not established that the other exchange fees are reasonable, nor that this would mean that the MIAX Pearl fees are reasonable as well.[92] SIG should be aware that it is not the Exchange's obligation to justify why another exchange's fees are reasonable and it is presumed that such fees were deemed reasonable by the Commission when filed by the exchange that proposed said fee. If SIG felt another exchange's fees were or are unreasonable, they are free to share that concern with the Commission and were provided an opportunity to submit comment letter on those earlier proposals from other exchanges. It is the Exchange's responsibility to show that its own proposed fee change is reasonable and consistent with the Act, and that assertion is amply supported by the statements made in this Item 5 and elsewhere herein.

The Proposed Fees Are Consistent With Section 6(b)(4) of the Act Because the Proposed Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

In the Initial Proposed Fee Change, the Exchange provided data that the proposed fee change would not result in excessive pricing or a supra-competitive profit. The Exchange outlined its projected revenues and expense related to the proposed fee change and estimated it would generate a 28% profit margin. The Exchange then compared its projected profit margin to the 2019 operating profit margin of ISE and PHLX, which were 83% and 67% respectively. SIG opined that a using the overall operating profit margins of ISE and PHLX is an ''apple-to-oranges'' comparison because 2019 was ''record setting year.'' [93] SIG assumes that because 2019 was a record setting year for options volumes, that each options exchange generated above average profits without provided any evidence to support this assumption. Data for 2019 was the most recent data available at the time the Exchange filed the Initial Proposed Fee Change on July 1, 2021. Since that time, data for 2020 became available and the Exchange discusses that data for numerous other options exchanges under Section 3.b. above in this proposed fee change.[94]

The Exchange sought to provide additional data to support a 28% profit margin based on the best, most recent data available. It did not provide this data to do an ''apple-to-apples'' comparison, but rather to provide insight into the profit margins of other exchanges to put the projected profit margin here into perspective. While the Exchange provided a detailed analysis and disclosure of its projected profit margins in this proposed fee change and the Initial Proposed Fee Change, other exchanges are generally not required to disclose profit margins on a more granular, per-product/non-transaction fee basis within their annual Form 1 filings. The Exchange, therefore, used the best, most recent data available to generate percentages of other exchange's profit margins. SIG has access to the same public data as the Exchange used in making the above projections regarding ISE and PHLX and is free to generate its own assumptions on that data if it believes the Exchange's calculations are wrong or misguided.

SIG also challenges the Exchange's methodology in determining its projected revenues and allocation of internal and third party expenses related to the proposed fee change. As stated above, the Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[95] This work with Commission Staff included thorough reviews of the Exchange's projected revenues and assignment of internal and third party expenses. The SIG Letter simply seeks to ignore the vast amount of disclosure the Exchange provided and kick up some sand in the hopes that raising questions about the analysis with no support on whether the answers to those questions would cause the proposed fee change to be excessive or result in supra-competitive pricing.

The Proposed Fee Change Is Reasonable, Equitably Allocated and Not Unfairly Discriminatory Because the Exchange, and Its Affiliates, Are Still Recouping Their Initial Expenditures

The Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The SIG Letter states that ''[t]he Exchange, however, draws no link between the recoupment of capital outlays with the reasonability, equitable allocation, and lack of unfair discriminatory nature of the proposed fees.'' [96] As stated above, the Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully supported an assertion that those proposed fee changes were consistent with the Act.[97] The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the Initial Proposed Fee Change included the same level of detail as those past proposed fee changes that previously survived Commission scrutiny. Asserting that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems is one of many justifications for the proposed fees and not a cornerstone of the Exchange's proposal.

As stated above, until recently, the Exchange has operated at a net annual loss since it launched operations in 2017.[98] This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. To do so, the Exchange chose to offer some non-transaction related services for no or little cost. This resulted in the Exchange forgoing revenue it could have generated from assessing higher fees and then use that revenue to more quickly recover its

trading volume or options traded. *See* Section 8.A. of the ISE fee schedule *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ISE%20Options%207* (last visited October 14, 2021).

[90] *See* Section 3)b) of the MIAX fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10142021.pdf, and* Section 3)b) of the Emerald fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_10142021.pdf* (both charging monthly trading permit fees ranging from $7,000 to $22,000).

[91] *See* SIG Letter at page 5, *supra* note 64.

[92] *See id.*

[93] *See* SIG Letter at page 6, *supra* note 64.

[94] *See supra* notes 50 to 62 and accompanying text.

[95] *See supra* note 77.

[96] *See* SIG Letter at page 6, *supra* note 64.

[97] *See supra* note 77.

[98] *See supra* note 75.

initial capital expenditures. Further, a vast majority of the Exchange's Members, if not all, benefited from these lower fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues and extending the duration during which it would recoup its initial capital expenditures. The SIG Letter choses to ignore this reality and instead criticize the Exchange for initially charging lower fees or providing a moratorium on certain non-transaction fees to the benefit of all market participants. The Exchange is now trying to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace.

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,[99] and Rule 19b–4(f)(2) [100] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2021–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2021–54. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2021–54 and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[101]

J. Matthew DeLesDernier,

Assistant Secretary.

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[99] 15 U.S.C. 78s(b)(3)(A)(ii).

[100] 17 CFR 240.19b–4(f)(2).

[101] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93557; File No. SR–IEX–2021–14]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fee Schedule for Market Data Fees

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 1, 2021, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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

Pursuant to the provisions of Section 19(b)(1) under the Act,[3] and Rule 19b–4 thereunder,[4] the Exchange is filing with the Commission a proposed rule change to modify its Fee Schedule, pursuant to IEX Rules 15.110(a) and (c), to assess fees for receipt and distribution of its proprietary market data feeds. IEX will implement the proposed fee beginning on January 3, 2022, to provide an opportunity for subscribers to update their data subscriptions to suit their particular market data needs.

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

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

IEX is proposing to modify its Fee Schedule, pursuant to IEX Rules 15.110(a) and (c), to assess fees for receipt and distribution of its proprietary market data feeds.

IEX has not previously imposed any fees to access its real-time top of book (''TOPS'' [5]) and depth of book (''DEEP'' [6]) proprietary market data feeds (''IEX Data''),[7] either by direct recipients or through redistribution. In general, IEX believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. IEX believes this high standard is especially important when an exchange imposes fees for its own market data, because it believes each exchange has a natural monopoly over its own market data (specifically depth of book and direct access to top of book). Therefore, IEX believes that each exchange should demonstrate that these fees bear a reasonable relationship to its costs and reasonable business needs and that it is not taking unfair advantage of its unique position as the sole provider of its own proprietary market data.

In proposing to charge fees for access to IEX Data, IEX has sought to determine such fees in a transparent way in relation to its own aggregate costs of providing the related service, and also carefully and transparently assess the impact on Data Subscribers [8]—both generally and in relation to other Data Subscribers, *i.e.,* to assure the fee will not create an undue financial burden on any participant and will not have an undue impact in particular on smaller Data Subscribers and competition among Data Subscribers in general.

IEX believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[9] and Rule 19b–4 thereunder,[10] with respect to the types of information self-regulatory organizations (''SROs'') should provide in seeking approval of any fee changes, and Section 6(b) of the Act,[11] which requires, among other things, that exchange fees be reasonable and equitably allocated,[12] not designed to permit unfair discrimination,[13] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[14] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[15]

As noted above, IEX offers two real-time proprietary market data feeds: TOPS and DEEP. TOPS is an uncompressed data feed that offers aggregated top of book quotations for all displayed orders resting on the Order Book [16] and last sale information for executions on the Exchange.[17] The data available in TOPS is also available through the securities information processor (''SIP'') feeds. DEEP is an uncompressed data feed that provides aggregated depth of book quotations for all displayed orders resting on the Order Book at each price level and last sale information for executions on the Exchange.[18] DEEP includes all resting displayed liquidity on the Exchange, aggregated by price level, meaning it includes the top of book quotes contained in TOPS, and also contains any less aggressively priced displayed quotes. The content of both TOPS and DEEP is derived exclusively from orders that are sent by the Exchange's Members,[19] which the Exchange formats and rebroadcasts to market participants and to data vendors.

IEX currently does not charge fees for access to IEX Data, irrespective of whether the Data Subscriber is a Member or not, the manner in which the data is received or used, the number of users, how quickly the recipient is able to receive the data after it is made available by the System,[20] or whether the data is subject to any delay through the redistribution process. The objective of this approach was to eliminate any fee-based barriers to access IEX Data when IEX launched as a national securities exchange in 2016, and it was successful in achieving this objective in that a large number of both Members and non-Members currently receive either TOPS, DEEP, or both. As discussed more fully below, IEX recently calculated its annual aggregate costs for providing IEX Data to its Data Subscribers at approximately $2.5 million. Because IEX has to date offered IEX Data free of charge, IEX has borne 100% of all costs for the compilation and dissemination of IEX Data to IEX's Data Subscribers.

In order to establish fees that are intended to recover the aggregate costs of providing IEX Data to its Data Subscribers and limit the amount of potential return in excess of those costs to a reasonable markup, the Exchange is proposing to modify its Fee Schedule, pursuant to IEX Rules 15.110(a) and (c), to charge all Data Subscribers fees to access IEX Data in real time. In addition, Data Subscribers that redistribute IEX Data in real time to an external, non-affiliated [21] third party would be subject to redistribution fees. However, Data Subscribers that redistribute IEX Data subject to a delay of at least fifteen milliseconds (''Delayed IEX Data'') [22] will not be subject to a fee for such redistribution, and the recipients of Delayed IEX Data (''Delayed IEX Data Recipient'') will not be considered to be

[5] *See* IEX Rule 11.330(a)(1).

[6] *See* IEX Rule 11.330(a)(3).

[7] As discussed below, both TOPS and DEEP also include last sale information.

[8] ''Data Subscriber'' refers to any natural person or entity, that receives real-time market data either directly from IEX or from another Data Subscriber. IEX notes that the current recipients of IEX Data include many Members of the Exchange, *see* IEX Rule 1.160(s), but also include several non-Members, including vendors who redistribute IEX Data to third-party recipients.

[9] 15 U.S.C. 78s(b)(1).

[10] 17 CFR 240.19b–4.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78f(b)(8).

[15] In May 2019, the Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (''Guidance''). While IEX understands that the Guidance does not create new legal obligations on SROs, the Guidance is consistent with IEX's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

[16] *See* IEX Rule 1.160(p).

[17] *See* IEX Rule 11.330(a)(1).

[18] *See* IEX Rule 11.330(a)(3).

[19] *See* IEX Rule 1.160(s).

[20] *See* IEX Rule 1.160(nn).

[21] The Data Subscriber Agreement defines affiliate as ''any individual, corporation, company, partnership, limited partnership, limited liability company, trust, association or other entity that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with such party.'' A non-affiliated third-party is any individual, corporation, company, partnership, limited partnership, limited liability company, trust, association or other entity that is not an affiliate of the Data Subscriber pursuant to such definition.

[22] IEX only provides real-time IEX Data and will not itself delay the dissemination of IEX Data to Data Subscribers.

Data Subscribers.[23] Neither approach will differentiate between redistribution to Data Subscribers that receive IEX Data in displayed versus non-displayed format, whether in real time or delayed.

Specifically, IEX proposes to charge the following flat fees to any Data Subscriber: $500 per month for real-time access to the TOPS feed; $2,500 per month for real-time access to the DEEP feed; and $500 per month to redistribute either the TOPS or DEEP feed (or both TOPS and DEEP) in real time. As noted above, IEX is proposing that redistribution of TOPS or DEEP after [sic] at least a fifteen-millisecond delay will be free. Data Subscribers may therefore redistribute IEX Data to any Delayed IEX Data Recipient without paying any distribution fees to IEX, and without requiring the Delayed IEX Data Recipient to become a Data Subscriber.[24] And IEX is also not proposing to charge a distribution fee to a Delayed IEX Data Recipient that further redistributes Delayed IEX Data.

IEX's proposed market data fees are based on a cost-plus model. In determining the appropriate fees to charge, IEX considered its costs of providing market data, using what it believes to be a conservative methodology (*i.e.,* that strictly considers only those costs that are most clearly directly related to the production and distribution of IEX Data) to estimate such costs,[25] as well as the relative costs of compiling the TOPS and DEEP feeds,[26] and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in IEX recouping less than all of its costs of providing market data because of the uncertainty of forecasting Data Subscriber decision-making with respect to their IEX market data subscriptions.

Applying this pricing model, IEX is proposing to charge $500 per month for real-time receipt of TOPS and $2,500 per month for real-time receipt of DEEP. IEX believes that it is reasonable and appropriate to charge a higher fee for DEEP because it contains significantly more market data than TOPS and costs more for IEX to compile.[27] Additionally, IEX's proposed fee structure for TOPS and DEEP is designed to make real time access to IEX's top of book widely available to a broad base of market participants. In order to accomplish this goal, IEX proposes to allocate its cost plus structure so that TOPS is materially more affordable than DEEP. IEX also notes, as described in footnote 23 [sic], *supra,* that because it contains multiple price levels, DEEP requires more processing (and related costs) for IEX to generate than TOPS.

IEX is also proposing to charge a $500 per month redistribution fee to Data Subscribers that choose to redistribute IEX market data in real time to an external, non-affiliate third party. Enabling redistribution in real time adds to IEX's administrative expenses related to the need to identify and track the recipients of IEX Data. In addition, IEX notes that if it allowed Data Subscribers to redistribute IEX Data in real time without any additional fees, it could enable Data Subscribers to circumvent IEX's fees for providing IEX Data, which would conflict with IEX's objective to recover its costs of producing IEX Data.

Finally, IEX is charging only for data that is made available in real time, because it is the very demand for real-time, low latency data that drives much of the costs associated with creating and distributing IEX Data. For example, IEX must invest more in the resiliency, capacity, and redundancy of its proprietary market data feeds to provide real-time, low latency access to IEX Data. Moreover, not charging IEX fees for Delayed IEX Data is also consistent with IEX's desire to make its data broadly available to a range of market participants including long-term investors.

As discussed below, this total maximum cost of $3,500 per month for a Data Subscriber to receive all IEX Data and be permitted to redistribute it in real time, reflects an amount that at most would lead to a reasonable markup over IEX's costs of providing IEX Data, and may even result in only a partial recoupment of IEX's costs.

In January 2019, IEX conducted a study of its aggregate costs to produce market data and connectivity (the ''Cost Study'').[28] The Cost Study includes a detailed analysis of IEX's aggregate baseline costs, including the methodology it used for determining such costs for three separate segments—market data, physical connectivity (the physical connections required to access IEX in its data center), and logical connectivity, which concerns the cost to offer and maintain Order Entry Ports. The Cost Study estimated IEX's aggregate annual cost to offer IEX Data to its Data Subscribers to be approximately $1.8 million per year, as reflected in Table 1.[29]

TABLE 1

Annual IEX Market Data Infrastructure	(2019) ($1,791,403)
Top of Book Servers (TOPS) (5)	($12,833)
Depth of Book Servers (DEEP) (5)	(12,833)
Market Data Feeds Switches (2 x 24 port)	(13,333)
ITF Market Data	(7,333)
Data Center Space, Power, Security	(10,605)
Administrative Access	(33,333)
Monitoring	(596,135)
Personnel	(1,104,998)
Total Annual Costs	(1,791,403)

IEX recently updated and refreshed the cost estimates contained in the Cost Study. As further detailed below, this update reflects somewhat lower annual hardware costs related to market data than contained in the 2019 Study, and somewhat higher personnel costs. Considering all factors together, the updated estimates reflect an increase in total annual costs to produce market data from $1,791,403 to $2,483,644.

Table 2, below, details the individual annual line-item costs considered by IEX to be directly related to offering IEX Data to Data Subscribers.[30] The chart shows three cost components: (1) Direct costs, such as servers, infrastructure, and monitoring; (2) enhancement initiative costs (*e.g.,* new functionality for IEX Data and increased capacity for the proprietary market data feeds, as described below);[31] and (3) personnel

[23] Data Subscribers, whether they receive IEX Data directly from the Exchange or from another Data Subscriber, will be required to enter into a Data Subscriber Agreement with IEX, which will be made available on IEX's website. Delayed IEX Data Recipients will *not* be required to enter into a Data Subscriber Agreement with IEX.

[24] The Delayed IEX Data Recipient may be subject to any fees charged by the redistributor of the Delayed IEX Data, based upon the contractual arrangement between the Delayed IEX Data Recipient and the provider of Delayed IEX Data. Such fees would not be paid to the Exchange.

[25] For example, IEX only included the costs associated with physical assets that are directly responsible for producing and transmitting IEX Data, and excluded from its market data cost calculations any physical connectivity assets that are used to provide both order entry and market data. *See* Cost Study at 16. Thus, IEX notes that this methodology underestimates the total costs of providing market data.

[26] DEEP is an aggregated feed that must perform additional logic on each order-related message received from the System to calculate the total number of displayed shares available at each price level. TOPS requires less processing than DEEP because it only aggregates displayed liquidity at a single price level, the top of book.

[27] *See supra* note 26.

[28] *See* ''The Cost of Exchange Services—Disclosing the Cost of Offering Market Data and Connectivity as a National Securities Exchange'' (January 2019) available at *https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf.*

[29] *See* Cost Study at 15–18 for details on how IEX estimated the costs of its market data infrastructure; *see also supra* note 25.

[30] Table 2 also shows the breakdown of the 2019 estimated market data infrastructure costs.

[31] These enhancement initiative costs are a routine part of offering proprietary market data. Some of the enhancement costs in Table 2, such as the introduction of the snapshot functionality for TOPS and DEEP, are one-time costs, but each year

costs. The servers included were limited to those specifically dedicated to IEX Data. ''Monitoring'' includes hardware and software licenses used to monitor these servers and the health of the market data products provided by such assets. All physical assets and software, which also includes assets used for testing and monitoring of market data infrastructure, were valued at cost, and depreciated over three years. For personnel costs, IEX calculated an allocation of employee time for employees whose functions include providing and maintaining IEX Data and/or the proprietary market data feeds used to transmit IEX Data,[32] and used a blended rate of compensation reflecting salary, stock and bonus compensation, bonuses, benefits, payroll taxes, and 401(k) matching contributions.[33]

TABLE 2

Annual IEX Market Data Infrastructure	2019 ($1,791,403)	2021 ($2,483,644)
Direct Costs:		
Servers	($32,999)	($26,696)
Network Infrastructure & Admin Access	(46,666)	(152,783)
Monitoring	(596,135)	(213,109)
Data Center (Space, Power, Security)	(10,605)	(79,142)
Enhancement Initiatives Costs:		
DEEP Snapshot	N/A	(95,974)
TOPS Snapshot	N/A	(95,974)
Capacity Planning	N/A	(232,856)
Monitoring Tools	N/A	(49,609)
Ongoing Personnel Costs	(1,104,998)	(1,537,500)
Total Annual Costs	(1,791,403)	(2,483,644)

As noted in Table 2, IEX continues to introduce enhancement initiatives to IEX Data. First, effective February 3, 2021, IEX launched ''DEEP Snapshot'', which allows Data Subscribers to download point-in-time snapshots of DEEP in order to enable Data Subscribers to accelerate late start recovery.[34] Second, effective September 27, 2021, IEX launched ''TOPS Snapshot'', which allows Data Subscribers to download point-in-time snapshots of TOPS in order to enable them to accelerate late-start recovery. Third, IEX is in the process of expanding the capacity and monitoring tools that support the efficient transmission of IEX Data to the IEX's proprietary market data feeds.

IEX also notes that it has made recent changes to its system functionality and architecture which improve the content and speed of IEX's proprietary market data feeds, but that have no impact on IEX's estimated costs of providing IEX Data. For example, effective February 16, 2021, IEX removed its outbound 350 microsecond latency ''speedbump'' while retaining its inbound 350 microsecond latency ''speedbump.''[35] Prior to that date, IEX disseminated its top of book data and last sale data to the SIPs free of any artificial delays, but all other outbound messages, including IEX Data transmitted through IEX's proprietary market data feeds, were subjected to a 350-microsecond latency.[36] Additionally, on April 1, 2021, IEX began to display odd lot sized orders, which are aggregated by price on DEEP, and can aggregate to form the top of book quote on TOPS.[37] And on October 13, 2021, IEX began disseminating a ''Retail Liquidity Indicator'' on both TOPS and DEEP, which tells market participants when IEX has at least one round of Retail Liquidity Provider order[38] interest available for a particular security, which is resting at the Midpoint Price[39] and priced at least $0.001 better than the NBB[40] or NBO.[41] The Retail Liquidity Indicator reflects the symbol and side of the resting interest, but does not include the price or size.[42]

IEX now proposes a fee structure designed to recoup its costs and limit any revenue in excess of cost to an amount that represents no more than what IEX believes is a reasonable rate of return over such costs.[43] If all of IEX's current Data Subscribers continue to receive and, as applicable, redistribute, real-time IEX Data, IEX estimates it would earn at most an approximately 95% markup over its costs (a total of $4,878,000 annually). IEX believes that such a scenario is unlikely (as discussed more fully below), so that any return in excess of its costs is likely to be significantly lower (IEX is targeting a return of 25% over its costs).[44] IEX believes that this cost-plus pricing model would allow IEX to recoup its annualized costs and continuing

IEX expects to incur new enhancement costs such as the costs associated with increasing the capacity of its market data feeds and costs associated with upgrading its market data infrastructure, as well as any new functionality. Thus IEX believes that its annual enhancement costs on an ongoing basis will be similar and that the enhancement costs included in the 2021 update are not extraordinary.

[32] Notably, IEX did not include any costs associated with operating the Exchange itself in calculating the costs of offering IEX Data.

[33] Applying the methodology of the Cost Study, IEX determined cost allocation for employees who perform work in support of compiling and disseminating IEX Data to arrive at a full time equivalent (''FTE'') of 6.15 FTEs across all the identified personnel (the FTE at the time of the Cost Study was 4.05). IEX then multiplied the FTE times a blended compensation rate for all relevant IEX personnel to determine the personnel costs associated with compiling and disseminating IEX Data.

[34] *See* Trading Alert No. 2021–003, available at *https://iextrading.com/alerts/#/135.*

[35] *See* Trading Alert 2021–006, available at *https://iextrading.com/alerts/#/138.*

[36] See Securities Exchange Act Release No. 91016, January 29, 2021, 86 FR 8238 (February 4, 2021) (SR–IEX–2020–18).

[37] *See* Trading Alert 2021–010, available at *https://iextrading.com/alerts/#/142; see also,* See Securities Exchange Act Release No. 90933, January 15, 2021, 86 FR 6687 (January 22, 2021) (SR–IEX–2021–01).

[38] *See* IEX Rule 11.190(b)(14).

[39] The term ''Midpoint Price'' means the midpoint of the NBBO. *See* IEX Rule 1.160(t). The term ''NBBO'' means the national best bid or offer, as set forth in Rule 600(b) of Regulation NMS under the Act, determined as set forth in IEX Rule 11.410(b).

[40] *See* IEX Rule 1.160(u).

[41] *Id.*

[42] *See* Trading Alert 2021–036, available at *https://iextrading.com/alerts/#/169; see also,* Securities Exchange Act Release No. 92398 (July 13, 2021), 86 FR 38166 (July 19, 2021) (SR–IEX–2021–06).

[43] IEX notes that it is not only being transparent about its costs associated with producing IEX Data, but is also being transparent about what it thinks the appropriate markup over costs should be.

[44] If the revenue IEX receives from the proposed fees materially deviates from IEX's projections described herein, IEX will assess whether it is appropriate to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly.

investments in its market data infrastructure, while introducing a straightforward pricing framework that would not be unwieldy or onerous for even the heaviest users of IEX Data, which would pay at most $3,500 per month for access to both TOPS and DEEP and the right to redistribute IEX Data in real time.

As described in the Statutory Basis section, IEX does not believe that exchange market data fees are constrained by competitive market forces, and therefore does not believe this fee proposal should be based on a comparative analysis of IEX's proposed fees for IEX Data and the fees charged by IEX's competitors for the equivalent data. Furthermore, IEX does not have visibility into other equities exchanges' costs to provide market data or their fee markup over those costs, and therefore cannot use other exchange's market data fees as a benchmark to determine a reasonable markup over the costs of providing market data. Nevertheless, IEX believes the other exchange's market data fees are a useful example of alternative approaches to providing and charging for market data. To that end, IEX notes that its proposed fees are materially lower than what competing equities exchanges charge IEX for similar market data products.[45] Specifically, during 2021 to date, IEX paid an aggregate of $101,024 to the 11 other equities exchanges[46] that charge for their market data[47] to obtain top of book, depth of book and last sale market data on a monthly basis. By comparison, to obtain the equivalent market data from IEX (as proposed) the aggregate monthly cost for those 11 equity exchanges would be $3,000 per exchange family.[48] Thus the 11 competing exchanges would be subject to aggregate monthly fees of $9,000 or approximately one-eleventh of the aggregate fees that IEX pays to those 11 exchanges. Additionally, as noted in the Cost Study, the actual costs IEX incurs to obtain market data from other exchanges often involve aggregating several different kinds of fees, making it difficult to ascertain the actual costs to a market participant of obtaining equivalent market data from other exchanges.[49] For example, several other exchanges charge separate fees depending on whether exchange data is redistributed internally[50] or externally,[51] is used for non-display or other forms of use,[52] or is calculated on a per user basis, with different fees for non-professional[53] and professional[54] users of the data feeds.[55] By contrast, IEX's fee proposal is much simpler—charging a flat fee for any entity to access one or both of the IEX Data feeds ($500 month for TOPS/$2,500 for DEEP), and a flat fee of $500 for any entity that wishes to redistribute TOPS, DEEP, or both TOPS and DEEP in real time (regardless of the number of recipients that the entity redistributes to). This simple fee structure means the cost burden for subscribing to receive IEX Data would be relatively flat regardless of the size of the Data Subscriber's firm. At the same time, IEX believes that the fees are set at a level that will not represent a significant cost to any Data Subscriber. For example, because IEX will not be charging any variable per user fees, Data Subscribers will not need to expend resources on monthly reporting of market data usage that can be required when subscribing to other exchange data feeds with pricing that differs based on the various factors noted above. Furthermore, because IEX will not be charging different usage fees (such as for ''display'' vs. ''non-display'' usage) or charging based on ''controlled'' and ''uncontrolled'' products, the Data Subscribers will not need to expend resources on managing different methods of receiving and distributing IEX Data or different types of application usage. Furthermore, IEX understands that the above administrative concerns can result in contentious audits or even litigation between data subscribers and providers of proprietary market data, all of which can result in substantial costs to the subscribers of other exchanges' market data feeds.

IEX acknowledges that there are trade-offs between the benefits of a relatively simple fee structure and a fee structure that is more graduated based on the extent and variety of uses of IEX Data. IEX believes it has struck an appropriate balance of these interests by creating a fee model that is simple, easy to understand and administer, and set at a level that is affordable for all firms that need real-time data, while imposing no charge on recipients of Delayed IEX Data that do not need real-time data.

IEX proposes to allow Data Subscribers to provide Delayed IEX Data free of charge in order to minimize barriers to access IEX Data. IEX's business model seeks to generate revenue from trading rather than from data and connectivity fees, so an essential part of the proposed fee structure is to enable all market participants to be able to obtain IEX Data while it is still timely and useful to most of them without incurring any IEX fees.

As noted above, this fee proposal would result in IEX receiving *at most* an amount equal to approximately 95% over its estimated costs of providing market data, only if *all* current Data Subscribers and their customers (*i.e.,* recipients of redistributed IEX Data from a Data Subscriber) elect to make no changes to their current subscriptions and continue to receive IEX market data in real time.[56] However, IEX expects to recoup far less than that amount because market participants that do not need real-time data will have the option to receive Delayed IEX Data (at a minimal delay of only 15 milliseconds) in lieu of real-time data, without paying a fee to IEX. For example, and as described more fully below, IEX believes that Data Subscribers that are not engaged in high speed, low latency trading may not choose to pay for real-time IEX Data. As noted above, this aspect of the proposal allows Data Subscribers to provide Delayed IEX Data to market participants who do not require (or quite possibly even have the

[45] For examples of other exchange's market data fees, *see https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf; https://nasdaqtrader.com/Trader.aspx?id=DPUSdata;* and *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[46] Currently, IEX pays for market data from four NYSE exchanges (New York Stock Exchange LLC, NYSE American LLC, and NYSE Arca, Inc.), three Nasdaq exchanges (Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC) and four Cboe exchanges (Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc.).

[47] Long-Term Stock Exchange Inc.; MEMX LLC; MIAX PEARL, LLC; and NYSE Chicago, Inc. currently do not charge for their market data.

[48] As described below, IEX is proposing to only charge the $500 Distribution Fee to external, non-affiliate third parties of the Data Subscriber.

[49] *See* Cost Study at 18.

[50] Internal distribution is receiving market data from an exchange and distributing it within the same entity that received the data.

[51] External distribution is receiving market data from an exchange and distributing it to a third party outside of the entity that received the data.

[52] Non-display usage means any method of accessing a market data product that involves access or use by a machine or automated device without access or use of a display by a natural person.

[53] Non-professional users are natural persons who use data for personal, not commercial, purposes, and are not a registered financial services professional.

[54] Anyone who is not a non-professional user is considered a professional user.

[55] *See supra* note 45.

[56] IEX notes that the proposed fee filing introduces a new subscription model, and IEX will notify all current Data Subscribers that before January 3, 2022, they will need to enter into a new Data Subscriber Agreement with IEX if they wish to continue receiving IEX Data in real time (either directly from IEX or via a third party). Furthermore, anyone who elects to receive Delayed IEX Data from a third party would no longer need to enter into a Data Subscriber Agreement with IEX, as required under IEX's current market data policies.

necessary technology tools to use) near instantaneous access to IEX Data.[57] These Delayed IEX Data Recipient that elect to receive Delayed IEX Data from a Data Subscriber of IEX Data will not incur any IEX fees.[58] Conversely, a market participant that values near instantaneous market data (*e.g.,* algorithmic traders or other equities venues that use proprietary market data feeds to calculate the NBBO for each security) will have the option of paying $3,000 per month to receive TOPS and DEEP. IEX also notes that any consumers can continue to obtain all the data in TOPS and DEEP free of charge on a T+1 basis from IEX's ''HIST'' [59] data product.[60]

IEX currently has 70 Data Subscribers who it believes are individuals [61] and expects that most, if not all, of the individual Data Subscribers will terminate their subscriptions for IEX Data and, if they choose to continue to receive IEX Data, can opt to receive Delayed IEX Data from a third-party vendor or through HIST. The remaining, non-individual, Data Subscribers are made up of approximately one-third IEX Members, one-third professional market participants that are not IEX Members (*e.g.,* hedge funds and broker-dealers), and one-third data vendors. Based on IEX's general understanding of many of its current Data Subscribers' business models, IEX projects at least half of the data vendors will retain all of their existing subscriptions for IEX Data while the others may cancel their real-time data subscriptions,[62] and also anticipates that several Members and non-Members will cancel their real-time data subscriptions for either TOPS, DEEP, or both. Based on this analysis, IEX set its proposed fees at a range that it anticipates will, in the most likely scenario, result in revenue of approximately 25% above cost. IEX's analysis and projections are based on the expertise and industry knowledge of relevant IEX personnel with respect to the broker-dealer community as well as market participants' sensitivity to market data costs. Having never charged for market data, IEX has no experience pricing market data. Furthermore, no equities exchange provides free redistribution of near real-time market data (that is delayed at least 15 milliseconds). Acknowledging the number of variables that could impact how much IEX recovers of its costs of providing IEX Data, the Exchange determined that a target return of 25% over costs is a reasonable goal for its market data fee model. If our projections are incorrect, revenues could range from ''break even'' (*or even below* aggregate costs) to an aggregate markup of *at most* approximately 95%.[63] However, the actual revenue will be determined by decisions made by each Data Subscriber based on the meaningful choices IEX proposes to offer for the receipt of market data.

IEX notes that other equities exchanges also offer delayed market data free of charge, but they define ''delayed data'' as data that is disseminated at least fifteen minutes after the same data is disseminated in real time.[64] These delayed data feeds are often used by brokerage firms [65] or online distributors of market data [66] to provide stock quote information free of charge, even if it is 15 minutes old.

In determining the appropriate delay interval, IEX sought to strike a balance between offering IEX Data at a reasonable and transparent price to market participants who require real-time data, while also offering market participants a commercially viable option for the receipt of free IEX Data within a time period in which the data will remain useful to market participants who do not require near instantaneous real-time market data for trading purposes. Knowing there is no ''exact science'' to the determination of how long to delay data before allowing it to be retransmitted free of charge, IEX sought informal feedback from Members and other Data Subscribers. Based upon that informal feedback, IEX believes that most, if not all, non-electronic trading desks would be able to continue to use IEX Data if it was received subject to at least a fifteen-millisecond delay. Also based on that informal feedback, IEX believes that there will be some current Data Subscribers—*e.g.,* algorithmic traders, data vendors, and any electronic trading platform that we believe typically use real-time data to calculate the NBBO—that will continue to pay for real-time IEX Data.

The proposed fees will not apply differently based upon the size or type of the market participant, but rather based upon the speed with which the Data Subscriber wishes to obtain IEX Data, based upon factors deemed relevant by each Data Subscriber, such as the cost to access and process IEX Data as well as business models.

Finally, IEX notes that this simple, transparent market data fee proposal will simplify IEX audits for compliance with applicable market data policies. Any Data Subscriber receiving real-time IEX Data will enter into a Data Subscriber Agreement with IEX, even if the Data Subscriber obtains their data through a third-party vendor. And any Delayed IEX Data Recipient does not need to enter into a Data Subscriber Agreement with IEX. Therefore, to assess compliance with applicable market data policies, IEX would simply audit whether any redistribution of IEX Data to any external, non-affiliate third party Data Subscribers is occurring, and if so, whether such redistribution is in real time or subject to at least a fifteen-millisecond delay.

In order to effectuate the proposed fee changes, IEX is proposing to make the following changes to the definitions in the ''Market Data Fees'' part of its Fee Schedule:

- Remove the definitions for ''Internal Distribution Fee'' and ''External Distribution Fee'' because IEX is not proposing to charge different fees for internal or external distribution and introduce the term ''Distribution Fee'' which IEX proposes to define as ''the fee charged to any Data Subscriber that receives IEX market data directly from

[57] As noted above, IEX will only provide real-time IEX Data and will not itself delay the dissemination of IEX Data to Data Subscribers.

[58] The Delayed IEX Data Recipient may be subject to any fees charged by the redistributor of the Delayed IEX Data, based upon the contractual arrangement between the Delayed IEX Data Recipient and the provider of Delayed IEX Data. Such fees would not be paid to the Exchange.

[59] *See* IEX Rule 11.330(a)(5).

[60] HIST data is available for download at *https://iextrading.com/trading/market-data/#hist-download.*

[61] IEX's belief in this regard is based on an assessment that the Data Subscriber has a natural person name (*i.e.,* fist name—last name), rather than an entity name.

[62] IEX notes that not all Data Subscribers classified as vendors by IEX are established professional market data vendors. Some appear to redistribute IEX market data on a less sophisticated basis (*e.g.,* startups redistributing data to a small number of customers).

[63] As discussed above, IEX believes it is unrealistic and unlikely that all current Data Subscribers will maintain their current subscriptions (including the 70 individual current Data Subscribers, all of whom IEX estimates will not maintain their current subscriptions), and therefore does not expect the markup over its costs of providing IEX Data to be anywhere near 95%.

[64] *See, e.g.,* NYSE Comprehensive Market Data Policies, Section 7 (Delayed Data Policy), available at *https://www.nyse.com/publicdocs/data/Policy-ComprehensivPackage_PDP.pdf;* Cboe Global Markets North American Data Policies, Section 5 (Delayed Data), available at *https://cdn.batstrading.com/resources/membership/Market_Data_Policies.pdf;* Nasdaq Delayed Data Policy, available at *http://www.nasdaqtrader.com/content/administrationsupport/policy/delayeddatapolicy.pdf.*

[65] *See, e.g.,* Interactive Brokers Delayed and Streaming Market Data, available at *https://www.interactivebrokers.com/en/software/webtrader/webtrader/marketdata/delayedandstreamingmarketdata.htm* (''Delayed market data is available for instruments for which you do not currently hold market data subscriptions.'').

[66] *See, e.g.,* MarketWatch Market Data Terms of Use, available at *https://www.marketwatch.com/site/investing-terms-of-use* (''comprehensive quotes and volume reflect trading in all markets and are delayed at least 15 minutes.'').

the Exchange or indirectly through another Data Subscriber and then redistributes that data to an external, non-affiliate third party.''

• Define the term ''Real-Time'' as ''IEX market data that is accessed, used, or distributed less than fifteen (15) milliseconds after it was made available by the Exchange. IEX provides only Real-Time IEX market data to Data Subscribers. A Data Subscriber may redistribute Real-Time IEX market data that it receives from the Exchange on a Real-Time basis to a natural person or entity.**''

• Define the term ''Delayed'' as ''IEX market data that is accessed, used, or distributed at least fifteen (15) milliseconds after it was made available by the Exchange. A Data Subscriber may redistribute Real-Time IEX market data that it receives from the Exchange on a Delayed basis to a natural person or entity. In addition, a recipient of Delayed IEX market data may further redistribute such Delayed IEX market data to a natural person or entity.**''

• Define the term ''Data Subscriber'' as ''any natural person or entity that receives Real-Time IEX market data either directly from the Exchange or from another Data Subscriber. A Data Subscriber must enter into a Data Subscriber Agreement with IEX in order to receive Real-Time IEX market data.''

• Remove the definition of ''Usage Fee'' because IEX is not proposing to charge any usage fees for its market data.

• Add the following words before the ''Service/Fee'' table: ''The following fees are assessed by IEX on market data recipients:''

IEX is also proposing to the make the following changes to the ''Service/Fee'' table in the Market Data Fees section of the Fee Schedule:

• Delete the references to the Internal Distribution, External Distribution, and Usage Fees.

• Add the following entries to the table:

Service	Fee
DEEP Feed (Real-Time)	$2,500 per month.*
TOPS Feed (Real-Time)	$500 per month.*
Distribution Fee (Real-Time)	$500 per month.*
DEEP Feed (Delayed)	FREE.
TOPS Feed (Delayed)	FREE.
Distribution Fee (Delayed)	FREE.

• Define the asterisk to say ''These fees will be operative beginning January 3, 2022.''

• Define the double asterisk to say ''The fees set forth above include only fees charged by IEX. Receipt of Real-Time IEX market data from a Data Subscriber or Delayed IEX market data from a Data Subscriber or other person may be subject to fees agreed to between the Data Subscriber and recipient of such IEX market data.''

As noted above, the proposed rule change is effective on filing and the fees proposed herein will become operative on January 3, 2022.[67] Delayed implementation will provide an opportunity for current Data Subscribers to modify the manner in which they receive IEX Data, if they choose to do so, allowing them to obtain IEX Data without incurring any charge from IEX if they receive it subject to at least a fifteen-millisecond delay,[68] before the first month in which IEX will charge for access to IEX Data.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6(b)[69] of the Act in general and furthers the objectives of Section 6(b)(4)[70] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also believes that the proposed fee change promotes just and equitable principles of trade and will not be unfairly discriminatory, consistent with the objectives of Section 6(b)(5)[71] of the Act.

Reasonableness

With regard to reasonableness, the Exchange understands that the Commission has traditionally taken a market-based approach to examine whether the SRO making the fee proposal was subject to significant competitive forces in setting the terms of the proposal. IEX understands that in general the analysis considers whether the SRO has demonstrated in its filing that (i) there are reasonable substitutes for the product or service; (ii) ''platform'' competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supracompetitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, IEX understands that in general the analysis will next consider whether there is any substantial countervailing basis to suggest the fee's terms fail to meet one or more standards under the Exchange Act. IEX further understands that if the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

As detailed in the Cost Study, IEX's experience as an exchange strongly supports its belief that the fees each equities exchange charges for its proprietary market data are not subject to competitive forces.[72] As noted in the Purpose section, each exchange has a monopoly over its own market data, particularly its depth of book data which is not available on the SIPs. IEX believes that this monopoly over proprietary market data, coupled with the need of many market participants for real-time data in order to compete in a market system in which trading outcomes can depend on time differences measured in millionths of a second, allows exchanges to set their fees for proprietary market data without competitive constraints. As also noted in the Cost Study, the extreme differences between IEX's aggregate cost to produce market data (as well as physical and logical connectivity products) and the prices charged by other exchanges for similar products and services clearly suggests that the pricing for market data is not constrained by competition.[73]

Further, IEX is not aware of and does not believe that there is any evidentiary support for the proposition that competition at the ''platform level'' constrains market data fees of the type proposed in this filing.

Because IEX believes that market data is not constrained by competition, IEX is not relying on an argument that the fees proposed in this filing are justified based on market competition. Instead, IEX believes the proposed fees are fair and reasonable as a form of cost recovery plus the possibility of a reasonable return for IEX's aggregate costs of offering IEX Data to its Data Subscribers.

As discussed in the Purpose section, IEX believes that charging $500 per month for TOPS, $2,500 per month for DEEP, and $500 per month for real-time redistribution of TOPS, DEEP, or both, is reasonable because it is based both on the relative costs to IEX to generate TOPS and DEEP, as well as IEX's objective to make TOPS broadly

[67] January 3, 2022 is the first trading day of the new year.

[68] The Delayed IEX Data Recipient may be subject to any fees charged by the redistributor of the Delayed IEX Data, based upon the contractual arrangement between the Delayed IEX Data Recipient and the provider of Delayed IEX Data. Such fees would not be paid to the Exchange.

[69] 15 U.S.C. 78f(b).

[70] 15 U.S.C. 78f(b)(4).

[71] 15 U.S.C. 78f(b)(5).

[72] *See* Cost Study at 34.

[73] *See* Cost Study at 18–19, 24–25, and 31–32, respectively.

available to a range of market participants including long-term investors. Specifically, DEEP contains more data than TOPS, and is more resource intensive to produce and maintain because it aggregates displayed liquidity at multiple price levels. Therefore, IEX believes that it is reasonable to charge a higher fee for DEEP than for TOPS. Similarly, as discussed in the Purpose section, IEX believes that charging $500 per month to any real-time redistributors of IEX Data is reasonable both because of the administrative and other costs IEX incurs in supporting the redistribution of IEX Data and to prevent the possible circumvention of IEX's market data fees by any redistributors of IEX Data.

IEX also believes the proposed fees are reasonable because they are designed to generate annual revenue of approximately $3.1 million (reflecting a 25% markup over costs). As described in the Purpose section, IEX expects many of its current Data Subscribers to terminate their subscriptions for real-time data, instead opting to pay IEX no fee and to receive Delayed IEX Data through a redistribution agreement with a Data Subscriber. Accordingly, IEX believes that this fee methodology is reasonable because it both allows IEX to recoup some or all of its expenses for providing market data (with any additional revenue representing no more than what IEX believes to be a reasonable rate of return), while continuing to allow market participants to access IEX Data free of charge if they can wait at least fifteen milliseconds to receive it.

Additionally, IEX believes the proposed fees are reasonable because IEX is only charging Data Subscribers who use IEX Data in real time, and as described in the Purpose section, these Data Subscribers are the very ones creating the demand for real-time data, thereby causing IEX to incur the costs described above to produce real-time market data feeds.

IEX also believes that the proposed fees are reasonable because they are significantly less than the fees charged by competing equities exchanges, notwithstanding that the competing exchanges may have different system architectures that may result in different cost structures for the provision of market data. As described above, the three large exchange families charge significantly more than IEX's proposed fees for real-time access to their proprietary market data. Significantly, they charge these fees without offering an option to receive delayed market data within a time frame that is usable for most trading purposes. The delayed data offered by other exchanges is also offered free of charge, but only fifteen minutes after it is first disseminated, which IEX believes generally makes the data stale for any subscribers using the data to make trading decisions.

Finally, as described in the Purpose section above, IEX believes that this fee proposal is reasonable because it will not impose onerous audit requirements on Data Subscribers, because there will be no need to substantiate the number of users of IEX Data or the manner in which it is being used, but rather only whether it is being redistributed in real time or subject to at least a fifteen-millisecond delay.

Equitable Allocation and Non-Discrimination

IEX believes that its proposed fees are reasonable, fair, and equitable, and not unfairly discriminatory because they are designed to align fees with services provided, will apply equally to all Data Subscribers that require real-time data, and will minimize barriers to entry by providing IEX Data for free after [sic] at least fifteen milliseconds, thereby allowing all but the most latency sensitive market participants access to IEX Data within a time frame that is usable for most trading purposes.

The Exchange believes that providing Delayed IEX Data without charging any fees and charging as much as $3,500 per month to Data Subscribers who require real-time data and/or wish to redistribute the same data is fair and equitable, and not unfairly discriminatory because it will enable all market participants to access Delayed IEX Data without paying any fees to IEX [74] and will charge only the users who require the fastest market data feeds available (which, as discussed in the Purpose section, drives much of the costs associated with creating and distributing IEX Data because it increases the resiliency, capacity and redundancy costs associated with IEX's proprietary market data feeds) for access to IEX Data. Additionally, as noted in the Purpose section, anyone can obtain TOPS and DEEP data free of charge on a T+1 basis through IEX's HIST data product. IEX believes this approach to market data fees will equitably distribute the costs of IEX Data among market participants whose business models require the highest speed market data available.

Furthermore, IEX believes that charging $500 per month for TOPS, $2,500 per month for DEEP, and $500 per month for real-time redistribution of TOPS, DEEP, or both, is fair and equitable because it is based both on the relative costs to IEX to generate TOPS and DEEP, as well as IEX's objective to make TOPS broadly available to a range of market participants including long-term investors. As described in the Purpose section, DEEP contains more data than TOPS, and is more resource intensive to produce and maintain because it aggregates displayed liquidity at multiple price levels. Therefore, IEX believes that it is fair and equitable to charge a higher fee for DEEP than for TOPS. Similarly, as discussed in the Purpose section, IEX believes that charging $500 per month to any real-time redistributors of IEX Data is fair and equitable both because of the administrative and other costs IEX incurs in supporting the redistribution of IEX Data and to prevent the possible circumvention of IEX's market data fees by any redistributors of IEX Data.

The Exchange further believes that the proposed fees are reasonable, fair, and equitable, and non-discriminatory because they will apply to all Data Subscribers in the same manner based on the type of market data needed. All similarly situated market participants are subject to the same fees. The fees also do not depend on any distinctions between Members, customers, broker-dealers, or any other entity, because they are solely determined by the individual Data Subscriber's business needs. For example, as discussed in the Purpose section, if the Data Subscriber is a market data vendor that resells IEX Data, IEX believes that Data Subscriber is likely to continue to subscribe for real-time IEX Data and pay the distribution fee because it is commercially beneficial to that Data Subscriber. By contrast, a non-Member Data Subscriber is far more likely to not require IEX Data in real time, and is therefore more likely to unsubscribe from one or both of IEX's real-time IEX Data and instead elect to receive Delayed IEX Data from a vendor or via HIST.

Finally, the Exchange believes that the proposed fee is consistent with Section 11A of the Exchange Act in that it is designed to facilitate the economically efficient execution of securities transactions, fair competition among brokers and dealers, exchange markets and markets other than exchange markets, and the practicability of brokers executing investors' orders in the best market. Specifically, the proposed low, cost-based fee, with the option of receiving free data from a third party on at least a fifteen-millisecond

[74] Although IEX will not charge any distribution fees to a redistributor of Delayed IEX Data, the distributor may still charge fees to any Delayed IEX Data Recipients.

delay [75] or for absolutely no cost on a T+1 basis using HIST, will enable a broad range of market participants to continue to receive IEX Data, thereby facilitating the economically efficient execution of securities transactions on IEX, fair competition between and among such Members, and the practicability of Members that are brokers executing investors' orders on IEX when it is the best market.

For the foregoing reasons, the Exchange believes that the proposed fee is reasonable, equitably allocated, and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fees are a cost-based fee, that are designed to enable the Exchange to recoup its applicable costs with the possibility of a reasonable profit on its investment as described in the Purpose and Statutory Basis sections. Competing equities exchanges are free to adopt comparable fee structures subject to the SEC rule filing process.

The Exchange also does not believe that the proposed fees will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because all market participants are entitled to receive IEX Data free of charge after [sic] at least a fifteen-millisecond delay. Providing a commercially viable free data feed to Data Subscribers is designed to avoid creating barriers to entry for smaller Members, thereby promoting intramarket competition. In addition, even Members [sic] subject to relatively higher fees, because they are paying up to $3,500 per month for IEX Data, will still be subject to a relatively low aggregate fee (and significantly less than the fees charged by competing exchanges, as described above) and IEX thus believes that the proposed fee will not operate as a barrier to entry for such Members [sic] or impose a significant business cost burden on such Members [sic] relative to their levels of business activity. Finally, as noted in the Purpose and Statutory Basis sections, IEX believes that not requiring any onerous audits for Data Subscribers will be of equal benefit to all Data Subscribers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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) [76] of the Act.

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 under Section 19(b)(2)(B) [77] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–IEX–2021–14 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–IEX–2021–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange and on its internet website at *www.iextrading.com.* All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–IEX–2021–14, and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[78]

J. Matthew DeLesDernier,

Assistant Secretary.

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[75] Distributors of Delayed IEX Data may charge a fee for the data, but that fee is not payable to IEX.

[76] 15 U.S.C. 78s(b)(3)(A)(ii).

[77] 15 U.S.C. 78s(b)(2)(B).

[78] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93553; File No. SR–NYSEArca–2021–67]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the One River Carbon Neutral Bitcoin Trust Under NYSE Arca Rule 8.201–E

November 10, 2021.

On September 20, 2021, NYSE Arca, Inc. (''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the One River Carbon Neutral Bitcoin Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change was published for comment in the **Federal Register** on October 5, 2021.[3] The Commission has received comments on the proposed rule change.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 19, 2021. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the comments received. Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates January 3, 2022, 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–NYSEArca–2021–67).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–25017 Filed 11–16–21; 8:45 am]

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[3] *See* Securities Exchange Act Release No. 93171 (Sept. 29, 2021), 86 FR 55073.

[4] Comments received on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nysearca-2021-67/srnysearca202167.htm.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93550; File No. SR–MIAX–2021–56]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the MIAX Options Fee Schedule

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 29, 2021, Miami International Securities Exchange, LLC (''MIAX'' 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 is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to: (1) Amend the criteria for Members[3] to receive the additional incremental MIAX Price Improvement Mechanism (''PRIME'') Agency Order (defined below) credit that is available for Priority Customer[4] PRIME Agency Orders for Members who achieve Priority Customer Rebate Program (''PCRP'') Tier 3 or higher and who achieve over a threshold of 0.60% of national customer volume in multiply-listed options classes listed on MIAX during the relevant month; and (2) make a minor, non-substantive corrective edit.

Background

PRIME is a process by which a Member may electronically submit for execution an order it represents as agent (an ''Agency Order'') against principal interest and/or solicited interest. The Member that submits the Agency Order (''Initiating Member'') agrees to guarantee the execution of the Agency Order by submitting a contra-side order representing principal interest or solicited interest (''Contra-Side Order''). When the Exchange receives a properly designated Agency Order for Auction processing, a request for response (''RFR'') detailing the option, side, size and initiating price is broadcasted to MIAX participants up to an optional designated limit price. Members may submit responses to the RFR, which can be either an Auction or Cancel (''AOC'') order or an AOC eQuote. The PRIME mechanism applies to orders on the Exchange's Simple Order Book.[5]

The Priority Customer rebate payment is calculated from the first executed contract at the applicable threshold per contract credit with rebate payments made at the highest achieved volume tier for each contract traded in that month. The percentage thresholds are calculated based on the percentage of national customer volume in multiply-listed options classes listed on MIAX entered and executed over the course of the month (excluding QCC and cQCC Orders, Priority Customer-to-Priority Customer Orders, C2C and cC2C Orders, PRIME and cPRIME AOC Responses, PRIME and cPRIME Contra-side Orders, and PRIME and cPRIME Orders for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). A ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[5] The ''Simple Order Book'' is the Exchange's regular electronic book of orders and quotes. *See* Exchange Rule 518(a)(15).

which both the Agency and Contra-side Order are Priority Customers). Volume for transactions in both simple and complex orders are aggregated to determine the appropriate volume tier threshold applicable to each transaction. Volume is recorded for and credits are delivered to the Member that submits the order to MIAX. MIAX aggregates the contracts resulting from Priority Customer orders transmitted and executed electronically on MIAX from Members and their Affiliates [6] for purposes of the thresholds described in the PCRP table.

Additional Agency Order Credit for Members in PCRP Tier 3 or Higher

The Exchange proposes to amend Section 1(a)(iii) of the Fee Schedule to amend the criteria for Members to receive the additional PRIME Agency Order credit that is available for Priority Customer PRIME Agency Orders for Members who achieve PCRP Tier 3 or higher and who achieve over a threshold of 0.60% of national customer volume in multiply-listed options classes listed on MIAX during the relevant month. Currently, any Member or its Affiliate that qualifies for PCRP Tier 3 or higher is credited an additional $0.01 per contract on incremental volume for each Priority Customer order executed in the PRIME Auction as a PRIME Agency Order over a threshold of above 0.60% of national customer volume in multiply-listed options classes listed on MIAX during the relevant month.[7]

The Exchange proposes to amend the criteria to include an additional requirement for Members to receive the additional PRIME Agency Order credit that is available for Priority Customer PRIME Agency Orders for Members who achieve PCRP Tier 3 or higher and who achieve over a threshold of 0.60% of national customer volume in multiply-listed options classes listed on MIAX during the relevant month. To qualify for the additional PRIME Agency Order credit, the Exchange proposes that Members must also achieve greater than 0.85% in Priority Customer complex volume on MIAX during a relevant month, represented as a percentage of the total national customer volume in multiply-listed options classes listed on MIAX during the same month. Accordingly, with the proposed change, Members will be eligible to receive the additional PRIME Agency Order credit of $0.01 per contract for their incremental Priority Customer PRIME Agency Orders if the Member executes over a monthly threshold of 0.60% of national customer volume in multiply-listed options classes listed on MIAX during the relevant month, the Member achieves PCRP Tier 3 or higher, and the Member achieves greater than 0.85% in Priority Customer complex volume on MIAX during a particular month, represented as a percentage of national customer volume in multiply-listed options classes listed on MIAX during the relevant month.

Fee Schedule Cleanup Item

The Exchange also proposes to amend Section 1(a)(iv) of the Fee Schedule to make a minor, non-substantive corrective edit. In particular, the Exchange proposes to amend the explanatory paragraph immediately below the table in Section 1(a)(iv) of the Fee Schedule to delete the phrase ''Non-Priority Customer-to-Non-Priority Customer Orders.'' The purpose of this change is to remove an order type that does not exist on the Exchange, which will provide clarity to all market participants that the Fee Schedule is accurate and concise.

Implementation

The proposed changes will become effective on November 1, 2021.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [9] 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) [10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that its proposal provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11] There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of October 20, 2021, no

[6] The term ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, (''Affiliate''), or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Market Maker) that has been appointed by a MIAX Market Maker, pursuant to the following process. A MIAX Market Maker appoints an EEM and an EEM appoints a MIAX Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* Fee Schedule, note 1.

[7] The Exchange notes that the following orders are excluded from counting towards this threshold: QCC and cQCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, C2C and cC2C Orders, cPRIME Agency Orders, PRIME and cPRIME AOC Responses, PRIME and cPRIME Contra-side Orders, PRIME and cPRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in MIAX Rule 1400. *See* Fee Schedule, Section 1(a)(iii).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

single exchange has more than approximately 12% of the market share of executed volume of multiply-listed equity and exchange-traded fund (''ETF'') options trades, for the month of October 2021.[12] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 20, 2021, the Exchange had a market share of approximately 5.87% of executed volume of multiply-listed equity and ETF options for the month of October 2021.[13]

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to transaction and/or non-transaction fee changes. For example, on February 28, 2019, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX Pearl''), filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[14] MIAX Pearl experienced a decrease in total market share between the months of February and March of 2019, after the fees were in effect. Accordingly, the Exchange believes that the MIAX Pearl March 1, 2019, fee change may have contributed to the decrease in the MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain options exchange transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers specific rates and credits in its fee schedule, like those of other options exchanges', which the Exchange believes provides incentives to Members to increase order flow of certain qualifying orders.

The Exchange believes its proposal to amend the criteria for Members to receive the additional PRIME Agency Order credit that is available for Priority Customer PRIME Agency Orders for Members who achieve PCRP Tier 3 or higher to include an additional requirement is reasonable, equitably allocated and not unfairly discriminatory because this change is for business and competitive reasons.

The Exchange believes its proposal is consistent with Section 6(b)(4) of the Act[15] because it applies equally to all participants with similar order flow who reach Tier 3 of the PCRP or higher. The Exchange believes that the proposed new requirement to achieve the additional PRIME Agency Order credit will encourage market participants to execute greater Priority Customer complex volume in order to receive the additional PRIME Agency Order credit. The Exchange believes this will result in increased liquidity that benefits all Exchange participants by providing more trading opportunities and tighter spreads.

Further, the Exchange believes that its proposal will continue to encourage Priority Customer order flow to PRIME Auctions. Increased Priority Customer order flow benefits all market participants because it continues to attract liquidity to the Exchange by providing more trading opportunities. This attracts Market Makers and other liquidity providers, thus, facilitating price improvement in the auction process, signaling additional corresponding increase in order flow from other market participants, and, as a result, increasing liquidity on the Exchange. The PCRP is reasonably designed because it incentivizes providers of Priority Customer order flow to send that Priority Customer order flow to the Exchange in order to obtain the highest volume threshold and receive a credit in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants.

In addition, the Exchange believes that its proposal is consistent with Section 6(b)(5) of the Act[16] because it perfects the mechanisms of a free and open market and a national market system and protects investors and the public interest because an increase in Priority Customer order flow will bring greater volume and liquidity to the Exchange, which benefits all market participants by providing more trading opportunities and tighter spreads. To the extent Priority Customer order flow and complex order flow is increased by this proposal, market participants will increasingly compete for the opportunity to trade on the Exchange including sending more orders and provided narrower and larger-sized quotations in the effort to trade with such Priority Customer and/or complex order flow.

The Exchange believes the proposed change to remove the incorrect phrase regarding a certain order type promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system because the proposed change makes a clarifying, non-substantive edit to the Fee Schedule. The Exchange believes that this proposed change will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule and that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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.

Intra-Market Competition

The Exchange does not believe that other market participants at the Exchange would be placed at a relative disadvantage by the proposed change to amend the criteria for Members to receive the additional PRIME Agency Order credit that is available for Priority Customer PRIME Agency Orders for Members who achieve PCRP Tier 3 or higher to include an additional requirement. The proposed change is designed to attract additional order flow to the Exchange. Accordingly, the Exchange believes that the proposal will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because it will continue to encourage Priority Customer order flow and an increase in Priority Customer order flow will bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads.

Inter-Market Competition

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available

[12] *See* MIAX's ''The Market at a Glance'', available at *https://www.miaxoptions.com/* (last visited October 20, 2021).

[13] *See id.*

[14] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(4).

information, and excluding index-based options, no single exchange has exceeded approximately 12% of the market share of executed volume of multiply-listed equity and ETF options trades as of October 20, 2021, for the month of October 2021.[17] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 20, 2021, the Exchange had a market share of approximately 5.87% of executed volume of multiply-listed equity and ETF options for the month of October 2021. In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because they modify the Exchange's fees in a manner that encourages market participants to provide Priority Customer liquidity and to send order flow to the Exchange. To the extent this is achieved, all the Exchange's market participants should benefit from the improved market quality.

Fee Schedule Cleanup Item

The Exchange believes that the proposed change to remove an incorrect order type will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not a competitive filing but rather is designed to remedy a minor non-substantive issue and provide added clarity to the Fee Schedule in order to avoid potential confusion on the part of market participants. In addition, the Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[18] and Rule 19b–4(f)(2)[19] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2021–56 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2021–56. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2021–56, and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

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[17] *See supra* note 12.

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 240.19b–4(f)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93549; File No. SR–EMERALD–2021–39]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Section 1(a)(ii) of the Fee Schedule To Revise the Application of the Tier Calculation

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 29, 2021, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

[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

The Exchange proposes to amend Section 1(a)(ii) of the Fee Schedule to revise the application of the Tier calculation (defined below).

Background

The Exchange currently assesses transaction rebates and fees to all market participants which are based upon a threshold tier structure (''Tier'') that is applicable to transaction fees. Tiers are determined on a monthly basis and are based on three alternative calculation methods, as defined in Section 1(a)(ii) of the Fee Schedule. The first calculation (''Method 1'') is total Member sides, based on % of Customer Total Consolidated Volume (''CTCV'');[3] the second calculation (''Method 2'') is total Emerald Market Maker sides volume, based on % of CTCV; and the third calculation (''Method 3'') is total Priority Customer,[4] Maker (defined below) sides volume, based on % of CTCV. The calculation method that results in the highest Tier achieved by the Member[5] shall apply to all Origin types by the Member. The monthly volume thresholds for each method, associated with each Tier, are calculated as the total monthly volume executed by the Member in all options classes on MIAX Emerald in the relevant Origins and/or applicable liquidity, not including Excluded Contracts,[6] (as the numerator) expressed as a percentage of (divided by) CTCV (as the denominator). In addition, the per contract transaction rebates and fees shall be applied retroactively to all eligible volume once the Tier has been reached by the Member. Members that place resting liquidity, *i.e.,* orders on the MIAX Emerald System, will be assessed the specified ''maker'' rebate or fee (each a ''Maker'') and Members that execute against resting liquidity will be assessed the specified ''taker'' fee or rebate (each a ''Taker'').[7] Members are also assessed lower transaction fees and smaller rebates for order executions in standard option classes in the Penny Interval Program[8] (''Penny classes'') than for order executions in standard option classes which are not in the Penny Program (''non-Penny classes''), for which Members will be assessed higher transaction fees and larger rebates.

Proposal

The Exchange proposes to amend the application of the calculation methodology used to determine the applicable Tier for Origin types by Member as follows. The Tier applied for a Member and its Affiliates'[9] Priority Customer Origin will solely be determined by Method 3, Total Priority Customer, Maker sides volume, based on % of CTCV. The Tier applied for a Member and its Affiliates' Market Maker and other professional Origins will be the highest Tier achieved among the three alternative calculation methods.

The Exchange proposes to amend the current text in Section 1(a)(ii), Tiers and their Application, to read, ''Tiers are determined on a monthly basis. Tiers are determined based on three (3) alternative calculation methods. The Tier applied for a Member and its Affiliates' Priority Customer Origin will solely be determined by Method 3 below. The Tier applied for a Member and its Affiliates' Market Maker and other professional Origins will be the highest Tier achieved among the three alternative calculation methods. Following are the three (3) alternative calculation methods:''

For example, under this proposal, if Member A reaches Tier 2 via Total Volume (Method 1); Tier 2 via Market Maker Volume (Method 2); and Tier 4 via Priority Customer Maker (Method 3); the effective Tier for Member A would be Tier 4 across all Origins. If Member B reaches Tier 3 via Total Volume

[3] ''CTCV'' means Customer Total Consolidated Volume calculated as the total national volume cleared at The Options Clearing Corporation in the Customer range in those classes listed on MIAX Emerald for the month for which fees apply, excluding volume cleared at the Options Clearing Corporation in the Customer range executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the MIAX Emerald Fee Schedule. The term ''Exchange System Disruption'' means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hour or more, during trading hours. *See id.* A ''Matching Engine'' is a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. *Id.*

[4] ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Exchange Rule 100, including Interpretation and Policy .01.

[5] ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[6] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[7] For a Priority Customer complex order taking liquidity in both a Penny class and non-Penny class against Origins other than Priority Customer, the Priority Customer order will receive a rebate based on the Tier achieved.

[8] *See* Securities Exchange Act Release No. 88993 (June 2, 2020), 85 FR 35145 (June 8, 2020) (SR–EMERALD–2020–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 510, Minimum Price Variations and Minimum Trading Increments, To Conform the Rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options) (the ''Penny Program'').

[9] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Emerald Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Emerald Market Maker) that has been appointed by a MIAX Emerald Market Maker, pursuant to the following process. A MIAX Emerald Market Maker appoints an EEM and an EEM appoints a MIAX Emerald Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the MIAX Emerald Fee Schedule.

(Method 1); Tier 4 via Market Maker Volume (Method 2); and Tier 2 via Priority Customer Maker (Method 3); their effective Tier will be Tier 4 for Market Maker and other professional Origins, and Priority Customer Origin will remain Tier 2.

The purpose of adjusting the application of the calculation methodology used to determine the applicable Tier for Origin types by Member is for business and competitive reasons. The Exchange designed the current calculation methodology to encourage Market Maker and Priority Customer order flow to the Exchange from its inception. The Exchange believes that this proposal continues to incentive all types of volume to the Exchange including Market Maker, professional, and Priority Customer.

Implementation

The proposed changes will become effective on November 1, 2021.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(4) of the Act,[11] in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,[12] 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 mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that its proposal provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 13% of the market share of executed volume of multiply-listed equity and exchange-traded fund (''ETF'') options trades as of October 26, 2021, for the month of October 2021.[14] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 26, 2021, the Exchange had an approximately 4.66% market share of executed volume of multiply-listed equity and ETF options for the month of October 2021.[15] The Exchange cannot predict with certainty how the proposed change regarding the application of the Tier calculation will affect market participants as Members may continually shift among the different Tiers from month to month.

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to transaction and/or non-transaction fee changes. For example, on February 28, 2019, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX Pearl''), filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[16] MIAX Pearl experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX Pearl March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes its proposal to revise the application of the Tier calculation to determine the Origin type Tier provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange is only changing the application of the Tier calculation for the Tier for Members and its Affiliates' Priority Customer Origin, which will solely be determined by Priority Customer, Maker sides volume, based on % of CTCV (Method 3). The Exchange believes that it is equitable and not unfairly discriminatory to calculate the Priority Customer Tier independently and to only use the Priority Customer Tier for all Origin types when it is the highest of all the Tier calculations as this may incentivize Members to increase their Priority Customer volume on the Exchange. An increase in Priority Customer order flow to the Exchange would create additional liquidity which would benefit all market participants who trade on the Exchange.

The Exchange believes its proposal is consistent with Section 6(b)(4) of the Act [17] because it applies equally to all Members of the Exchange and similarly situated participants are subject to the same Tier calculations and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes its proposal may result in increased Priority Customer order flow which liquidity benefits all Exchange participants by providing more trading opportunities and tighter spreads.

In addition, The Exchange believes that its proposal is consistent with Section 6(b) (5) of the Act [18] because it perfects the mechanisms of a free and open market and a national market system and protects investors and the public interest because an increase in Priority Customer order flow will bring greater volume and liquidity to the Exchange, which benefits all market participants by providing more trading opportunities and tighter spreads.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes in the application of the Tier

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(1) and (b)(5).

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[14] *See* MIAX's ''The Market at a Glance'', available at *https://www.miaxoptions.com/* (last visited October 26, 2021).

[15] *See id.*

[16] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(4).

calculation should continue to encourage liquidity that enhances the quality of the Exchange's market and increases the number of trading opportunities on the Exchange for all participants who will be able to compete for such opportunities.

Intra-Market Competition

The Exchange does not believe that other market participants at the Exchange would be placed at a relative disadvantaged by the proposed change to amend the application of the calculation methodology used to determine the applicable Tier for Origin types by Member. The proposed change is designed to attract additional Priority Customer order flow to the Exchange. Accordingly, the Exchange believes that the proposal will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because it will continue to encourage Priority Customer order flow to the Exchange and an increase in Priority Customer order flow will bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads.

Inter-Market Competition

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has exceeded approximately 13% of the market share of executed volume of multiply-listed equity and ETF options trades as of October 26, 2021, for the month of October 2021.[19] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 26, 2021, the Exchange had a market share of approximately 4.66% of executed volume of multiply-listed equity and ETF options for the month of October 2021.[20] In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because they modify the Exchange's fees in a manner that encourages market participants to provide Priority Customer liquidity and to send order flow to the Exchange. To the extent this is achieved, all the Exchange's market participants should benefit from the improved market quality.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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,[21] and Rule 19b–4(f)(2)[22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2021–39 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2021–39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2021–39 and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

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[19] *Supra* note 14.

[20] *See id.*

[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] 17 CFR 240.19b–4(f)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93552; File No. SR–CBOE–2021–065]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule

November 10, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2021, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule in connection with: The Global Trading Hours (''GTH'') Executing Agent Subsidy Program; surcharges applicable to Non-Customer orders executed in long-term index options series (''LEAPS'') for S&P 500 Index (''SPX'') options; a waiver applicable to transaction fees for Customer orders executed in Cboe Volatility Index (''VIX'') options during GTH; and the GTH VIX/VIX Weekly (''VIXW'') Lead Market-Maker (''LMM'') Incentive Program, effective November 1, 2021.

GTH Executing Agent Subsidy Program

The proposed rule change amends the GTH Executing Agent Subsidy Program to adopt volume-based tiers that correspond to increasingly higher subsidies. In particular, the GTH Executing Agent Subsidy Program offers a monthly subsidy to Trading Permit Holders (''TPHs'') with executing agent operations [3] during the GTH trading session. Pursuant to the current program, a designated GTH executing agent will receive a $5,000 monthly subsidy if it executes at least 1,000 contracts executed on behalf of customers (including public and broker-dealer customers) during GTH in a calendar month. To become a designated GTH executing agent, a TPH must submit a form to the Exchange no later than 3:00 p.m. on the second to last business day of a calendar month to be designated an GTH executing agent under the program, and thus eligible for the subsidy, beginning the following calendar month. The TPH must include on or with the form information demonstrating it maintains an GTH executing agent operation: (1) Physically staffed throughout each entire GTH trading session and (2) willing to accept and execute orders on behalf of customers, including customers for which the agent does not hold accounts. The designation will be effective the first business day of the following calendar month, subject to the Exchange's confirmation the TPH's GTH executing agent operations satisfies these two conditions and will remain in effect until the Exchange receives an email from the TPH terminating its designation or the Exchange determines the TPH's GTH executing agent operation no longer satisfies these two conditions. Within two business days following the end of a calendar month, in order to receive the subsidy for that month, the designated GTH executing agent must submit to the Exchange (in a form and manner determined by the Exchange) documentation and other evidence it executed at least 1,000 contracts on behalf of customers during GTH that month.

As stated above, the Exchange now proposes to adopt volume-based tiers that correspond to increasingly higher monthly subsidies for designated GTH executing agents. Specifically, as proposed, a designated GTH executing agent will receive the monthly subsidy amount that corresponds to the number of contracts executed on behalf of customers (including public and broker-dealer customers) during GTH in a calendar month per the GTH Executing Agent Subsidy Program table, as follows:

GTH monthly customer volume	Subsidy
0–999 contracts	$0.00
1,000–4,999 contracts	5,000
5,000–29,999 contracts	15,000
30,000+ contracts	20,000

The proposed rule change removes the language related to the requirement that a designated GTH executing agent must submit to the Exchange (in a form and manner determined by the Exchange) documentation and other evidence of the number of contracts it executed on behalf of customers in a month, as the Exchange has automated the process for documenting this for designated GTH executing agents each month. The current timing, process, requirements and all other documentation applicable to designated GTH executing agent under the GTH Executing Agent Subsidy Program will continue to apply in the same manner.

The proposed volume-based tiers are designed to encourage designated GTH executing agents to increase their order flow executed as agent in the symbols that trade during GTH (SPX and VIX) to meet the proposed volume thresholds in order to receive the proposed corresponding subsidies, as the proposed tiers present additional opportunities for designated GTH agents to receive larger subsidies than that which is currently offered by the program. As such, the proposed tiers may also incentivize more TPHs to become designated GTH executing agents that may submit customer (including public and broker-dealer customer) order flow during GTH to meet the proposed volume thresholds and receive the corresponding subsidies. The Exchange notes that incentivizing TPHs to conduct executing agent operations willing to accept orders from all customers during GTH is designed to increase customer accessibility to the GTH trading session. The Exchange believes that increased order flow through designated GTH executing agents would allow the Exchange to grow participation during GTH, which may benefit all market participants, as additional liquidity to the Exchange during GTH would create more trading opportunities during GTH, and in turn attract market participants to submit additional order flow during GTH.

SPX LEAPS Surcharge

The Exchange intends to begin listing SPX LEAPS options with expirations more than three years out on November 1, 2021. Index LEAPS are index options series that expire from 12 to 180 months

[3] An executing agent operation is one that accepts orders from customers (who may be public or broker-dealer customers and including customers for which the agent does not hold accounts) and submits the orders for execution (either directly to the Exchange or through another TPH).

from the date of issuance.[4] In connection with the planned listing of SPX LEAPS options, the Exchange proposes to adopt surcharge fees for Non-Customer[5] orders executed in SPX LEAPS options that vary according to time-to-expiration in Rate Table—Underlying Symbol List A of the Fees Schedule, as follows:

- Non-Customer orders executed in SPX LEAPS options that expire three years to less than four years out will be assessed a surcharge fee of $1.00 per contract;
- Non-Customer orders executed in SPX LEAPS options that expire four years to less than five years out will be assessed a surcharge fee of $1.50 per contract;
- Non-Customer orders executed in SPX LEAPS options that expire five years to less than six years out will be assessed a surcharge fee of $2.00; and
- Non-Customer orders executed in SPX LEAPS options that expire six years out or more will be assessed a surcharge fee of $2.50.

The Exchange anticipates SPX LEAPS may attract a different customer-base and generally sustain lower volumes than that of standard SPX options given the relatively higher premium prices, implied volatility, and overall risk associated with trading SPX LEAPS as a result of their long-dated expirations. Therefore, in order to initially and continue to list SPX LEAPS, as well as attempt to grow liquidity in these series, the Exchange must expend a number of resources. As such, the proposed SPX LEAPS surcharge fees are designed to assist the Exchange in recouping the resources expended in developing and maintaining a market for SPX LEAPS options. The Exchange notes that other index options are also subject to surcharge fees.[6]

GTH VIX Transaction Fees Waiver

The Exchange proposes to waive transaction fees for Customer orders executed in VIX options during GTH through December 31, 2022. Pursuant to the Rate Table—Underlying Symbol List A in the Fees Schedule, Customer simple orders and Customer complex orders executed in VIX options are assessed a transaction fee by premium price. Such transaction fees are applicable during Regular Trading Hours (''RTH'') and GTH. Customer simple orders in VIX options with a premium price between $0.00 and $0.10 are assessed a transaction fee of $0.10 per contract and complex orders with the same premium price range are assessed a transaction fee of $0.05 per contract. Customer simple orders in VIX options with a premium price between $0.11 and $0.99 are assessed a transaction fee of $0.25 per contract and complex orders with the same premium price range are assessed a transaction fee of $0.17 per contract. Customer simple orders in VIX options with a premium price between $1.00 and $1.99 are assessed a transaction fee of $0.40 per contract and complex orders with the same premium price range are assessed a transaction fee of $0.30 per contract. Both Customer simple and complex orders in VIX options with a premium price of $2.00 or more are assessed a transaction fee of $0.45 per contract.

Proposed footnote 32 provides that transactions fees will be waived for Customer orders executed in VIX options during GTH through December 31, 2022 and the proposed rule change appends footnote 32 to the line items in Rate Table—Underlying Symbol List A applicable to transaction fees for Customer simple and complex orders in VIX options.[7] The proposed waiver is designed to encourage customer order flow in VIX options during GTH. As described above, the Exchange wishes to promote the growth of its GTH trading session. Additionally, the Exchange has observed lower volume and participation in VIX options during GTH than compared to volume and participation in SPX options (the other class currently available for trading during GTH). As such, it believes that incentivizing increased customer order flow in VIX options during GTH would attract additional liquidity to the Exchange, providing market participants with more trading opportunities and signaling an increase in Market-Maker activity, which facilitates tighter spreads. This may cause an additional corresponding increase in order flow from other market participants, contributing overall towards a robust and well-balanced market ecosystem, particularly in VIX options during GTH.

GTH VIX/VIXW LMM Incentive Program

The proposed rule change also amends the GTH VIX/VIXW LMM Incentive Program. The GTH VIX/VIXW LMM Incentive Program provides a rebate to TPHs appointed as LMMs to the program that meet certain quoting standards in VIX and VIXW options series in a month. The Exchange notes that meeting or exceeding the quoting standards (both current and as proposed; described in further detail below) in VIX or VIXW to receive the applicable rebate (both currently offered and as proposed; described in further detail below) is optional for an LMM appointed to the program. Rather, an LMM appointed to the program is eligible to receive a rebate if it satisfies the applicable quoting standards, which the Exchange believes encourages the LMM to provide liquidity in VIX/VIXW options during GTH. The Exchange may consider other exceptions to the programs' quoting standards based on demonstrated legal or regulatory requirements or other mitigating circumstances. In calculating whether an LMM appointed to the program meets the program's basic and heightened quoting standards each month, the Exchange excludes from the calculation for each set of quoting standards the business day in which the LMM missed meeting or exceeding the quoting standards in the highest number of the applicable series that month.[8]

Currently, the program provides that if an LMM in VIX/VIXW provides continuous electronic quotes during GTH that meet or exceed the basic quoting standards in at least 99% of each of the VIX and VIXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $15,000 for VIX and $5,000 for VIXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) for that month. Additionally, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the VIX heightened quoting standards in at least 99% of the VIX series, 90% of the time in a given

[4] *See* Rule 4.13(b).

[5] Non-Customers include all capacities except for ''C'' (Customer), specifically: ''M'' capacity (Market-Maker); ''N'' capacity (Non-TPH Market-Maker); ''F'' capacity (Clearing TPH); ''L'' capacity (Non-Clearing TPH Affiliates); ''J'' capacity (Joint Back-Office); ''U'' capacity (Professional); and ''B'' capacity (Broker-Dealer).

[6] *See generally* Cboe Options Fees Schedule, Rate Table—Underlying Symbol List A.

[7] For clarity, the proposed rule change also appends proposed footnote 32 to the line item containing VIX in the Customer Large Trade Discount table in the Fees Schedule.

[8] The Exchange recently implemented basic and heightened quoting standards in the program. *See* Securities Exchange Act Release No. 93348 (October 15, 2021), 86 FR 58335 (October 21, 2021) (SR–CBOE–2021–058). The proposed rule change now makes a clarifying update to the language regarding the Exchange's exclusion of an LMM's worst quoting day in a month to account for the separate sets of quoting requirements. Specifically, the proposed rule change clarifies that an LMM's worst quoting day will be excluded from the calculation applicable to each set of quoting standards for that month.

month, the LMM will receive a rebate for that month of $0.03 per VIX/VIXW contract executed in its Market-Maker capacity during RTH.

The proposed rule change seeks to amend the VIXW basic quoting standards, which are currently as follows:

Premium level	Maximum allowable width
$0.00–$100.00	$10.00
$100.01–$200.00	16.00
Greater than $200.000	24.00

The proposed rule change amends the VIXW basic quoting standards to reflect the following:

Premium level	Less than 21 days to expiration		21 days or greater to expiration	
	Width	Size	Width	Size
VIX Value at Prior Close <18				
$0.00–$1.00	$1.00	10	$1.50	10
$1.01–$3.00	1.50	10	2.50	10
$3.01–$5.00	2.50	3	4.00	3
$5.01–$10.00	4.00	1	6.00	1
$10.01–$30.00	6.00	1	10.00	1
Greater than 30.00	10.00	1	10.00	1
VIX Value at Prior Close from 18–25				
$0.00–$1.00	1.50	5	2.00	5
$1.01–$3.00	2.50	5	4.00	5
$3.01–$5.00	4.00	1	5.00	1
$5.01–$10.00	6.00	1	8.00	1
$10.01–$30.00	10.00	1	10.00	1
Greater than $30.00	10.00	1	10.00	1
VIX Value at Prior Close from >25				
$0.00–$1.00	10.00	1	10.00	1
$1.01–$3.00	10.00	1	10.00	1
$3.01–$5.00	10.00	1	10.00	1
$5.01–$10.00	10.00	1	10.00	1
$10.01–$30.00	10.00	1	10.00	1
Greater than $30.00	10.00	1	10.00	1

The Exchange believes the proposed basic quoting requirements for VIXW options under the GTH VIX/VIXW LMM Incentive Program are designed to continue to encourage LMMs appointed to the program to provide significant liquidity in VIXW options during GTH. The proposed basic quoting standards for VIXW options provide for tighter widths than the current basic quoting standards and implement size standards based on finer premium ranges. As such, the proposed rule change offers LMMs appointed to the program a more challenging opportunity, thus further incentive, to strive to meet the VIXW basic quoting standards in order to receive the applicable rebate. The Exchange notes that the proposed rule change also seeks to tailor the VIXW basic quoting standards to better reflect then-current market conditions and market characteristics the Exchange has observed in VIXW options, as the proposed VIXW basic quoting standards that are applicable depend on the VIX Index value at the prior market close (*i.e.,* at the close of the preceding RTH session). Spreads in VIXW options generally widen when the market experiences higher volatility (*i.e.,* the VIX Index level is higher in value). Therefore, to encourage LMMs to meet the proposed basic quoting standards regardless of market volatility, the proposed rule change adopts generally wider widths and smaller quote sizes where the market may be experiencing higher volatility (*i.e.,* when the value of the VIX Index in the proposed VIX value categories becomes relatively higher compared to the closing index value from the preceding trading session). The proposed rule change also adopts generally tighter widths in the nearer in term expiration category (less than 21 days to expiration) than that of the longer in term expiration category (21 days or greater to expiration). The Exchange believes the proposed rule change provides a balance between providing more challenging opportunities, thus greater quoting incentive, in the expiration category that is nearer in term and easing the width requirements in the expiration category that is longer in term, as the Exchange understands that demand and participation is generally lower for options that expire farther out, which may make it more difficult for LMMs to quote within tighter widths. The Exchange notes that the basic quoting standards currently in place for VIX options under the program are tailored in a similar manner.

The Exchange also proposes to update the rebate amount received for meeting the VIXW basic quoting standards, as proposed, in a given month, by slightly increasing the rebate amount from $5,000 to $10,000. The proposed increase is designed to further incentivize LMMs appointed to the program to provide significant liquidity in VIXW options in order to meet the proposed basic quoting standards. Finally, the proposed rule change marginally decreases the amount of the additional rebate that applies to VIX/VIXW contracts executed in RTH where an appointed LMM meets the VIX heightened quoting standards from $0.03 to $0.02. The Exchange notes that it is not required to maintain this additional incentive at any amount and that an LMM will continue to have the opportunity to receive the additional rebate on its VIX/VIXW orders executed in RTH, albeit at a marginally lower rate.

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.[9] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[11] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

First, the Exchange believes that the proposed rule changes are reasonable. In particular, the Exchange believes that the proposed rule change to adopt a volume-based tier structure for the GTH Executing Agent Subsidy Program is reasonably designed to encourage designated GTH executing agents to increase their customer order flow in the symbols that trade during GTH and to incentivize more TPHs to become designated GTH executing agents that may submit order flow during GTH, to meet the proposed volume thresholds and receive the corresponding subsidies. By incentivizing TPHs to conduct executing agent operations willing to accept orders from all customers during GTH, the proposed rule change is reasonably designed to increase customer accessibility and increase order flow to the GTH trading session. The Exchange believes that increased order flow would allow the Exchange to grow participation in the GTH trading session to the benefit of all market participants that trade during GTH, by providing greater trading opportunities as a result of increased liquidity, thereby attracting additional order flow from market participants during GTH. The Exchange notes that the Fees Schedule currently offers many other programs with similar volume-based incentive tier structures.[12]

The Exchange believes that the proposed rule change to adopt surcharge fees based on the time to expiration for SPX LEAPS (which the Exchange intends to begin listing on November 1, 2021) is reasonable because the surcharge fees will assist the Exchange in recouping some of the resources it expends developing and maintaining a market for SPX LEAPS, which the Exchange anticipates will have a different customer base and sustain relatively lower volume than that of standard SPX options. The Exchange notes that it also assesses other surcharge fees on proprietary index options pursuant to Rate Table—Underlying Symbol List A in the Fees Schedule for similar reasons. While the proposed surcharge fees for SPX LEAPS are generally higher than the other surcharges fees in Rate Table—Underlying Symbol List A, the Exchange believes the proposed amounts are reasonably commensurate with the market characteristics of SPX LEAPS, where relatively lower volumes generally result in liquidity providers quoting wider spreads, which may absorb higher premiums and costs.

The Exchange believes that the proposed rule change to waive transaction fees for Customer orders executed in VIX options during GTH is reasonably designed to encourage customer order flow in VIX options during GTH. The Exchange wishes to promote the growth of its GTH trading session, and, as the Exchange has observed comparatively lower volume and participation in VIX options during GTH, it believes that incentivizing increased customer order flow in VIX options during GTH would attract additional liquidity to the Exchange. As described above, increased customer order flow facilitates increase trading opportunities and attracts Market-Maker activity, which facilitates tighter spreads and may ultimately signal an additional corresponding increase in order flow from other market participants, contributing overall towards a robust and well-balanced market ecosystem, particularly in VIX options during GTH. The Exchange notes that it similarly waives fees for other types of Customer orders in the Fees Schedule.[13]

The Exchange believes that the proposed rule change to amend the GTH VIX/VIXW LMM Incentive Program is reasonable. Particularly, the Exchange believes the proposed basic quoting requirements are reasonably designed to continue to encourage LMMs appointed to the program to provide significant liquidity in VIXW options during GTH. Additionally, the Exchange believes that it is reasonable to adopt tighter widths and implement sizes based on finer premium categories in the basic quoting standards for VIXW options in order to provide more challenging opportunities, thus greater quoting incentive, for LMMs to strive to meet the basic quoting standards and receive the corresponding rebate, as proposed. As such, the Exchange believes the proposed rule change is reasonably designed to encourage LMMs appointed to the program to meet the VIXW basic quoting standards (and receive the rebate, as amended) by increasing their quoting activity and posting tighter spreads and more aggressive quotes in VIXW options. An increase in quoting activity and tighter quotes tends to signal additional corresponding increase in order flow from other market participants, which benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(b)(4).

[12] *See e.g.,* Cboe Options Fees Schedule, Liquidity Provider Sliding Scale and Floor Broker Sliding Scale Rebate Program.

[13] *See* Cboe Options Fees Schedule, footnote 8, which waives the transaction fee for customer orders in ETF and ETN options executed in open outcry or in AIM or as a QCC or as a FLEX Options transaction, and footnote 9, which waives transaction fees for customer orders that provide or remove liquidity that are 99 contracts or less in ETF and ETN options.

protection. The Exchange also believes that the proposed basic quoting standards are reasonably tailored to reflect then-current market conditions and market characteristics in VIXW options, as they relate to volatility in the market (*i.e.,* VIX Index level) as well as time-to-expiration. The Exchange notes that the basic quoting standards currently in place for VIX options under the program are tailored in a similar manner.

In addition to this, the Exchange believes that it is reasonable to amend the monthly rebate amounts applicable to VIXW options under the GTH VIX/VIXW LMM Incentive Program. The Exchange believes that the proposed increased rebate amount (from $5,000 to $10,000) for VIXW options is reasonably designed to continue to incentivize an appointed LMM to meet the applicable quoting standards for VIXW options, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. The Exchange also believes that the proposed increase is reasonably commensurate with the proposed basic quoting standards for VIXW, which, as described above, present more challenging opportunities for LMMs. The Exchange also believes that the proposed rule change to reduce the additional rebate applicable to an LMM's VIX/VIXW orders executed in RTH where an LMM meets the VIX heightened quoting requirements in a month is reasonable because an LMM will still be able to meet the heightened quoting requirements and receive the additional rebate, albeit at a marginally reduced rate (from $0.03 to $0.02). The Exchange notes that it is not required to maintain this additional incentive at any amount.

The Exchange also believes that the proposed rule changes are equitable and not unfairly discriminatory. In particular, the Exchange believes that offering volume-based incentives that correspond to higher subsidies to designated GTH executing agents is equitable and not unfairly discriminatory because TPHs that conduct executing agent operations willing to accept orders from all customers take on additional risks and potential costs (including those related to staffing and clearing) associated with this type of business. Such TPHs also provide benefits to investors during GTH, including increased customer accessibility to the GTH trading session and increased order flow. All TPHs that conduct this type of operation during GTH will continue to have the opportunity to become a designated GTH executing agent and thus eligible for the monthly subsidy.

The Exchange believes that the proposed surcharge fees for SPX LEAPS are equitable and not unfairly discriminatory because each proposed surcharge will apply equally to all Non-Customer orders SPX LEAPS in the corresponding expiry category. Likewise, the Exchange believes that the proposed waiver for Customer orders executed in VIX options in GTH is equitable and not unfairly discriminatory because the waiver will apply equally to all Customer transactions in VIX options during GTH. The Exchange also notes that, regarding the application of the proposed surcharge fees to Non-Customer orders and the transaction fee waiver to Customer orders, there is a history in the options markets of providing preferential treatment to customers and, as described herein, customer order flow tends to attract key liquidity from other market participants.

Regarding the VIX/VIXW LMM Incentive Program, the Exchange believes that it is equitable and not unfairly discriminatory generally to continue to offer this financial incentive, including as amended, to LMMs appointed to the program, because it benefits all market participants trading in the corresponding products during GTH. As described above, the program encourages the appointed LMMs to satisfy the quoting standards, which may increase liquidity and provide more trading opportunities and tighter spreads. Indeed, the Exchange notes that these LMMs serve a crucial role in providing quotes and the opportunity for market participants to trade VIX/VIXW options, which can lead to increased volume, providing for robust markets. The Exchange ultimately offers the GTH VIX/VIXW LMM Incentive Program, as amended, to sufficiently incentivize the appointed LMMs to provide key liquidity and active markets in VIX/VIXW options during GTH, and believes that the program, as amended, will continue to encourage increased quoting to add liquidity in VIX/VIXW options to the benefit of investors. The Exchange also notes that an LMM appointed to the program may undertake added costs each month to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity).

In particular, the Exchange believes it is equitable and not unfairly discriminatory to adopt new VIXW quoting standards because such quoting standards will equally apply to any and all TPHs with LMM appointments to the GTH VIX/VIXW LMM Incentive Program that seek to meet the program's quoting standards in order to receive the rebates offered. The Exchange believes the amended rebate for VIXW options and the amended additional rebate applicable during RTH are equitable and not unfairly discriminatory because they, too, will equally apply to any TPH that is appointed as an LMM to the GTH VIX/VIXW LMM Incentive Program. Additionally, if an LMM appointed to the GTH VIX/VIXW LMM Incentive Program does not satisfy the quoting standards for any given month, then it simply will not receive the corresponding rebate offered by the program for that 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 intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity to the floor of a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution and price improvement opportunities for all TPHs. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [14]

The Exchange 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 stated, all TPHs that conduct executing agent operations willing to accept orders from all customers will continue to have an opportunity to be eligible for the GTH Executing Agent Subsidy program. Also, such TPHs that conduct this type of operation take on additional risks and potential costs (including those related to staffing and clearing) associated with this type of business, and may provide benefits to investors during GTH, including increased customer accessibility to, and liquidity and trading opportunities during, the GTH trading session. Additionally, the proposed surcharge

[14] Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

fees and fee waiver will apply equally to the applicable orders for all similarly situated market participants (*i.e.,* all Non-Customer orders in SPX LEAPS in the corresponding expiry categories and all Customer transactions in VIX options during GTH). The Exchange again notes that there is a history in the options markets of providing preferential treatment to customers and customer order flow tends to attract key liquidity from other market participants. Further, the proposed changes to the GTH VIXW/VIX LMM Incentive Program will apply to all LMMs appointed to the program in a uniform manner. To the extent the LMMs appointed to the program receive a benefit that other market participants do not, as stated, these LMMs in their role as Market-Makers on the Exchange have different obligations and are held to different standards. For example, Market-Makers play a crucial role in providing active and liquid markets in their appointed products, thereby providing a robust market which benefits all market participants. Such Market-Makers also have obligations and regulatory requirements that other participants do not have. An LMM appointed to the program may undertake added costs each month that it needs to satisfy the quoting standards (*e.g.,* having to purchase additional logical connectivity). The program is ultimately designed to attract additional order flow in VIX/VIXW options to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity.

The Exchange also does not believe that the proposed changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the Act because each of the proposed changes applies only to fees and programs applicable to transactions in products exclusively listed on the Exchange. Additionally, the Exchange notes that it operates in a highly competitive market. TPHs have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges, many of which offer substantially similar price improvement auctions. Based on publicly available information, no single options exchange has more than 16% of the market share.[15] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange, and, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [16] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[17] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and paragraph (f) of Rule 19b–4 [19] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2021–065 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2021–065. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments

[15] *See* Cboe Global Markets U.S. Options Market Volume Summary, Month-to-Date (October 25, 2021), available at *https://markets.cboe.com/us/options/market_statistics/.*

[16] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[17] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f).

received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2021–065 and should be submitted on or before December 8, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–25016 Filed 11–16–21; 8:45 am]

BILLING CODE 8011–01–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Energy Resource Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Energy Resource Council (RERC) will hold a meeting on Wednesday, December 8, 2021, regarding regional energy related issues in the Tennessee Valley.

DATES: The meeting will be held on Wednesday, December 8, 2021, from 9:00 a.m. to 1:00 p.m. ET. A 30-minute public listening session will be held at 9:30 a.m. ET.

ADDRESSES: The meeting is virtual and open to the public. Public members must preregister at the following link: *https://bit.ly/RERC-Dec.* Anyone needing special accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Cathy Coffey, *ccoffey@tva.gov* or 865/632–4494.

SUPPLEMENTARY INFORMATION: The RERC was established to advise TVA on its energy resource activities and the priorities among competing objectives and values. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2.

The meeting agenda includes the following:

1. Welcome and Introductions
2. Public Comments
3. TVA Business Update
4. Update on TVA's Transmission Planning & Operations
5. Update on TVA's Long-term Resource Planning
6. Update on TVA's Pricing Fundamentals

The RERC will hear views of citizens by providing a 30 minute public comment session starting at 9:30 a.m. ET. Persons wishing to speak must register at *ccoffey@tva.gov* by 5:00 p.m. EDT, on Tuesday, December 7, 2021, and will be called on during the public listening session for up to two minutes to share their views. Written comments are also invited and may be emailed to *ccoffey@tva.gov* or mailed to the Regional Energy Resource Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 9D, Knoxville, Tennessee 37902.

Dated: November 9, 2021.

Cathy Coffey,

Senior Program Manager, Stakeholder Relations, Tennessee Valley Authority.

[FR Doc. 2021–25058 Filed 11–16–21; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Generic Clearance for Customer Interactions

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 **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on March 31, 2021. The collection is a part of the Federal Government-wide effort to streamline the process to seek feedback from the public.

DATES: Written comments should be submitted by December 17, 2021.

ADDRESSES: Send Comments to the FAA at the following address: Barbara Hall, Federal Aviation Administration, ASP–110, 10101 Hillwood Parkway, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Barbara Hall at (940) 594–5913, or by email at: *Barbara.L.Hall@faa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0772.

Title: Generic Clearance for Customer Interactions.

Form Numbers: None.

Type of Review: Renewal.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on March 31, 2021 (86 FR 16833). Customer Interactions provide the Federal Aviation Administration valuable information and connect the agency to the public that we serve. In order to ensure a timely and consistent process for Paperwork Reduction Act compliance, the Federal Aviation Administration is proposing to develop a Generic Information Collection Request to be utilized for Customer Interactions that support the Agency's mission.

Customer Interactions can support the Federal Aviation Administration's mission by allowing the Agency to collect qualitative and quantitative data that can help inform scientific research; aviation assessments and monitoring efforts; validate models or tools; and enhance the quantity and quality of data collected across communities. Customer Interactions also create an avenue to incorporate local knowledge and needs, and can contribute to increased data sharing, open data, and government transparency. The Federal Aviation Administration may sponsor the collection of this type of information in connection with aviation projects. All such collections will follow Agency policies and regulations. If a new collection is not within the parameters of this generic Information Collection Request (ICR), the Agency will submit a separate information collection request to Office of Management and Budget (OMB) for approval.

Collections under this generic ICR will be from volunteers who participate on their own initiative through an open and transparent process; the collections will be low-burden for participants; collections will be low-cost for both the participants and the Federal Government; and data will be available to support the endeavors of the Agency, states, tribal or local entities where data collection occurs.

Respondents: Approximately 110,000 Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

[20] 17 CFR 200.30–3(a)(12).

Frequency: Once per request.

Estimated Average Burden per Response: 10 minutes.

Estimated Total Annual Burden: 18,330 hours.

Issued in Fort Worth, TX, on November 12, 2021.

Sandra L. Ray,

Aviation Safety Inspector.

[FR Doc. 2021–25060 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2021–0014]

Petition for Exemption; Summary of Petition Received; Helicopter Association International

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 7, 2021.

ADDRESSES: Send comments identified by docket number FAA–2021–1028 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 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 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Alphonso Pendergrass, (202) 267–4713, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

Caitlin Locke,

Acting Executive Deputy Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2021–1028.

Petitioner: Helicopter Association International.

Section(s) of 14 CFR Affected: §§ 91.205(h)(7), 91.9(a), 135.160, and 135.179(a).

Description of Relief Sought: Helicopter Association International petitions on behalf of its members and other part 135 helicopter air carriers/operators for an exemption for relief from §§ 91.205(h)(7), 91.9(a), 135.160, and 135.179(a) to allow for operations to be conducted under 14 CFR part 135. These operations include night vision goggles (NVGs) and night landings and takeoffs from unimproved or off-airport sites, with inoperative or unreliable radar (radio) altimeters due to 5G telecommunications systems in the 3.7–3.98 GHz band (C-Band) causing harmful interference to radar altimeters on all types of civil aircraft, including transport and general aviation helicopters.

[FR Doc. 2021–25071 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Roadway in California

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final. The actions relate to a proposed roadway project, the I–10 Bypass: Banning to Cabazon Project from the intersection of Hathaway Street and Westward Avenue in the City of Banning, to the intersection of Bonita Avenue and Apache Trail in the unincorporated community of Cabazon, for approximately 3.3 miles of new roadway in the County of Riverside, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before April 18, 2022. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Aaron Burton, Senior Environmental Planner, Caltrans-District 8, Environmental Local Assistance, 464 West Fourth Street, MS 760, San Bernardino, CA 92401, weekdays 9:00 a.m. to 3:00 p.m., telephone (909) 383–2841, email *aaron.burton@dot.ca.gov.* For FHWA, contact David Tedrick at (916) 498–5024, or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: the I–10 Bypass: Banning to Cabazon Project (Federal Project No. DEMO03L 5956 [210]), which would construct a new two-lane roadway extending approximately 3.3 miles from the intersection of Hathaway

Street and Westward Avenue in the City of Banning to the intersection of Bonita Avenue and Apache Trail in the unincorporated community of Cabazon in order to provide a local roadway connecting these two communities, improve local transportation facilities, and provide safe bicycle and pedestrian facilities. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (Final EA) for the project, approved on October 6, 2021, in the Finding of No Significant Impact (FONSI) issued on October 6, 2021, and in other documents in the Caltrans project records. The Final EA/FONSI, and other project records are available by contacting Caltrans at the address provided above. The Caltrans Final EA and FONSI can be viewed and downloaded from the project website at *https://rcprojects.org/i10bypass* or viewed at Caltrans District 8 or the Riverside County Transportation Department.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. E.O. 12372, Intergovernmental Review;
2. E.O. 11990, Protection of Wetlands;
3. E.O. 12088, Pollution Control Standards;
4. E.O. 13112, Invasive Species;
5. E.O. 11988, Floodplain Management;
6. Council on Environmental Quality regulations;
7. National Environmental Policy Act (NEPA);
8. Department of Transportation Act of 1996;
9. Federal Aid Highway Act of 1970;
10. Clean Air Act Amendments of 1990;
11. Department of Transportation Act of 1966; Section 4(f);
12. Clean Water Act of 1977 and 1987;
13. Endangered Species Act of 1973;
14. Migratory Bird Treaty Act;
15. National Historic Preservation Act of 1966, as amended; and
16. Historic Sites Act of 1935.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1)

Issued on: November 10, 2021.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2021–25033 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2018–0190]

Aviation Consumer Protection Advisory Committee Matters; Meeting

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: Public meetings of the Aviation Consumer Protection Advisory Committee (ACPAC).

DATES: The first meeting will be held from 9:30 a.m.–5:00 p.m. (ET), on December 2, 2021. The second meeting will be held from 9:30 a.m.–5:00 p.m. (ET), on March 21 and 22, 2022. Requests to attend the meeting must be received by March 11, 2022.

ADDRESSES: The meetings will be open to the public. The first meeting will be held virtually on Zoom's video platform. Please register for the first meeting at *https://usdot.zoomgov.com/webinar/register/WN_6X7_jo0CTvia3JfU9XR82A.* The second meeting is tentatively planned to be held in-person at the DOT headquarters building in Washington, DC and will be livestreamed. Attendance is open to the public, up to the room's capacity of 100 attendees. In the event the meeting is held virtually, information regarding how to attend the meeting virtually will be provided to individuals who registered to attend the in-person meeting. That information will also be made available to the public through another **Federal Register** notice.

A detailed agenda for each meeting will be available on the ACPAC website at *https://www.transportation.gov/airconsumer/ACPAC* in advance of each meeting, along with copies of the meeting minutes after the meeting.

FOR FURTHER INFORMATION CONTACT: Register for the first virtual meeting at *https://usdot.zoomgov.com/webinar/register/WN_6X7_jo0CTvia3JfU9XR82A.* To register for the second in-person meeting, please contact the Department by email at *ACPAC@dot.gov.* In the event the meeting is held virtually, information regarding how to attend the meeting virtually will be provided to individuals who registered to attend the in-person meeting. That information will also be made available to the public through another **Federal Register** notice. Attendance is open to the public subject to any technical and/or capacity limitations. For further information, contact Kimberly Graber, Deputy Assistant General Counsel, by telephone at (202) 366–1695 or by email at *kimberly.graber@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The ACPAC was initially established as a Federal advisory committee by the Department as mandated by the FAA Modernization and Reform Act of 2012. The statutory termination date for the Committee has been extended several times, most recently by the FAA Reauthorization Act of 2018 (2018 FAA Act), to the current termination date of September 20, 2023. The ACPAC evaluates current aviation consumer protection programs and provides recommendations to the Secretary for improving them, as well as recommending any additional consumer protections that may be needed.

II. Purpose of the Meetings and Agendas

A. December 2, 2021 Meeting

Two topics will be discussed at the December 2, 2021 meeting—(1) Airline Ticket Refunds and (2) Information for Consumers Adversely Affected by Airline Delays or Cancellations. Regarding airline ticket refunds, the Department has consistently interpreted 49 U.S.C. 41712, which prohibits U.S. air carriers, foreign air carriers, and ticket agents from engaging in unfair practices in the sale of air transportation, to require carriers and ticket agents to provide requested refunds to passengers when a carrier cancels or significantly changes a flight to, from, or within the United States. The Department has not defined the terms ''significant change'' and ''cancellation'' in regulation or statute. The Department has announced a rulemaking [1] that would clarify in regulation the Department's longstanding interpretation of the refund requirement. In addition, the rulemaking would also address protections for consumers who are unable to travel due to government restrictions. The ACPAC will consider potential definitions of the terms ''significant change'' and ''cancellation'' and the issue of protections for consumers who are unable to travel due to government restrictions or advisories.

Regarding reporting the causes of airline delays and cancellations, Section 413 of the 2018 FAA Act directs the Department to review the categorization by reporting airlines of the causes of delays and cancellations, including, among other things, whether it is an unfair or deceptive practice for an air carrier to inform a passenger that a flight is delayed or cancelled due to weather

[1] Airline Ticket Refunds, RIN 2105–AF04.

alone when other factors are involved. Section 413 states that the Department may consult with the ACPAC to assist in conducting the review and providing recommendations on improving the quality and quantity of information provided to passengers adversely affected by a cancellation or delay. At the December 2, 2021 meeting, the Committee will consider the quality and quantity of information on causes of airline delays or cancellations provided to passengers adversely affected by an airline cancellation or delay, focusing on whether it is an unfair or deceptive practice for an air carrier to inform a passenger that a flight is delayed or cancelled due to weather alone when other factors are involved.

B. March 21 and 22, 2022 Meeting

Two topics, one continuing from the December meeting and one new topic, will be discussed at the March 21 and 22, 2022 meeting—(1) Airline Ticket Refunds (continued) and (2) Enhancing Consumer Access to Airline Flight Information. Regarding airline ticket refunds, the Committee will continue to consider this topic and will discuss the Department's Airline Ticket Refunds Notice of Proposed Rulemaking which the Department anticipates will be issued prior to the March 21 and 22, 2022 meeting.

Regarding the second topic, the Executive Order on Promoting Competition in the American Economy, issued on July 9, 2021 (E.O. 14036), directed the Department to take action to protect consumers and promote competition. Specifically, the Department is directed, among other things, to ''promote enhanced transparency and consumer safeguards, as appropriate and consistent with applicable law, including through potential rulemaking, enforcement actions, or guidance documents, with the aims of: (1) Enhancing consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines; and . . .'' The ACPAC will consider the topic of enhancing access to airline flight information so that consumers can more easily find a broader set of available flights.

III. Public Participation

The meetings will be open to the public; however, attendance may be limited due to constraints of the virtual platform and/or physical meeting space. Register for the December 2, 2021 meeting at *https://usdot.zoomgov.com/webinar/register/WN_6X7_jo0CTvia3JfU9XR82A.* To register for the March 2022 meeting, please send an email to the Department as set forth in the **FOR FURTHER INFORMATION CONTACT** section. The Department is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language interpreter or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Members of the public may also present written comments at any time. The docket number referenced above (DOT–OST–2018–0190) has been established for committee documents including any written comments that may be filed. At the discretion of the Chair or Designated Federal Officer of ACPAC, after completion of the planned agenda, individual members of the public may provide comments, time permitting. Any oral comments presented must be limited to the objectives of the Committee and will be limited to five (5) minutes per person.

Individual members of the public who wish to present oral comments must provide advance notice to the Department of Transportation contact noted above via email that they wish to present oral comments. Advance notice by individuals wishing to present oral comments at the December 2, 2021 must be provided to the Department no later than Monday, November 22, 2021. Advance notice by individuals wishing to present oral comments at the March 21 and 22, 2022 meeting must be provided to the Department no later than Friday, March 11, 2022.

Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to ACPAC members prior to the meetings. Individuals speaking at the December 2, 2021 meeting are requested to submit their remarks no later than Monday, November 29, 2021. Individuals speaking at the March 21 and 22, 2022 meeting are requested to submit their remarks no later than Tuesday, March 15, 2022. All prepared remarks submitted on time will be accepted and considered as part of the meeting's record.

IV. Viewing Documents

You may view documents mentioned in this notice at *https://www.regulations.gov.* After entering the docket number (DOT–OST–2018–0190), click the link to ''Open Docket Folder'' and choose the document to review.

Issued in Washington, DC, this 12th day of November 2021.

John E. Putnam,

Deputy General Counsel.

[FR Doc. 2021–25084 Filed 11–16–21; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA), VACO FOIA Service.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, all agencies are required to publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled ''Freedom of Information Act (FOIA) Records—VA'' (119VA005R1C).

DATES: Comments on this modified system of records must be received no later than 30 days after date of publication in the **Federal Register**. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the modified system of records will become effective a minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted through *www.regulations.gov* or mailed to VA Privacy Service, 810 Vermont Avenue NW, (005R1A), Washington, DC 20420. Comments should indicate that they are submitted in response to ''Freedom of Information Act (FOIA) Records—VA'' (119VA005R1C). Comments received will be available at *regulations.gov* for public viewing, inspection, or copies.

FOR FURTHER INFORMATION CONTACT: James Killens III, Acting Director, VA FOIA Service (005R1C), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–7233.

SUPPLEMENTARY INFORMATION: The Freedom of Information Act (FOIA) was enacted on July 4, 1966 and is a statutory law requiring Federal agencies to provide to the fullest extent possible release of agency information to the public, except to the extent that such

records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. The law provides individuals with a statutory right of access to certain federal agency records. FOIAXpress (FX) is the official VA mandatory FOIA tracking system. The FX System automates the FOIA business process for all FOIA requests received at the various VA departmental FOIA offices. FX is designed specifically to automate FOIA and Privacy Act (PA) request case processing, including request tracking and management, document management, electronic redaction, fee management and invoicing, and annual reporting. FX provides compliance with FOIA/PA regulations with a powerful application that will provide VA with a tool that will transform FOIA/PA processing from a cumbersome, manual process to an automated, electronic one. The FX system processes FOIA request data received by FOIA users. FOIA data consists of requests for information received from the public which includes personal identification information and financial information related to the processing of FOIA request.

As required by the Privacy Act of 1974, notice is hereby given that the Department of Veterans Affairs (VA) is adding a function to an existing system of records entitled ''Freedom of Information Act (FOIA) Records—VA'' (119VA005R1C). The amended system of records has added the Public Access Link (PAL). PAL is a public facing web page with a separate URL. PAL allows the requester to electronically submit their FOIA requests via a public facing website which links directly into the FX system. PAL will streamline the VA's FOIA intake process as it permits the requester to input their contact information, select requesters' category for fee purposes, select the appropriate VA office, receive a FX tracking number (case number), and generate a FOIA acknowledgement letter as mandated by law.

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document 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. Neil C. Evans, M.D., Chief Officer, Connected Care, Performing the Delegable Duties of the Assistant Secretary for Information and Technology and Chief Information Officer, approved this document on October 6, 2021 for publication.

Dated: November 12, 2021.

Amy L. Rose,

Program Analyst, VA Privacy Service, Office of Information Security, Office of Information and Technology, Department of Veterans Affairs.

SYSTEM NAME AND NUMBER:

Freedom of Information Act (FOIA) Records—VA (119VA005R1C).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the VA Central Office FOIA Offices, 810 Vermont Avenue NW, Washington, DC 20420; AINS, Inc., 1355 Piccard Drive, Rockville, MD 20850, and all VA field facilities. A list of the field facilities may be found at the following internet address: *https://www.va.gov/directory/guide/home.asp.*

SYSTEM MANAGER(S):

James Killens III, Acting Director, VA FOIA Service (005R1C), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–7233.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Includes the following with any revisions and amendments: The Privacy Act of 1974 (5 U.S.C. 552a); the Freedom of Information Act, as amended (5 U.S.C. 552); 5 U.S.C. 301; and 38 U.S.C. 501; FOIA Improvement Act of 2016, Public Law 114–185.

PURPOSE(S) OF THE SYSTEM:

The system is maintained for the purpose of processing an individual's record request made under the provisions of the Freedom of Information and Privacy Acts. These records are also used by VA to prepare reports required by the Freedom of Information and Privacy Acts to the Office of Management and Budget and the Department of Justice. The proposed system of records will assist the Department of Veterans Affairs in carrying out its responsibilities under the Freedom of Information and Privacy Acts. The records maintained in the proposed system can originate in both paper and electronic format.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains FOIA records and related correspondence on individuals who have filed with VA:

a. Requests for information under the provisions of the Freedom of Information Act (5 U.S.C. 552), including requests for review of initial denials of such requests.

b. Requests under the provisions of the Privacy Act (5 U.S.C. 552a) for records about themselves where the FOIA is also relied upon to process the request and which then meet the Department of Justice's (DOJ) standard for required reporting in the Annual FOIA Report to the Attorney General of the United States.

c. All persons who have requested records from VA under the provisions of the Freedom of Information Act (FOIA); all persons whose requests for records have been referred to VA by other Federal agencies; and all persons who have submitted appeals to the Secretary of VA under the provisions of the FOIA.

d. All persons about whom information has been requested under the provisions of the FOIA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Agency records include all documents or records created or obtained by an agency of the government that are in an agency's possession and control at the time a FOIA request is received. Four factors determine an agency's control: The intent of the creator of the document to retain control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the document; and the degree to which the document was integrated into the agency's record systems or files.

Information maintained by an entity pursuant to a Government contract for a VA component for the purposes of records management is considered in the VA component's possession. Records created by an agency employee during employment, including emails, may be either agency records or personal files.

This system contains correspondence and other documents related to requests made by individuals to VA for:

a. Information under the provisions of the Freedom of Information Act (5 U.S.C. 552), including requests for review of initial denials of such requests.

b. Information under provisions of the Privacy Act (5 U.S.C. 552a) and requests for review of initial denials of such requests made under VA's Privacy Act regulations regarding requests for records about themselves where the FOIA is also relied upon to process the request and which then meet the Department of Justice's (DOJ) standard for required reporting in the Annual FOIA Report to the Attorney General of the United States.

c. Name, home address, telephone number, email address, FOIA case numbers assigned to individual cases and appeals, FOIA requests and appeals, responses to requests (including unredacted and redacted responsive records), determinations of appeals, correspondence with requesters and with other persons who have contacted VA in connection with requests or appeals other than requesters or other memoranda, and correspondence in connection with requests or appeals.

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from the following: Requests and administrative appeals submitted by individuals and organizations pursuant to the FOIA and Privacy Acts; VA personnel assigned to handle such requests and appeals; Agency records searched and identified as responsive to such requests and appeals; and requests referred by Agencies or other entities concerning VA records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. Congress

VA may disclose information to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

2. Data Breach Response and Remediation, for VA

VA may disclose information to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that there has been a breach of the system of records; (2) VA has determined that, as a result of the suspected or confirmed breach, there is a risk of harm to individuals, VA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with VA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

3. Data Breach Response and Remediation, for Another Federal Agency

VA may disclose information to another Federal agency or Federal entity when VA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

4. Law Enforcement

VA may disclose information that, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, to a Federal, state, local, territorial, tribal, or foreign law enforcement authority or other appropriate entity charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing such law. The disclosure of the names and addresses of veterans and their dependents from VA records under this routine use must also comply with the provisions of 38 U.S.C. 5701.

5. DOJ for Litigation or Administrative Proceeding

VA may disclose information to the Department of Justice (DOJ), or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when:

(a) VA or any component thereof;

(b) Any VA employee in his or her official capacity;

(c) Any VA employee in his or her official capacity where DOJ has agreed to represent the employee; or

(d) The United States, where VA determines that litigation is likely to affect the agency or any of its components, is a party to such proceedings or has an interest in such proceedings, and VA determines that use of such records is relevant and necessary to the proceedings.

6. Contractors

VA may disclose information to contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for VA, when reasonably necessary to accomplish an agency function related to the records.

7. OPM

VA may disclose information to the Office of Personnel Management (OPM) in connection with the application or effect of civil service laws, rules, regulations, or OPM guidelines in particular situations.

8. EEOC

VA may disclose information to the Equal Employment Opportunity Commission (EEOC) in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by law.

9. FLRA

VA may disclose information to the Federal Labor Relations Authority (FLRA) in connection with: The investigation and resolution of allegations of unfair labor practices; the resolution of exceptions to arbitration awards when a question of material fact is raised; matters before the Federal Service Impasses Panel; and the investigation of representation petitions and the conduct or supervision of representation elections.

10. MSPB

VA may disclose information to the Merit Systems Protection Board (MSPB) and the Office of the Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. 1205 and 1206, or as authorized by law.

11. NARA

VA may disclose information to NARA in records management inspections conducted under 44 U.S.C. 2904 and 2906, or other functions authorized by laws and policies governing NARA operations and VA records management responsibilities.

12. OMB

VA may disclose information from this system of records to the Office of Management and Budget (OMB) for the performance of its statutory responsibilities for evaluating Federal programs.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic data are maintained on Direct Access Storage Devices at AINS Inc., 1355 Piccard Drive, Rockville, Maryland. AINS Inc. stores registry tapes for disaster back up at the storage location. Registry tapes for disaster back up are also maintained at an off-site location. VA Central Office and VA field facilities also maintain electronic data.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are indexed by FOIA case number, and/or name of requester.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records will be maintained and disposed of in accordance with records disposition authority approved by the Archivist of the United States. Agencies must dispose of records on managing information access and protection activities after three years but may retain such records longer if needed for

business use; records documenting policies and procedures involving agency-wide responsibilities for FOIA, PA, and classified documents must be scheduled for disposal on an agency-specific schedule. Agencies must dispose of general request files involving requests for information with no need for administrative action, policy decision, or special complications or research when ninety days old but may retain such files longer if required for business use. Agencies must dispose of case files created in response to requests for information under FOIA or PA either six years after the final agency determination or three years after final adjudication by the courts, whichever is later, but retain them longer if required for business use. These retention and disposal statements are pursuant to the National Archives and Records Administration (NARA) General Record Schedules: 4.2 Information Access and Protection Records, Items 001, 010, and 020.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

This list of safeguards furnished in this System of Records is not an exclusive list of measures that has been, or will be, taken to protect individually-identifiable information.

All records are maintained in compliance with applicable VA security policy directives that specify the standards that will be applied to protect sensitive personal information, including protection from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include restricting access to authorized personnel who have a need-to-know, using locks, and password protection identification features.

Authorized personnel are required to take annual VA mandatory data privacy and security training. Access to data storage areas is restricted to authorized VA employees or contract staff who have been cleared to work by the VA Office of Security and Law Enforcement. File areas are locked after normal duty hours. VA facilities are protected from outside access by the Federal Protective Service and/or other security personnel. Security complies with applicable Federal Information Processing Standards (FIPS) issued by the National Institute of Standards and Technology (NIST). Contractors and their subcontractors who access the data are required to maintain the same level of security as VA staff. Access to electronic files is controlled by using an individually unique password entered in combination with an individually unique user identification code.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to their records maintained under his or her name may write or visit the nearest VA facility or write to their regional VA Public Liaison/FOIA officer listed at *https://www.va.gov/FOIA/docs/Updated_Documents/POC/VACOCentralOffice.pdf.*

CONTESTING RECORD PROCEDURES:

(See ''Record Access Procedures above.'')

NOTIFICATION PROCEDURES:

An individual who wishes to determine whether a record is being maintained in this system under his or her name or other personnel identifier, or wants to determine the contents of such record, should submit a written request or apply in person to the last VA facility where the request or appeal was submitted or to the Director, FOIA Service (005R1C), 810 Vermont Avenue NW, Washington, DC 20420.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

During the course of a FOIA action, exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this FOIA case record, VA hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records of which they are a part.

HISTORY:

Citation(s) to the last full **Federal Register** notice is 80 FR 68618 published on 11/05/2015.

[FR Doc. 2021–25046 Filed 11–16–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Former Prisoners of War, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. app. 2., that the Advisory Committee on Former Prisoners of War (ACFPOW) will conduct a virtual meeting December 9, 2021 from 11:00 a.m.–5:00 p.m. Eastern Standard Time. The meeting session is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of benefits under Title 38 U.S.C., for Veterans who are Former Prisoners of War (FPOW), and to make recommendations on the needs of such Veterans for compensation, health care, rehabilitation, and memorial benefits.

The agenda will include briefings/presentations from the Veterans Health Administration, the Veterans Benefits Administration, National Cemetery Administration, and VA Staff Offices, as well as briefings on other issues impacting FPOW Veterans and their families.

No time will be allocated at this meeting for receiving oral presentations from the public. Any member of the public may also submit a 1–2-page commentary for the Committee's review. Any member of the public seeking additional information should contact Mr. Julian Wright, Designated Federal Officer, Department of Veterans Affairs, Advisory Committee on Former Prisoners of War at *Julian.Wright2@va.gov* no later than November 23, 2021. Any member of the public who wishes to participate in the virtual meeting may use the following.

Microsoft Teams Meeting Link, either on your Computer or Mobile App: *https://gcc02.safelinks.protection.outlook.com/ap/t-59584e83/?url=https%3A%2F%2Fteams.microsoft.com%2Fl%2Fmeetup-join%2F19%253ameeting_YzIyM2QzZjQtNGEyYi00ZTU3LWFiNDAtODYyY2Q0ZDUxNjY1%2540thread.v2%2F0%3Fcontext%3D%257b%2522Tid%2522%253a%2522e95f1b23-abaf-45ee-821d-b7ab251ab3bf%2522%252c%2522Oid%2522%253a%2522b857b6c6-44d8-46b4-8041-6e7d50b9890a%2522%257d&data=04%7C01%7C%7C402bbc307f964be3b0fb08d9a2d7bae0%7Ce95f1b23abaf45ee821db7ab251ab3bf%7C0%7C0%7C637719869694150889%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=uQcchCiQ0KkRVpZEiuLWHyXhWXKxWU5V4ErU2BxXmtc%3D&reserved=0.*

Or you may dial into the meeting via phone audio at 1–872–701–0185, Code: 289 339 150#.

Dated: November 9, 2021.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2021–24911 Filed 11–16–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0890]

Agency Information Collection Activity Under OMB Review: FNMA Forms 1004, 1004C, 1025, 2055 and 1075

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0890.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0890'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 3731.

Title: FNMA Forms 1004, 1004C, 1025, 2055 and 1075.

OMB Control Number: 2900–0890.

Type of Review: Extension of a currently approved collection.

Abstract: This information collection package seeks approval of VA's requirement that appraisers utilize certain industry-standard forms in completing an appraisal. 38 U.S.C. 3731 authorizes the VA Secretary to establish a panel of appraisers, prescribe qualifications for such appraisers, and determine reasonable value of a property, construction, repairs or alterations based on an appraisal report provided by a panel appraiser for the purpose of guaranteeing a loan.

VA is requesting approval to authorize collection of these forms because accurate and thorough appraisal reporting is critical to the accuracy of underwriting for the mortgage process. Additionally, VA is looking to expand the list of authorized forms for use due to ongoing needs related to the pandemic. This collection of information provides a more thorough and complete appraisal of prospective VA-guaranteed properties ensuring that mortgages are acceptable for VA guarantee and thereby protect the interest of VA, taxpayers, and the Veterans Housing Benefit Program Fund. Policies and procedures for governing the VA appraisal program are set forth in Chapter 36, Title 38 of the CFR.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at: 86 FR 50595 on September 9, 2021, pages 50595 and 50596.

Affected Public: Individuals or Households.

Estimated Annual Burden: 10,833.

Estimated Average Burden per Respondent: 1 minute.

Frequency of Response: One time.

Estimated Number of Respondents: 650,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2021–25066 Filed 11–16–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Commerce

Patent and Trademark Office

37 CFR Parts 2 and 7

Changes To Implement Provisions of the Trademark Modernization Act of 2020; Final Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. PTO–T–2021–0008]

RIN 0651–AD55

Changes To Implement Provisions of the Trademark Modernization Act of 2020

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) amends the rules of practice in trademark cases to implement provisions of the Trademark Modernization Act of 2020 (TMA). This rule establishes ex parte expungement and reexamination proceedings for cancellation of a registration when the required use in commerce of the registered mark has not been made; provides for a new nonuse ground for cancellation before the Trademark Trial and Appeal Board (TTAB or Board); establishes flexible Office action response periods; and amends the existing letter-of-protest rule to indicate that letter-of-protest determinations are final and non-reviewable. The rule also sets fees for petitions requesting institution of ex parte expungement and reexamination proceedings, and for requests to extend Office action response deadlines. The rules governing the suspension of USPTO proceedings and attorney recognition in trademark matters are also amended. Finally, a new rule is added to address procedures regarding court orders cancelling or affecting registrations.

DATES: This rule is effective on December 18, 2021, except for §§ 2.6(a)(28); 2.62(a) and (c); 2.63(b) introductory text, (b)(1) and (2), (c), and (d); 2.65(a); 2.66(b); 2.163(b) through (e); 2.165; 2.176; 2.184(b); 2.186(b) through (d); 7.6(a)(9); 7.39; and 7.40, which are effective on December 1, 2022.

FOR FURTHER INFORMATION CONTACT: Robert Lavache, Office of the Deputy Commissioner for Trademark Examination Policy, USPTO, at 571–272–5881, or by email at *TMPolicy@uspto.gov.*

SUPPLEMENTARY INFORMATION: The TMA was enacted on December 27, 2020. See Public Law 116–260, Div. Q, Tit. II, Subtit. B, sections 221–228 (Dec. 27, 2020). The TMA amends the Trademark Act of 1946 (the Act) to establish new ex parte expungement and reexamination proceedings to cancel, either in whole or in part, registered marks for which the required use in commerce was not made. *Id.* at section 225(a), (c). Furthermore, the TMA amends section 14 of the Act to allow a party to allege that a mark has never been used in commerce as a basis for cancellation before the TTAB. *Id.* at section 225(b). The TMA also authorizes the USPTO to promulgate regulations to set flexible Office action response periods between 60 days and 6 months, with an option for applicants to extend the deadline up to a maximum of 6 months from the Office action issue date. *Id.* at section 224. In addition, the TMA includes statutory authority for the USPTO's letter-of-protest procedures, which allow third parties to submit evidence to the USPTO relevant to the registrability of a trademark during the initial examination of the application, and provides that the decision of whether to include such evidence in the application record is final and non-reviewable. *Id.* at section 223. The TMA requires the USPTO to promulgate regulations to implement the provisions relating to the new ex parte expungement and reexamination proceedings, and the letter-of-protest procedures, within one year of the TMA's enactment. *Id.* at sections 223(b), 225(f).

Accordingly, the USPTO revises the rules in 37 CFR part 2 to implement the TMA's provisions and set fees for the new ex parte expungement and reexamination proceedings and for response deadline extensions. The rule also clarifies that the new ex parte expungement and reexamination proceedings are subject to suspension in appropriate cases and reflects existing practice regarding suspension of proceedings before the USPTO and the TTAB. The USPTO also amends the rules regarding attorney recognition and correspondence to clarify that the USPTO will not recognize an attorney who has been ''mistakenly, falsely, or fraudulently designated'' and that an attorney need not formally withdraw under such circumstances. Finally, a new rule is added, formalizing the USPTO's longstanding procedures concerning action on court orders canceling or affecting a registration under section 37 of the Act, 15 U.S.C. 1119. In formulating this final rule, the USPTO considered the public comments submitted pursuant to the notice of proposed rulemaking (NPRM) published in the **Federal Register** on May 18, 2021, at 86 FR 26862, and made adjustments to the substance of this rule based on these considerations. Comments the USPTO received about specific requirements or procedures are summarized, and the USPTO's responses are provided, in section VIII below.

I. Ex Parte Expungement and Reexamination Proceedings

As the House Report for the TMA explained, ''Trademarks are at the foundation of a successful commercial marketplace. Trademarks allow companies to identify their goods and services, and they ensure that consumers know whose product they are buying. . . . By guarding against deception in the marketplace, trademarks also serve an important consumer protection role.'' H.R. Rep. No. 116–645, at 8–9 (2020) (citation omitted).

In order to have a well-functioning trademark system, the trademark register should accurately reflect trademarks that are currently in use. *Id.* at 9. When the register includes marks that are not currently in use, it is more difficult for legitimate businesses to clear and register their own marks. *Id.* It has become apparent in recent years that registrations are being obtained and maintained for marks that are not properly in use in commerce. *Id.* at 9–10. Moreover, this ''cluttering'' has real-world consequences when the availability of marks is depleted. *Id.* at 9.

The House Report also noted that ''[a] recent rise in fraudulent trademark applications has put further strain on the accuracy of the federal register. Although trademark applications go through an examination process, some of these forms of fraud are difficult to detect in individual applications (even if patterns of fraud can be seen across multiple applications), leading to illegitimate registrations. Although the USPTO can try to develop better systems to detect fraud during the examination process, its authority to reconsider applications after registration is currently limited.'' *Id.* at 10–11 (citation omitted).

To address these problems, the TMA created two new ex parte processes that will allow a third party, or the Director, to challenge whether a registrant made use of its registered trademark in commerce. If the registered mark was not properly used, the Office will be able to cancel the registration. *Id.* at 11. The TMA also provides for improvements to make the trademark examination process more efficient and more effective at clearing applications that may block later-filed applications from proceeding to registration. *Id.*

The two new ex parte proceedings created by the TMA—one for expungement and one for reexamination—provide new mechanisms for removing a registered mark from the trademark register, or cancelling the registration as to certain goods and/or services, when the registrant has not used the mark in commerce as of the relevant date required by the Act. In an expungement proceeding, the USPTO must determine whether the evidence of record supports a finding that the registered mark has never been used in commerce on or in connection with some or all of the goods and/or services recited in the registration. In a reexamination proceeding, the USPTO must determine whether the evidence of record supports a finding that the mark registered under section 1 of the Act was not in use in commerce on or in connection with some or all of the goods and/or services as of the filing date of the application or amendment to allege use, or before the deadline for filing a statement of use, as applicable. If the USPTO determines that the required use was not made for the goods or services at issue in the proceeding, and that determination is not overturned on review, the registration will be cancelled in whole or in part, as appropriate.

These new proceedings are intended to provide a more efficient and less expensive alternative to a contested inter partes cancellation proceeding before the TTAB. While the authority for the expungement and reexamination proceedings is set forth in separate subsections of the Act, the procedures for instituting the proceedings, the nature of the evidence required, and the process for evaluating evidence and corresponding with the registrant, as set forth in this rule, are essentially the same. Thus, for administrative efficiency, proceedings involving the same registration may be consolidated by the USPTO for review.

To implement these new proceedings and related procedures, the USPTO amends its rules to add the following new rules:

- Section 2.91, setting forth the requirements for a petition requesting the institution of expungement or reexamination proceedings;
- Section 2.92, regarding the institution of ex parte expungement and reexamination proceedings; and
- Sections 2.93 and 2.94, setting forth the procedures for expungement and reexamination proceedings, and for action after those proceedings.

In addition, conforming amendments are made to the following existing rules:

- Section 2.6, which sets the fees for petitions for expungement and/or reexamination and for requests for extensions of time to respond to an Office action;
- Section 2.11, which requires U.S. counsel for foreign-domiciled petitioners and registrants;
- Section 2.23, which addresses the duty to monitor the status of a registration;
- Section 2.67, which addresses suspension of action by the USPTO;
- Section 2.117, which addresses suspension of proceedings before the TTAB;
- Section 2.142, which addresses the time and manner of ex parte appeals;
- Section 2.145, which addresses appeals to the U.S. Court of Appeals for the Federal Circuit;
- Section 2.146, which addresses petitions to the Director; and
- Section 2.193, which addresses signature requirements.

A. Timing for Requests for Proceedings

The TMA specifies the time periods during which a petitioner can request institution of expungement and reexamination proceedings, and during which the Director may institute such proceedings based on a petition or on the Director's own initiative. Accordingly, under § 2.91(b)(1), a petitioner may request, and the Director may institute, an ex parte expungement proceeding between 3 and 10 years following the date of registration. However, the TMA provides that, until December 27, 2023 (3 years from the TMA's enactment date), a petitioner may request, and the Director may institute, an expungement proceeding for a registration that is at least 3 years old, regardless of the 10-year limit. Under § 2.91(b)(2), a petitioner may request, and the Director may institute, a reexamination proceeding during the first five years following the date of registration.

The TMA gives discretion to the Director to establish by rule a limit on the number of petitions for expungement or reexamination that can be filed against a registration. However, after consideration of the comments received regarding establishing such a limitation, which are discussed below, and to foster clearing of the register of unused marks, the USPTO has determined that it will not impose a limitation on the number of petitions at this time. This will allow the USPTO time to determine whether existing safeguards in the statute and the regulations implemented herein suffice to protect registrants from potential misuse of the proceedings. These safeguards include the fact that the registrant does not participate until after the Director institutes a proceeding based on a prima facie case of nonuse of the mark, and the registrant cannot be subject to another proceeding for the same goods and/or services for which use of the mark was established in a prior proceeding. If the existing safeguards in the statute and the regulations do not suffice to protect registrants from misuse of the proceedings, the USPTO may establish a limit on the number of petitions for expungement or reexamination that can be filed against a registration in a future rule.

B. Petition Requirements

Under the TMA, and § 2.91, any person may file a petition with the USPTO requesting institution of an expungement or reexamination proceeding. In the NPRM, the USPTO sought comments on whether and when the Director should require a petitioner to identify the name of the real party in interest on whose behalf the petition is filed. As discussed below, this rule does not require a petitioner to identify the name of the real party in interest on whose behalf the petition is filed, but retains the Director's authority to require that information in particular cases.

Reexamination and expungement petitions are intended to allow third parties to bring unused registered marks to the attention of the USPTO. To the extent a registrant believes its own mark was not used in commerce, or is no longer used in commerce, on or in connection with some or all of the goods and/or services listed in the registration, the registrant should utilize the existing mechanisms for voluntarily amending the registration to delete the goods and/or services or surrendering the registration in its entirety, pursuant to section 7 of the Act, 15 U.S.C. 1057. To incentivize registrants to keep their registrations accurate and up-to-date as to the goods and/or services on which the mark is actually used in commerce, the USPTO previously established a $0 fee for voluntary deletions of goods and/or services made outside of a maintenance examination. See Trademark Fee Adjustment rule (85 FR 73197, November 17, 2020).

A petition for expungement must allege that the relevant registered trademark has never been used in commerce on or in connection with some or all of the goods and/or services listed in the registration.

A petition for reexamination must allege that the trademark was not in use in commerce on or in connection with

some or all of the goods and/or services listed in the registration on or before the relevant date, which, for any particular goods and/or services, is determined as follows:

- In a use-based application for registration of a mark with an initial filing basis of section 1(a) of the Act for the goods and/or services listed in the petition, and not amended at any point to be filed pursuant to section 1(b) of the Act, 15 U.S.C. 1051(b), the relevant date is the filing date of the application; or
- In an intent-to-use application for registration of a mark with an initial filing basis or amended basis of section 1(b) of the Act for the goods and/or services listed in the petition, the relevant date is the later of the filing date of an amendment to allege use identifying the goods and/or services listed in the petition, pursuant to section 1(c) of the Act, or the expiration of the deadline for filing a statement of use for the goods and/or services listed in the petition, pursuant to section 1(d), including all approved extensions thereof.

Under § 2.91(c), the Director will consider only complete petitions for expungement or reexamination. To be considered complete, the petition must be made in writing and filed through the USPTO's Trademark Electronic Application System (TEAS), and must include:

- The fee required by § 2.6(a)(26);
- The U.S. trademark registration number of the registration subject to the petition;
- The basis for petition under § 2.91(a);
- The name, domicile address, and email address of the petitioner;
- If the domicile of the petitioner is not located within the United States or its territories, a designation of an attorney, as defined in § 11.1, who is qualified to practice under § 11.14;
- If the petitioner is, or must be, represented by an attorney, as defined in § 11.1, who is qualified to practice under § 11.14, the attorney's name, postal address, email address, and bar information under § 2.17(b)(3);
- Identification of each good and/or service recited in the registration for which the petitioner requests that the proceeding be instituted on the basis identified in the petition;
- A verified statement signed by someone with firsthand knowledge of the facts to be proved that sets forth in numbered paragraphs:

a. The elements of the reasonable investigation of nonuse conducted, as defined under § 2.91(d), where for each source of information relied upon, the statement includes a description of how and when the searches were conducted and what the searches disclosed; and

b. A concise factual statement of the relevant basis for the petition, including any additional facts that support the allegation of nonuse of the mark in commerce on or in connection with the goods and services as specified in § 2.91(a);

- A clear and legible copy of all documentary evidence supporting a prima facie case of nonuse of the mark in commerce and an itemized index of such evidence.

If a petition does not satisfy the requirements for a complete petition, the USPTO will issue a letter providing the petitioner 30 days to perfect the petition by complying with the outstanding requirements, if otherwise appropriate.

C. Petition Fee

After consideration of the comments discussed below regarding the proposed fee of $600 per class, this final rule sets a fee of $400 per class for a petition for expungement or reexamination. In setting this fee, the USPTO intends to strike a balance between recovering the costs associated with conducting these proceedings (including Director-initiated proceedings) and providing a less expensive alternative to a contested inter partes cancellation proceeding before the TTAB.

D. Reasonable Investigation Requirement

Under § 2.91(c)(8), a petition requesting institution of an expungement or reexamination proceeding must include a verified statement that sets forth the elements of the reasonable investigation the petitioner conducted to determine that the mark was never used in commerce (for expungement petitions) or not in use in commerce as of the relevant date (for reexamination petitions) on or in connection with the goods and/or services identified in the petition.

A reasonable investigation is an appropriately comprehensive search likely to reveal use of the mark in commerce on or in connection with the relevant goods and/or services, if such use was, in fact, made. Thus, what constitutes a reasonable investigation is a case-by-case determination, but any investigation should focus on the mark disclosed in the registration and the identified goods and/or services, keeping in mind their scope and applicable trade channels.

The elements of a petitioner's investigation should demonstrate that a search for use in relevant channels of trade and advertising for the identified goods and/or services did not reveal any relevant use. In addition, the petitioner's statement regarding the elements of the reasonable investigation should specifically describe the sources searched, how and when the searches were conducted, and what information and evidence, if any, the searches produced.

Sources of information and evidence should include reasonably accessible sources that can be publicly disclosed, because petitions requesting institution of expungement and reexamination proceedings will be entered in the registration record and thus be publicly viewable through the USPTO's Trademark Status & Document Retrieval (TSDR) database. The number and nature of the sources a petitioner must check in order for its investigation to be considered reasonable, and the corresponding evidence that would support a prima facie case, will vary depending on the goods and/or services involved, their normal trade channels, and whether the petition is for expungement or reexamination. Because nonuse for purposes of expungement and reexamination is necessarily determined in reference to a time period that includes past activities (not just current activities), a petitioner's investigation normally would include research into past usage of the mark for the goods and/or services at issue in the petition and thus may include archival evidence.

As a general matter, a single search using an internet search engine likely would not be considered a reasonable investigation. See H.R. Rep. No. 116–645, at 15 (2020). On the other hand, a reasonable investigation does not require a showing that all of the potentially available sources of evidence were searched. Generally, an investigation that produces reliable and credible evidence of nonuse at the relevant time should be sufficient.

As set forth in § 2.91(d)(2), appropriate sources of evidence and information for a reasonable investigation may include, but are not limited to:

- State and Federal trademark records;
- internet websites and other media likely to or believed to be owned or controlled by the registrant;
- internet websites, other online media, and publications where the relevant goods and/or services likely would be advertised or offered for sale;
- Print sources and web pages likely to contain reviews or discussions of the relevant goods and/or services;
- Records of filings made with or of actions taken by any State or Federal

business registration or regulatory agency;

- The registrant's marketplace activities, including, for example, any attempts to contact the registrant or purchase the relevant goods and/or services;
- Records of litigation or administrative proceedings reasonably likely to contain evidence bearing on the registrant's use or nonuse of the registered mark; and
- Any other reasonably accessible source with information establishing that the mark was never in use in commerce (expungement), or was not in use in commerce as of the relevant date (reexamination), on or in connection with the relevant goods and/or services.

A petitioner is not required or expected to commission a private investigation but may choose to generally reference the results of any report from such an investigation without disclosing specific information that would waive any applicable privileges.

Finally, any party practicing before the USPTO, including those filing petitions to request institution of these ex parte proceedings, is bound by all ethical rules involving candor toward the USPTO as the adjudicating tribunal. Of particular relevance in ex parte expungement and reexamination proceedings is 37 CFR 11.303(d), which states: ''In an ex parte proceeding, a practitioner shall inform the tribunal of all material facts known to the practitioner that will enable the tribunal to make an informed decision, whether or not the facts are adverse.'' Also relevant is the USPTO rule concerning submissions in trademark matters, which provides that by presenting any trademark submission to the USPTO, a party, whether a practitioner or non-practitioner, is certifying that ''[t]o the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . the paper is not being presented for any improper purpose, such as to harass someone or cause unnecessary delay'' and ''[t]he allegations and other factual contentions have evidentiary support.'' 37 CFR 11.18(b)(2). *See also* 37 CFR 11.18(c) (providing that violations of any subparagraphs of § 11.18(b)(2) are ''subject to such sanctions or actions as deemed appropriate by the USPTO Director'').

E. Director-Initiated Proceedings

As authorized by the TMA, § 2.92(b) provides that the Director may, within the time periods set forth in § 2.91(b), institute an expungement or reexamination proceeding on the Director's own initiative, if the information and evidence available to the USPTO supports a prima facie case of nonuse.

Section 2.92(e)(1) provides that, for efficiency and consistency, the Director may consolidate proceedings (including a Director-initiated proceeding with a petition-initiated proceeding). Consolidated proceedings are related parallel proceedings that may include both expungement and reexamination grounds.

In addition, under § 2.92(e)(2), if two or more petitions under § 2.91 are directed to the same registration and are pending concurrently (*i.e.,* expungement or reexamination proceedings based on these petitions are not yet instituted), or the Director wishes to institute an ex parte expungement or reexamination proceeding on the Director's own initiative under § 2.92(b) concerning a registration for which one or more petitions under § 2.91 are pending, the Director may elect to institute a single proceeding.

F. Establishing a Prima Facie Case

Under § 2.92, as provided for explicitly in the TMA, an expungement or reexamination proceeding will be instituted only in connection with the goods and/or services for which a prima facie case of relevant nonuse has been established. *See* Public Law 116–260, Div. Q, Tit. II, Subtit. B, section 225(a), (c). For the purpose of this rule, a prima facie case requires only that a reasonable predicate concerning nonuse be established. *See* H.R. Rep. No. 116–645, at 8 (2020) (citing *In re Pacer Tech.,* 338 F.3d 1348, 1351 (Fed. Cir. 2003) and *In re Loew's Theatres, Inc.,* 769 F.2d 764, 768 (Fed. Cir. 1985)). Thus, with respect to these proceedings, a prima facie case includes sufficient notice of the claimed nonuse to allow the registrant to respond to and potentially rebut the claim with competent evidence, which the USPTO must then consider before making a determination as to whether the registration should be cancelled in whole or in part, as appropriate.

For expungement and reexamination proceedings instituted on the basis of a petition under § 2.91, the determination of whether a prima facie case has been made is based on the evidence and information that is collected as a result of the petitioner's reasonable investigation and set forth in the petition, along with the USPTO's electronic record of the involved registration. Appropriate sources of such evidence and information include those listed in § 2.91(d)(2).

For Director-initiated expungement and reexamination proceedings, the evidence and information that may be relied upon to establish a prima facie case may be from essentially the same sources as those in the petition-initiated proceeding.

G. Notice of Petition and Proceedings

When a petitioner files a petition requesting institution of expungement or reexamination proceedings, the petition will be uploaded into the registration record and be viewable through TSDR. The USPTO plans to send a courtesy email notification of the filing to the registrant and/or the registrant's attorney, as appropriate, if an email address is of record. The registrant may not respond to this courtesy notice. No response from the registrant will be accepted unless and until the Director institutes a proceeding under § 2.92.

Once the Director has determined whether to institute a proceeding based on the petition, notice of that determination will be sent to the petitioner and the registrant, along with the means to access the petition and supporting documents and evidence.

If a proceeding is instituted, the petitioner will not have any further involvement. In the case of Director-initiated proceedings, there is no petitioner, and thus all relevant notices will be provided only to the registrant. In both types of proceedings, documents associated with the proceeding will be uploaded into the registration record and will be publicly viewable through TSDR.

Under the TMA and § 2.92(c)(1), any determination by the Director whether to institute an expungement or reexamination proceeding, based either on a petition or on the Director's own initiative, is final and non-reviewable. See Public Law 116–260, Div. Q, Tit. II, Subtit. B, section 225(a), (c).

Finally, for purposes of correspondence relating to these proceedings, the ''registrant'' is the owner/holder currently listed in USPTO records.

H. Procedures for Expungement and Reexamination Proceedings

Under § 2.92(f)(2), the Director's determination to institute a proceeding is set forth in an Office action, which, in accordance with § 2.93(a), will require the registrant to provide such evidence of use, information, exhibits, affidavits, or declarations as may be reasonably necessary to rebut the prima facie case by establishing that the

required use in commerce has been made on or in connection with the goods and/or services at issue, as required by the Act. While institution necessitates a response from the registrant that includes evidence rebutting the prima facie case, the ultimate burden of proving nonuse by a preponderance of the evidence remains with the Office.

Although the Office action will be substantively limited in scope to the question of use in commerce, the registrant will also be subject to the requirements of § 2.11 (requirement for representation), § 2.23 (requirement to correspond electronically), and § 2.189 (requirement to provide a domicile address). Thus, the USPTO will require the registrant to furnish domicile information as necessary to determine if the registrant must be represented by a U.S.-licensed attorney. In addition, all registrants will be required to provide a valid email address for correspondence, if one is not already in the record, and to update the email address as necessary to facilitate communication with the USPTO.

The TMA provides that any documentary evidence of use provided by the registrant need not be the same as that required under the USPTO's rules of practice for specimens of use under section 1(a) of the Act, 15 U.S.C. 1051(a), but must be consistent with the definition of ''use in commerce'' set forth in section 45 of the Act, 15 U.S.C. 1127, and in relevant case law. Although testimonial evidence may be submitted, it should be supported by corroborating documentary evidence.

The USPTO anticipates that the documentary evidence of use in most cases will take the form of specimens of use, but the TMA contemplates situations where, for example, specimens for particular goods and/or services are no longer available, even if they may have been available at the time the registrant filed an allegation of use. In these cases, the registrant may be permitted to provide additional evidence and explanations supported by declaration to demonstrate how the mark was used in commerce at the relevant time. As a general matter, because the registration file, including any specimens, has already been considered in instituting the proceeding based on a prima facie case of nonuse, merely resubmitting the same specimen of use previously submitted in support of registration or maintenance thereof, or a verified statement alone, without additional supporting evidence, will likely be insufficient to rebut a prima facie case of nonuse.

For expungement proceedings, the registrant's evidence of use must show that the use occurred before the filing date of the petition to expunge under § 2.91(a), or before the date the proceeding was instituted by the Director under § 2.92(b), as appropriate. For reexamination proceedings, the registrant's evidence of use must demonstrate use of the mark in commerce on or in connection with the goods and/or services at issue on or before the relevant date established pursuant to the TMA under the relevant section of the Act.

Under § 2.93(b)(5)(ii), a registrant in an expungement proceeding may provide verified statements and evidence to establish that any nonuse as to particular goods and/or services with a sole registration basis under section 44(e) of the Act, 15 U.S.C. 1126(e), or section 66(a) of the Act, 15 U.S.C. 1141f(a), is due to special circumstances that excuse such nonuse, as set forth in § 2.161(a)(6)(ii). However, excusable nonuse will not be considered for any goods and/or services registered under section 1 of the Act, 15 U.S.C. 1051.

Section 2.93(d) provides that a registrant in an expungement or reexamination proceeding may also respond to an Office action by deleting some or all of the goods and/or services at issue in the proceeding and that an acceptable deletion will be immediately effective, that is, upon deletion the registration is considered cancelled as to the deleted goods and/or services, and the deleted goods and/or services cannot be reinserted. The rule further specifies that no other amendment to the identification of goods and/or services in a registration will be permitted as part of the proceeding. If goods and/or services that are subject to an expungement or reexamination proceeding are deleted after the filing, and before the acceptance, of an affidavit or declaration under section 8 or 71 of the Act, the deletion will be subject to the fee under § 2.161(c) or § 7.37(c).

In addition, a registrant may submit a request to surrender the subject registration for cancellation under § 2.172 or a request to amend the registration under § 2.173, but the mere filing of these requests will not constitute a sufficient response to an Office action requiring the registrant to provide evidence of use of the mark in the expungement or reexamination proceeding. The registrant must affirmatively notify the Office of the separate request in a timely response to the Office action.

Any deletion of goods and/or services at issue in a pending proceeding requested in a response, a surrender for cancellation under § 2.172, or an amendment of the registration under § 2.173 shall render the proceeding moot as to those goods and/or services, and the Office will not make any further determination regarding the registrant's use of the mark in commerce as to those goods and/or services.

Under § 2.93(b)(1), the registrant must respond to the initial Office action via TEAS within three months of the issue date, but has the option to request a one-month extension of time to respond for a fee of $125, as set forth in § 2.6(a)(27). As discussed below, the USPTO made this change after consideration of the comments received in response to the proposed response period in the NPRM of two months for an Office action issued in connection with an expungement or reexamination proceeding. If the registrant fails to timely respond, the rule provides that the USPTO will terminate the proceedings and the registration will be cancelled, in whole or in part, as appropriate. However, a registrant may request reinstatement of the registration and resumption of the proceeding if the registrant failed to respond to the Office action because of an extraordinary situation. Under § 2.146(d)(2)(iv), such a petition must be filed no later than two months after the date of actual knowledge of the cancellation of goods and/or services in a registration and not later than six months after the date of cancellation as indicated in TSDR. Section 2.146(c)(2) requires the registrant to include a response to the Office action with the petition.

Relatedly, § 2.23(d)(3) provides that registrants are responsible for monitoring the status of their registrations in the USPTO's electronic systems at least every three months after notice of the institution of an expungement or reexamination proceeding until a notice of termination issues under § 2.94.

The USPTO also sought comments regarding whether § 2.93 should provide that, when a timely response by the registrant is a bona fide attempt to advance the proceeding and is a substantially complete response to the Office action, but consideration of some matter or compliance with a requirement has been omitted, the registrant may be granted 30 days, or to the end of the time period for response in the Office action to which the substantially complete response was submitted, whichever is longer, to resolve the issue. As discussed below, after consideration of the comments received, § 2.93 includes the option for the USPTO to issue a 30-day letter in

such circumstances. However, granting the registrant additional time in such circumstances does not extend the time for filing an appeal to the TTAB or a petition to the Director. In addition, the USPTO sought comments on whether it should take additional action when a registrant's failure to respond in an expungement or reexamination proceeding leads to cancellation of some of the goods and/or services in the registration. Specifically, the USPTO considered whether, in these cases, the registration should also be selected for audit under 37 CFR 2.161(b) or 7.37(b) if a registration maintenance filing is pending or, if one is not pending, when the next maintenance filing is submitted. As under current practice, if selected for audit, the registrant would be required to substantiate use for some or all of the remaining goods and/or services recited in the registration. As discussed below, after consideration of the comments received, the USPTO will not automatically select for audit a registration when the registrant fails to respond to an expungement or reexamination Office action and its registration is cancelled in part.

If the registrant timely responds to the initial Office action in the expungement or reexamination proceeding, the USPTO will review the response to determine if use of the mark in commerce at the relevant time has been established for each of the goods and/or services at issue. If the USPTO finds, during the course of the proceeding, that the registrant has demonstrated relevant use of the mark in commerce on or in connection with the goods and/or services at issue sufficient to rebut the prima facie case, demonstrated excusable nonuse in appropriate expungement cases, or deleted goods and/or services, such that no goods and/or services remain at issue, the proceeding will be terminated upon the USPTO issuing a notice of termination under § 2.94.

If, however, the response fails to establish use of the mark in commerce at the relevant time (or to sufficiently establish excusable nonuse, if applicable) for all of the goods and/or services at issue, or otherwise fails to comply with all outstanding requirements, the USPTO will issue a final action. In an expungement proceeding, the final action will include the examiner's decision that the registration should be cancelled for each good or service for which the mark was determined to have never been used in commerce or for which no excusable nonuse was established. In a reexamination proceeding, the final action will include the examiner's decision that the registration should be cancelled for each good and/or service for which it was determined the mark was not in use in commerce on or before the relevant date. As appropriate, in either an expungement or reexamination proceeding, the final action will include the examiner's decision that the registration should be cancelled in whole for noncompliance with any requirement under §§ 2.11, 2.23, and 2.189.

If a final action is issued, the registrant will have three months to file a request for reconsideration or an appeal to the TTAB, if appropriate. These deadlines are not extendable. In accordance with § 2.93(c)(3)(ii), if the registrant fails to timely appeal or file a request for reconsideration that establishes use of the mark in commerce at the relevant time for all goods and/or services that remain at issue in a final action (or that deletes the remaining goods and/or services at issue), the USPTO will issue a notice of termination of the proceeding under § 2.94, clearly setting forth the goods and/or services for which relevant use was, or was not, established, as well as any other outstanding requirements. The notice of termination is a statement intended to provide notice to the registrant and the public of the ultimate outcome of the proceedings and is not itself reviewable. The USPTO will also issue, as appropriate, an order canceling the registration in whole or in part, in accordance with the examiner's decision in the final action. Section 2.93(b)(1) provides that, if the registrant fails to timely respond, the USPTO will terminate the proceedings, and the registration will be cancelled, in whole or in part, as appropriate. However, a registrant may request reinstatement of the registration and resumption of the proceeding if the registrant failed to respond to the Office action because of an extraordinary situation. Under § 2.146(d)(2)(iv), such a petition must be filed no later than two months after the date of actual knowledge of the cancellation of goods and/or services in a registration and may not be filed later than six months after the date of cancellation in TSDR. Under § 2.146(c)(2), the registrant must include a response to the Office action with the petition.

Under § 2.94, if the required use in commerce (or excusable nonuse, in appropriate cases) is not established, the notice of termination will indicate a cancellation of either some of the goods and/or services or the entire registration, depending on the circumstances. If the goods and/or services for which use (or excusable nonuse) was not demonstrated are the only goods and/or services in the registration, or there remain any additional outstanding requirements, the entire registration will be cancelled. However, if the notice of termination relates only to a portion of the goods and/or services in the registration, and there are no other outstanding requirements, the registration will be cancelled in part, as appropriate. A notice of termination will not issue until all outstanding issues are satisfactorily resolved (and thus no cancellation is necessary) or the time for appeal has expired or any appeal proceeding has terminated. Petitioners and other interested parties may monitor the progress of a proceeding by reviewing the status and associated documents through TSDR.

In setting the deadlines for expungement and reexamination proceedings, the USPTO considered the amount of time a registrant might need to research and collect relevant evidence of use, the fact that some proceedings may involve more goods and/or services than others, and the comments it received regarding the proposed deadlines. The USPTO also weighed these considerations against the goal that these proceedings be faster and more efficient than other available options for cancellation of registrations for marks not used with goods and/or services listed therein, as well as the probability that most registrants are likely to have evidence of use that is contemporaneous with the relevant date at issue.

I. Estoppel and Co-Pending Proceedings

Section 2.92(d) of this rule includes provisions for estoppel and bars co-pending proceedings involving the same registration and the same goods and/or services.

Specifically, § 2.92(d)(1) provides that, upon termination of an expungement proceeding where it was established that the registered mark was used in commerce on or in connection with any of the goods and/or services at issue in the proceedings prior to the date a petition to expunge was filed under § 2.91 or the Director-initiated proceedings were instituted under § 2.92, no further expungement proceedings may be instituted as to those particular goods and/or services. Subsequent reexamination proceedings for marks registered under section 1 of the Act are not barred under these circumstances because reexamination proceedings involve a question of whether the mark was in use in commerce as of a particular relevant date, whereas earlier expungement proceedings would only have involved

a determination of whether the mark was never used. Proof of use sufficient to rebut a prima facie case of nonuse in an expungement proceeding might not establish use in commerce as of a particular relevant date, as required in a reexamination proceeding.

Section 2.92(d)(2) provides that, upon termination of a reexamination proceeding where it was established that the registered mark was used in commerce on or in connection with any of the goods and/or services at issue, on or before the relevant date at issue in the proceedings, no further expungement or reexamination proceedings may be instituted as to those particular goods and/or services. The TMA does not explicitly bar a subsequent expungement proceeding following a determination in a reexamination proceeding. However, the rule takes into account that it would be unnecessary for the registrant to be subjected to a later-instituted proceeding alleging the mark was never used in commerce when the USPTO has already determined that the mark was used in commerce on or before a relevant date.

In addition, § 2.92(d)(3) provides that, with respect to a particular registration, while an expungement proceeding is pending, no later expungement proceeding may be instituted with respect to the same goods and/or services at issue in the pending proceeding. Section 2.92(d)(4) establishes that, with respect to a particular registration, while a reexamination proceeding is pending, no later expungement or reexamination proceeding may be instituted with respect to the same goods and/or services at issue in the pending proceeding.

For the purposes of these rules, the wording ''same goods and/or services'' refers to identical goods and/or services that are the subject of the pending proceeding or the prior determination. Thus, for example, if a subsequent petition for reexamination identifies goods that are already the subject of a pending reexamination proceeding and goods that are not, only the latter goods could potentially be the subject of a new proceeding. The fact that there is some overlap between the goods and/or services in the pending proceeding and those identified in a petition would not preclude the goods and/or services that are not the same from being the subject of a new proceeding, if otherwise appropriate. This situation is addressed in § 2.92(c)(2), which permits the Director to institute a proceeding on petition for fewer than all of the goods and/or services identified in the petition. The comments received in connection with the estoppel and co-pending provisions are discussed below.

II. New Nonuse Ground for Cancellation Before the TTAB

The TMA created a new nonuse ground for cancellation under section 14 of the Act, allowing a petitioner to allege that a mark has never been used in commerce as a basis for cancellation before the TTAB. This ground is available at any time after the first three years from the registration date. Therefore, the USPTO amends § 2.111(b) to indicate when a petition on this ground may be filed and to distinguish it from the timing of other nonuse claims.

III. Flexible Response Periods

The TMA amended section 12(b) of the Act, 15 U.S.C. 1062(b), to allow the USPTO to set response periods by regulation for a time period between 60 days and 6 months, with the option for extensions to a full 6-month period. Under current § 2.62(a), applicants have six months to respond to Office actions issued during the examination of a trademark application. Many examination issues, particularly formal requirements like amendments to identifications or mark descriptions, can be resolved well before the current six-month deadline. However, the USPTO also recognizes that Office actions containing statutory refusals may present complex issues that require more time to address, and thus applicants and their attorneys may need the full response period to prepare and submit a response.

USPTO data analytics indicate that, in fiscal year (FY) 2020, 42% of represented applicants and 66% of unrepresented applicants responded to an Office action with a single substantive ground of refusal within three months from the issuance of a non-final Office action. Where the Office action covered multiple refusals, 31% of represented applicants and 56% of unrepresented applicants responded within three months.

Accordingly, the USPTO amends § 2.62 to set a response period of three months for responses to Office actions in applications under sections 1 and/or 44 of the Act. Under § 2.62(a)(2), applicants may request a single three-month extension of this three-month deadline, subject to payment of the fee in § 2.6(a)(28), namely, $125 for an extension request filed through TEAS and $225 for a permitted paper-filed request. To be considered timely, the request for an extension must be received by the USPTO on or before the deadline for response, which, consistent with current examination practice, will be set forth in the Office action. If an applicant fails to respond or request an extension within the specified time period, the application will be abandoned. This extension will not affect the existing practice under § 2.65(a)(2) that permits an examiner to grant an applicant 30 days, or to the end of the time period for response to the action to which a substantially complete and timely response was submitted, whichever period is longer, to explain or supply an omission. The amendments to § 2.66 address the requirement for the extension fee in situations where an applicant files a petition to revive past a three-month deadline.

Although post-registration actions are not subject to the response provisions in section 12 of the Act, for convenience and predictability, the same three-month response period and single three-month extension apply to Office actions issued in connection with post-registration review of registration maintenance and renewal filings.

However, applications under section 66(a) of the Act will not be subject to the three-month deadline for Office action responses; the deadline will instead remain at six months. USPTO data analytics indicate that in FY 2020, only 11% of Madrid applicants filed a response to a non-final Office action with multiple grounds within three months, while 62% of Madrid applicants took six months to file a response. The additional processing required for these applications, both at the USPTO and the World Intellectual Property Organization's International Bureau (IB), per article 5(2) of the Madrid Protocol, introduces time constraints that justify maintaining the current deadlines.

These flexible response periods are intended to promote efficiency in examination by shortening the prosecution timeline for applications with issues that are relatively simple to address, while providing sufficient time, through an optional extension, for responses to Office actions with more complex issues. In addition, shorter response periods may result in faster disposal of applications and thus reduce the potential delay in examination of later-filed applications for similar marks.

The rule includes conforming revisions to §§ 2.63, 2.65, 2.66, 2.141, 2.142, 2.163, 2.165, 2.176, 2.184, 2.186, 7.6, 7.39, and 7.40 to account for the deadlines and extensions. The USPTO inadvertently failed to list § 2.176 in the NPRM but has included it here.

Although the rules regarding expungement and reexamination proceedings must be implemented within one year of the TMA's enactment, there is no required date of implementation for the flexible response and extension provisions. Therefore, because these flexible response periods and extensions will involve significant changes to examination processes and the USPTO's information technology (IT) systems, the Office will delay implementation of them until December 1, 2022. This will also allow customers to update their practices and IT systems for these changes.

The USPTO also sought comments on two alternatives to the procedures discussed above. The comments received regarding the flexible response period implemented herein, as well as the proposed alternatives, are discussed below.

IV. Letters of Protest

The TMA amends section 1 of the Act, 15 U.S.C. 1051, to add a new paragraph (f), providing express statutory authority for the USPTO's existing letter-of-protest procedure, which allows third parties to submit to the USPTO for consideration and entry into the record evidence bearing on the registrability of a mark. This procedure is intended to aid in examination without causing undue delay or compromising the integrity and objectivity of the ex parte examination process. The TMA also provides that the Director shall determine whether evidence should be included in the record of the relevant application within two months of the date on which a letter of protest is filed.

The USPTO promulgated letter-of-protest procedures at 37 CFR 2.149 in a final rule published in the **Federal Register** on November 17, 2020 (85 FR 73197). The requirements set out in § 2.149 are consistent with those in the TMA. However, the TMA further provides that any determination by the Director of the USPTO whether to include letter-of-protest evidence in the record of an application shall be final and non-reviewable, and that such a determination shall not prejudice any party's right to raise any issue and rely on any evidence in any other proceeding. *See* Public Law 116–260, Div. Q, Tit. II, Subtit. B, section 223(a). Therefore, the USPTO revises § 2.149 to include these additional provisions.

The TMA also authorizes the USPTO to charge a fee for letters of protest. Public Law 116–260, Div. Q, Tit. II, Subtit. B, section 223(a). Under existing § 2.6(a)(25), the USPTO currently charges $50 per letter-of-protest submission. That fee is not changed in this rulemaking. Comments received in connection with the procedures for letters of protest are discussed below.

V. Suspension of Proceedings

The USPTO revises §§ 2.67 and 2.117 to clarify that expungement and reexamination proceedings are included among the types of proceedings for which suspension of action by the Office or the TTAB is authorized. In addition, the USPTO revises these rules to align them with the existing practice regarding suspension of proceedings before the USPTO or the TTAB. Generally, the USPTO will suspend prosecution of a trademark application or a matter before the TTAB during the pendency of a court or TTAB proceeding that is relevant to the issue of registrability of the involved mark; therefore, this rule eliminates the limitation in § 2.117 to other proceedings in which a party or parties are engaged.

Suspension will normally be maintained until the outcome of the proceeding has been finally determined. As set forth in the current version of section 510.02(b) of the Trademark Trial and Appeal Board Manual of Procedure, the USPTO considers a proceeding to have been finally determined when an order or ruling that ends litigation has been rendered and noticed, and no appeal has been filed, or all appeals filed have been decided and the time for any further review has expired without further review being sought. The expiration of time for any further review includes the time for petitioning for rehearing or U.S. Supreme Court review. Thus, the Office will not normally lift a suspension until after the time for seeking such review has expired, a decision denying or granting such review has been rendered, and any further review has been completed. Comments received regarding suspension procedures are discussed below.

VI. Attorney Recognition

The USPTO proposed revising § 2.17(g) to indicate that, for the purposes of an application or registration, recognition of a qualified attorney as the applicant's or registrant's representative will continue until the owner revokes the appointment or the attorney withdraws from representation. Accordingly, to end attorney recognition by the USPTO under the proposal, owners and attorneys would be required to proactively file an appropriate revocation or withdrawal document under § 2.19, rather than the current situation, where recognition automatically ends when one of the events listed in current § 2.17(g) occurs.

Furthermore, under the proposed revision to § 2.17(g), if the applicant or registrant wished to retain a new attorney for submissions to the USPTO following abandonment or registration, the applicant or registrant would be required to revoke the original power of attorney, or the attorney would need to request to withdraw from representation, before a new attorney could be recognized.

In addition, under the proposed rule, recognition of the attorney of record would continue, even when there is a change of ownership, until the attorney affirmatively withdraws or representation is revoked.

After consideration of the comments received in connection with the proposed changes, as discussed below, the USPTO has decided not to implement these proposed changes to the rules governing attorney recognition and withdrawal at this time.

However, as proposed, this rule adds § 2.17(b)(4) to specify that when a practitioner has been mistakenly, falsely, or fraudulently designated as an attorney for an applicant, registrant, or party to a proceeding without the practitioner's prior authorization or knowledge, recognition of that practitioner shall be ineffective.

In addition, the USPTO revises § 2.18(a)(1) to refer to ''recognition'' instead of ''representation,'' consistent with the wording in § 2.18(a)(2). The term ''recognition'' reflects the fact that the USPTO does not control representation agreements between practitioners and clients but merely recognizes an attorney for purposes of representation before the USPTO. In addition, revised § 2.18(a)(2) indicates that, as with service of a cancellation petition, the USPTO may correspond directly with a registrant in connection with notices of institution of expungement or reexamination proceedings. Accordingly, the USPTO plans to send notices of institution of expungement and reexamination proceedings to the owner currently identified in the registration record and to the attorney of record, if any, or any previous attorney of record whose contact information is still in the record.

VII. Court Orders Concerning Registrations

This rule also adds new § 2.177 to codify the USPTO's longstanding procedures concerning action on court orders cancelling or affecting a registration under section 37, 15 U.S.C. 1119, which are currently set forth in section 1610 of the Trademark Manual

of Examining Procedure (TMEP). The USPTO requires submission of a certified copy of the order and normally does not act on such orders until the case is finally determined.

VIII. Comments and Responses

A. Number of Petitions

Comment 1: Several commenters submitted comments about whether the USPTO should limit the number of petitions for expungement or reexamination that can be filed against a registration. Two commenters agreed with the approach, stated in the NPRM, that the USPTO would not initially limit the number of petitions. These commenters suggested that the Report on Decluttering Initiatives would inform the USPTO on whether additional safeguards might be needed after some experience with these proceedings and encouraged the USPTO to address patterns of abusive filings by denying institution of bad-faith petitioners' future requests. One commenter was concerned about the possibility of misuse by deferring a limit on the number of petitions that can be filed against a registration, but was amenable to a wait-and-see approach, while encouraging the USPTO to reserve the authority of the Director to limit the number of petitions at his or her discretion or for the USPTO to establish a limit in a future rule. Two commenters stated that the USPTO should limit the number of petitions that can be filed as an additional safeguard against abuse, one opining that allowing multiple ex parte proceedings against a single registration disproportionately impacts small and medium-sized enterprises.

Response: As noted above, the USPTO is not imposing a limitation on the number of petitions at this time. The USPTO agrees with those commenters who believe that experience with these proceedings will inform the USPTO as to whether there are patterns of abuse in the filing of petitions for expungement or reexamination. As referenced by the comments, the TMA requires the USPTO to collect data for a congressionally mandated report on the effectiveness of the expungement and reexamination proceedings in addressing inaccurate and false claims of use. Some of these comments suggested that this data could identify whether or not abuses of the proceedings have occurred. In connection with the report, the USPTO is establishing internal systems for collecting data on, among other things, the number of petitions for expungement or reexamination filed, the number of proceedings instituted, and the final outcome of those proceedings. However, this data is primarily for the purpose of measuring the effectiveness of the proceedings and likely will not inform the USPTO as to the potential for abuse. Thus, the USPTO's Special Task Force for Improper Activities (STF) will be separately analyzing other data elements to evaluate abuse of the proceedings. The USPTO does not intend to make this investigative data collection public because of the potential for bad actors to use that information to evade detection. If it appears that abuse of the petition process or of the nonuse proceedings is occurring, the USPTO may take steps to prevent such abuse from continuing to occur, the USPTO may take steps to prevent it from continuing by establishing a limit on the number of petitions for expungement or reexamination in a future rulemaking or by imposing appropriate sanctions under 37 CFR 11.18, which may include striking submissions and precluding parties from making submissions. Regarding the concern that multiple ex parte proceedings against a single registration would disproportionately impact small and medium-sized enterprises, the USPTO notes that the absence of a limit on petitions to cancel at the TTAB does not appear to have disproportionately impacted these enterprises and there is no evidence to suggest a different result with respect to petitions for reexamination or expungement. It should be noted, however, that, based on information already collected, many of the applications and registrations in which nonuse may be an issue are owned by individuals or small-volume filers. Therefore, the USPTO anticipates that a significant portion of the expungement and reexamination proceedings instituted will be brought against registrants who are considered small enterprises. If so, this fact alone would not indicate that the process was unfairly impacting this group. However, the USPTO will carefully review the data to be collected for the above-referenced report, along with the data to be collected by the STF, which should provide additional insight to allow the USPTO to assess the impact of these proceedings on registrants, as well as potential abuse, and make adjustments if necessary. For now, given the per-class filing fee for submitting a petition for expungement and/or reexamination, the time and resources required to demonstrate the petitioner's search for use in relevant channels of trade and advertising, and the potential ramifications under § 11.18 of submitting a petition for an improper purpose, the USPTO expects that petitioners will take care to submit petitions that appropriately challenge all goods and/or services for which they allege nonuse.

B. Real Party in Interest

Comment 2: The USPTO received six comments agreeing that it should not require a petitioner to identify the name of the real party in interest on whose behalf a petition is filed. These commenters stated, among other things, that: (1) Allowing the real party in interest to remain anonymous will encourage filers to take advantage of the system by reducing the likelihood of retaliation, (2) requiring real-party-in-interest information could become an obstacle to the use of the system, (3) it is consistent with the TMA and congressional intent not to require standing, and (4) these proceedings are only between the USPTO and the registrant after institution. Four commenters supported a requirement to identify the real party in interest in order to discourage frivolous, speculative, or abusive filings and so the registrant would know who is challenging its registration. Two commenters suggested that the USPTO adopt a wait-and-see approach and revisit the issue after gaining some experience with processing the petitions, with one stating that the Director should nonetheless retain the discretion to require a petitioner to identify the real party in interest.

Response: The USPTO agrees with the rationale articulated by those commenters who stated that the identity of the real party in interest should not be required in order to file a petition for expungement or reexamination. The TMA allows any party to file and does not require the real party in interest to be identified and requiring such information could discourage legitimate petitions from being filed where the potential filers have concerns about being identified in the petitions. However, the USPTO also agrees that there is merit in retaining the Director's discretion to require the identity of the real party in interest in order to discourage and prevent abusive filings. Therefore, this rule retains such discretion in § 2.91(h).

C. 30-Day Letter—Petition

Comment 3: One commenter supported providing petitioners an opportunity to supplement a deficient petition. Another stated that allowing petitioners 30 days to perfect a deficient petition is too long and does not appear fairly balanced with the registrant's

proposed response period of two months to provide evidence of use for a potentially large number of goods and/or services across multiple classes. One commenter requested that the USPTO clarify whether a petitioner's failure to establish a prima facie case will be correctable under the 30-day letter process for perfecting a petition or if the letter will only issue when a petition is incomplete as a result of other formal requirements. Another commenter asked whether the USPTO will place 30-day letters in the TSDR record of the challenged registration, whether it will notify the registrant of the letter, and whether it will issue the 30-day letter under the same current processes and procedures as letters issued in relation to petitions to the Director. That commenter also recommended that any notification to the registrant be made to the email addresses of the registrant, attorney of record, and any secondary email addresses listed in the registration. Finally, one commenter suggested that a technical defect in a petition, such as failing to adequately describe its reasonable investigation, should not preclude the Director from instituting a proceeding.

Response: A 30-day letter will be issued in connection with a petition for expungement or reexamination when the petition is incomplete because it fails to include all of the required elements listed in § 2.91(c). For example, a 30-day letter will be issued when: (1) The petition does not include the name, domicile address, or email address of the petitioner; (2) a U.S.-licensed attorney is not designated when the petitioner has a foreign domicile; (3) the petition does not include the required verified statement; or (4) the documentary evidence is not clear and legible. As set out in § 2.91(c)(8)(i), the verified statement must include the elements of the petitioner's reasonable investigation, a description of how and when the searches were conducted, and what the searches disclosed. For purposes of determining whether the petition includes elements required under § 2.91(c), the verified statement will be reviewed for whether it includes the descriptions listed in paragraph (c)(8)(i), but not for the substantive adequacy of those descriptions. If the USPTO determines that the petition does not include the descriptions required in § 2.91(c)(8)(i), the petitioner may be given 30 days to perfect its petition.

The 30-day letter is intended only to give the petitioner an opportunity to provide a required element for a complete petition, consistent with the current procedure regarding missing required elements for petitions to the Director under § 2.146. It will not include a determination regarding whether the petition establishes a prima facie case, and the petitioner may not include additional evidence in its response. If the petitioner includes additional evidence in its response, such evidence will not be considered. If a proceeding is not instituted because the USPTO ultimately determines that the petition fails to establish a prima facie case based on the evidence originally submitted, the petitioner may submit a new petition with additional evidence.

Regarding the inquiry about whether the USPTO will place 30-day letters in the TSDR record of the challenged registration and whether it will notify the registrant of the letter, as well as the recommendation that any notification to the registrant be made to the email addresses of the registrant, attorney of record, and any secondary email addresses listed in the registration, the USPTO notes that the issue of whether a petition for expungement or reexamination complies with the requirements set out in § 2.91 involves only the petitioner and the USPTO. Therefore, a 30-day letter giving a petitioner an opportunity to perfect an incomplete petition will be sent only to the petitioner. The letter will be loaded into TSDR, as will the petitioner's response, if one is received. The registrant will have received notice of the petition via the courtesy email notification sent by the USPTO when the petition is filed, and will be able to view any 30-day letter issued in connection with an incomplete petition, and the petitioner's response, in TSDR.

Finally, the USPTO agrees with the commenter who suggested that a technical defect in a petition should not preclude a Director-instituted proceeding. If a petitioner fails to perfect its petition by supplying all of the required elements, the petition will be denied, and none of the petitioner's evidence will be reviewed. However, nothing in § 2.92(b) prohibits the Director from instituting a proceeding on the Director's own initiative simply because a third party filed an incomplete petition.

D. Petition Fee

Comment 4: Two commenters agreed with the proposed $600 per-class fee for filing a petition for expungement or reexamination, with one noting that the fee should be adequate to discourage abuse by petitioners, while also accounting for the increased administrative burden on the Office. Several others thought that it was too high. Those commenters generally opined that the proposed fee was excessive considering the limited scope and duration of the proceedings and that it would discourage parties from using the process. Four commenters suggested specific fees, ranging from $250 to $400 per class. Two commenters also recommended that the USPTO extend the applicability of the fee for deleting goods and/or services after submission and prior to acceptance of a section 8 or section 71 affidavit to goods and/or services deleted as a result of reexamination or expungement, and that the Office issue these fees back to petitioners.

Response: The USPTO agrees with the commenter who noted that the fee should be adequate to discourage abuse by petitioners, while also accounting for the increased administrative burden on the Office. As noted above, the USPTO must determine whether the requirements to establish a prima facie case have been satisfied by the petitioner in order to institute a proceeding. Thus, although the proceeding is more limited in scope than examination prior to registration, the USPTO must expend the time and resources to evaluate whether the petitioner has provided sufficient notice of the claimed nonuse to allow the registrant to respond to and potentially rebut the claim. Upon response by the registrant, the USPTO must review and evaluate all evidence provided by the registrant to determine whether it is sufficient to show use in commerce for each challenged good and/or service. Nevertheless, after consideration of the comments recommending a lower fee, the USPTO has adjusted the per-class fee for filing a petition for expungement or reexamination to $400 per class to ensure that it adequately discourages abuse and accounts for the increased costs to the Office, while also incentivizing the use of these procedures.

Regarding the suggestion to extend the fee for deleting goods and/or services after submission and prior to acceptance of a section 8 or section 71 affidavit to goods and/or services deleted as a result of reexamination or expungement, the USPTO notes that the deletion fee would be charged if goods and/or services are deleted from a registration in response to a petition for expungement or reexamination and a section 8 or section 71 affidavit is pending while the expungement or reexamination proceeding is ongoing. However, extending the applicability of the deletion fee during other periods was not proposed in the NPRM and is outside the scope of this rule.

E. Reasonable Investigation Requirements

Comment 5: One commenter stated that allowing internet search engine results, let alone a single internet search, to suffice as a reasonable investigation biases ex parte proceedings against small and medium-sized enterprises. That commenter suggested that: (1) The limitations of internet search engine results should preclude such results alone from constituting a reasonable search and that evidence be required from at least one additional source before a prima facie case can be established; and (2) any internet search relied upon as part of the broader body of evidence should be conducted within the United States and at a time reasonably contemporaneous with the filing of the petition, *e.g.,* within 14 calendar days. Another commenter suggested adding a statement in § 2.91(d)(3) to indicate that a petitioner's investigation will be deemed reasonable if the sources used sufficiently demonstrate that a search for use in the typical relevant channels of trade and advertising for the identified goods and/or services did not reveal any relevant use. A third commenter suggested that ''information about domain name registrations presently or previously in the name of the Registrant, including offers of such domain names for sale,'' be included within the sources of information for a reasonable investigation. Another commenter suggested that the USPTO assign a dedicated group of examiners to review and evaluate whether a petitioner has conducted a reasonable investigation and established a prima facie case. That commenter and two others suggested that such examiners receive specialized training. Another commenter suggested that the notice regarding whether a proceeding will be instituted should clarify what evidence is required to meet the reasonable investigation requirement, whether such evidence is sufficiently provided, and whether the evidence supports a prima facie case. Several commenters also requested clarification regarding whether the petitioner's sources and evidence will be viewable in TSDR in addition to the petition itself.

Response: The USPTO appreciates the commenter's concerns regarding the limitations of search-engine results. However, the commenter did not provide evidence that such searches are biased against small and medium-sized enterprises other than to state that they are prone to variation based on such factors as the location of the user, the time the search was conducted, and prior search history. Even assuming that an internet search would not return evidence of use by small and medium-sized enterprises, the petitioner still bears the responsibility of demonstrating that its investigation was reasonable and producing reliable and credible evidence of nonuse at the relevant time. Moreover, there may be situations in which an investigation comprised only of internet searches would be deemed reasonable, based on the nature of the goods and/or services at issue. Therefore, the USPTO declines to adopt a requirement that evidence be provided from at least one additional source before a prima facie case can be established.

Regarding the commenter's suggestion that any internet search relied upon be conducted within the United States, the USPTO understands that search-engine algorithms may include a geographic component that may lead to different search results for users in different countries. Thus, users outside the United States may not see the same search results that U.S. users see. Generally, a search should encompass the relevant online sources that would be searched and returned if it was conducted by someone seeking information about a product or service that is in use in commerce in or with the United States, as defined by the Act. However, there are means for conducting such a search that do not require the person conducting such a search to be located in the United States; any suggestion that the search be conducted by someone located in the Unites States may unfairly inhibit foreign parties from submitting legitimate petitions. Therefore, the USPTO declines to adopt such a requirement in the final rule.

As to requiring that searches be conducted at a particular time that is reasonably contemporaneous with the filing of the petition, the USPTO notes that under § 2.91, evidence comprising screenshots from relevant web pages must include the URL and access or print date. This information will allow the USPTO to weigh the value and currency of such evidence when determining whether a prima facie case of nonuse has been established by the petitioner.

As to the request that the regulatory text specifically list information about domain name registrations owned or offered for sale by the registrant as a source for a reasonable investigation, the USPTO notes that § 2.91(d)(2) clearly states that the sources for a reasonable investigation are not limited to those listed in the regulation. Therefore, the rule does not prohibit petitioners from including such information.

Regarding the suggestion that § 2.91(d)(3) include a statement specifying the circumstances in which a petitioner's investigation will be deemed reasonable, the USPTO declines to include such a statement in the regulations. If the USPTO issues a notice instituting a proceeding after submission of a petition for expungement or reexamination, institution of the proceeding will demonstrate that the USPTO determined the petitioner's investigation was reasonable and provided sufficient evidence of nonuse for the challenged goods and/or services.

Regarding the request that the notice regarding whether a proceeding will be instituted clarify what evidence is required to meet the reasonable investigation requirement, the USPTO notes that examples of the types of evidence required to meet the reasonable investigation requirement are set out in § 2.91(d)(2). Further, what constitutes a reasonable investigation is a case-by-case determination, and the USPTO will not provide specific guidance as to what types of evidence would comprise a reasonable investigation in a particular situation.

As to the suggestion that a specialized group of examiners should be assigned to review and evaluate whether a petitioner has conducted a reasonable investigation and established a prima facie case, and that they receive specialized training, the USPTO assures the commenters that attorneys within the Trademarks organization who are assigned to review petitions for expungement and reexamination will receive appropriate training.

Finally, because the petitioner's sources and evidence are required for a complete petition under § 2.91(c), they are not separate from the petition, but form part of the petition. As noted in the NPRM, petitions requesting institution of expungement and reexamination proceedings will be entered in the registration record, and thus these materials will be publicly viewable in TSDR.

F. Professional Responsibility

Comment 6: Two commenters submitted comments regarding the USPTO's reference to a practitioner's responsibility under 37 CFR 11.303(d) to inform the USPTO in an ex parte proceeding of all material facts known to the practitioner that will enable the USPTO to make an informed decision, whether or not the facts are adverse. One commenter requested that the

USPTO clarify whether reference to this rule means that after submission of a petition, but prior to institution of a proceeding, a registrant could provide evidence of use to the petitioner, and thereby obligate the petitioner to submit such evidence to the USPTO or withdraw the petition, if withdrawal is possible. The other commenter inquired whether a petitioner is required to update its evidence to account for adverse evidence discovered after its petition is filed and before a proceeding is instituted.

Response: Under the TMA, any person may file a petition to expunge or reexamine a registration of a mark on the basis that the mark has never been used in commerce, or was not used on or before a relevant date, on or in connection with some or all of the goods or services recited in the registration. The petition is the mechanism by which a third party may submit such a challenge to the USPTO. In that way, it is similar to the letter-of-protest process whereby third parties may submit evidence relevant to the registrability of a mark in a pending application. The involvement of the third party in that situation ends with the submission of the letter of protest. Here, if the USPTO determines that the petition establishes a prima facie case of nonuse during the relevant time period and institutes an expungement or reexamination proceeding, such proceeding is ex parte, and, as noted in the NPRM and reiterated above, the petitioner will have no further involvement.

As to the first comment, under the procedures set forth in the rules, the registrant should not engage with the petitioner regarding a pending petition, but rather only with the USPTO after a proceeding is instituted. The petitioner's involvement ends with the filing of the petition. Any evidence of use should be submitted by the registrant in a timely response to an Office action issued in connection with the proceeding.

As to the second comment, if the petitioner discovers that its petition included false or fraudulent information, the petitioner should seek to correct the petition by filing a petition under § 2.146(a)(3) to invoke the supervisory authority of the Director to correct the submission and specifying the facts to be corrected. *See* § 11.18(b)(2) (submission constitutes certification) and § 11.303(d) (duty of candor).

G. Director-Initiated Proceedings

Comment 7: One commenter requested that the USPTO explain the meaning of ''essentially'' in the statement that ''for Director-initiated expungement and reexamination proceedings, the evidence and information that may be relied upon to establish a prima facie case may be from essentially the same sources as in the petition-initiated proceeding.'' The commenter also asked whether the Director will be able to use evidence submitted in support of one or more failed petitions to establish a prima facie case of non-use in a Director-initiated proceeding against the same registration and whether the reference to a preponderance of the evidence applies only to Director-initiated proceedings. Another commenter asked if the USPTO contemplated further investigating potential nonuse whenever a petition for expungement or reexamination is filed for fewer than all the goods and/or services in a registration and requested clarification as to whether third parties may request consolidation of proceedings. A third commenter suggested that the USPTO consider setting up an email address for parties to notify the Director if there are registrations that may be vulnerable to a Director-initiated expungement or reexamination proceeding.

Response: Regarding the inquiry about the use of the term ''essentially'' in connection with sources of evidence and information relied upon in a Director-instituted proceeding, the term merely emphasized that the Director's evidence will come from the same types of sources as those of a petitioner. In this final rule, § 2.92(a) refers to proceedings instituted upon petition and § 2.92(b) refers to proceedings instituted upon the Director's initiative. In either case, institution of the relevant proceeding must be based on information that supports a prima facie case for expungement or reexamination of a registration for some or all of the goods or services identified in the registration. Section 2.91(c)(9) provides a non-exhaustive list of the types of evidence that may support a prima facie case of nonuse. The USPTO anticipates that the evidence put forth in a Director-initiated proceeding would come from the same types of sources as those relied on in a petition submitted by a third party. As to the commenter's second question, nothing in the rule prohibits the Director from using evidence submitted in support of a petition that failed to establish a prima facie case of non-use in a Director-initiated proceeding against the same registration as part of the prima facie case in a Director-initiated proceeding.

As to whether the USPTO contemplated further investigating potential nonuse whenever a petition for expungement or reexamination is filed for fewer than all the goods and/or services in a registration, the USPTO has contemplated such a situation. As noted in the NPRM and above, if the Director wishes to institute an ex parte expungement or reexamination proceeding on the Director's own initiative concerning a registration for which one or more petitions are pending, the Director may elect to institute a proceeding for other goods and/or services and consolidate the proceedings as related parallel proceedings. Regarding consolidation of proceedings, the rule provides that, for efficiency and consistency, the Director may consolidate consideration of a new proceeding with a pending proceeding. There is no provision for requests by third parties to consolidate proceedings.

Regarding the suggestion that the USPTO provide an email address for parties to notify the Director about registrations they believe may be vulnerable to a Director-initiated expungement or reexamination proceeding, the USPTO will not provide a separate email address for such notifications. If a third party has information and evidence to support a prima facie case of nonuse, the appropriate vehicle for providing such information and evidence to the USPTO is a petition for expungement or reexamination.

H. Establishing a Prima Facie Case

Comment 8: One commenter requested that the USPTO clarify whether examiners should conduct independent internet searches or rely primarily on the petitioner's evidence, and further stated that the USPTO should conduct such independent searches to ensure the prima facie case is met. The commenter also suggested that the USPTO conduct a more thorough review when the goods and/or services are industrial or business-to-business products, or other goods/services not typically sold or advertised online. Another commenter inquired whether the USPTO will supplement the prima facie evidence of the petitioner to meet the preponderance-of-the-evidence standard of proof. A third commenter suggested that the USPTO corroborate in appropriate cases whether the reasonable predicate concerning nonuse is supported.

Response: Under § 2.92, an expungement or reexamination proceeding will be instituted only in connection with the goods and/or services for which a prima facie case of relevant nonuse has been established. Section 2.92(a) provides that the Director will determine ''*if the petition*

sets forth a prima facie case of nonuse to support the petition basis'' (emphasis added). It is the petitioner's burden to establish a prima facie case. Therefore, with regard to a petition for expungement or reexamination, the USPTO will review the evidence provided and determine whether it establishes a prima facie case. The USPTO will not conduct independent research to ensure that the prima facie case is met, nor will it supplement the evidence of the petitioner. The USPTO notes, however, that in a Director-instituted proceeding, the evidence and information that may be relied upon to establish a prima facie case may be from the same types of sources as in the petition-initiated proceeding, as well as independent research conducted by the USPTO and the electronic record of the registration. Regarding goods and/or services not typically sold or advertised online, as noted above, a prima facie case must include sufficient notice of the claimed nonuse to allow the registrant to respond to and potentially rebut the claim with competent evidence. The USPTO will not impose a higher level of review based on the nature of the goods and/or services but will thoroughly review the evidence in all cases to determine whether this standard has been met.

I. Notice of Petition and Proceedings

Comment 9: Three commenters expressed concern that numerous registrations do not have up-to-date email addresses for the registrant and assigned attorneys or details regarding any assignments. One commenter suggested that where a petitioner's research has disclosed one or more email addresses of appropriate parties, the petitioner should have an ethical duty to provide such information for proper notification of the proceeding by the USPTO. Another commenter asked whether the USPTO would accept a response from a new owner when the registration was assigned, but the assignment was not recorded before the proceeding was instituted, and whether the new owner is required to formally record documents evidencing a change of title to be recognized as the registrant or if it would be sufficient to supply ownership documents with its response.

Response: The USPTO appreciates the commenters' concerns regarding proper notification of a proceeding to the relevant registrant. Under 37 CFR 2.23(b), registrants must provide and maintain a valid email address for correspondence. Therefore, it is the registrant's responsibility to ensure that any changes to its email address have been properly submitted to the USPTO. Moreover, in order to change a registrant's correspondence address, a properly signed written request is required. 37 CFR 2.18(c), 2.193(e)(9). Therefore, the USPTO cannot change the registrant's email address based on information provided by a third party.

Similarly, it is the registrant's or the new owner's responsibility to provide information regarding changes of ownership to the USPTO. In a registration based on section 1 or section 44 of the Act, if the registrant has not recorded a change of ownership with the Assignment Recordation Branch of the USPTO, and a party other than the owner of record attempts to take an action with respect to the registration, the party must establish ownership of the registration. To establish ownership, the new owner must either: (1) Record the assignment (or other document affecting title) with the Assignment Recordation Branch, and notify the Trademarks organization that the document has been recorded; or (2) submit other evidence of ownership, in the form of a document transferring ownership from one party to another, or an explanation, in the form of an affidavit or declaration under 37 CFR 2.20, that a valid transfer of legal title has occurred. 37 CFR 3.73(b)(1). The document(s) must show a clear chain of title from the original owner to the party who is taking the action. *See* TMEP section 502.01. In an application under section 66(a) of the Act, or a registered extension of protection, the new owner must record changes in ownership or in the name or address of the holder with the World Intellectual Property Organization's IB in order to take an action with respect to a registration. The new owner does not have the option to submit documentary evidence of ownership pursuant to 37 CFR 3.73(b)(1). 37 CFR 7.22. Therefore, it is in the best interests of both the prior and new owners to provide evidence of changes of title, either by recordation of an assignment or otherwise, in a timely manner.

J. Response Period—Expungement and Reexamination Proceedings

Comment 10: Several commenters encouraged the USPTO to allow registrants longer than two months to respond to an Office action in an expungement or reexamination proceeding. They noted, among other things, that it may be difficult for foreign owners or large corporations to collect use evidence where: (1) Communication with multiple layers of personnel who may be in different countries and time zones is required; (2) the registrant has recently acquired a company with a large portfolio of marks, including the challenged registration; or (3) the registrant is a large company, and key personnel with knowledge have recently left the company. Two commenters suggested a six-month response period, while another suggested that registrants be given nine months to respond. Four commenters noted that the response period should be consistent with what is contemplated for other Office actions, with five commenters proposing a three-month response period. Multiple commenters also asked that the USPTO allow registrants to request an extension of time to respond, five of whom suggested that such extension include a statement of good cause. In addition, one commenter suggested that the registrant should have an opportunity to set aside a default, for good cause, when correspondence was not received, similar to situations at the TTAB.

Response: The USPTO appreciates the concerns the commenters raised about the proposed two-month response period for Office actions issued in connection with expungement and reexamination proceedings, including that registrants likely will need more time to get counsel and gather use evidence in response, especially in proceedings involving multiple goods and/or services. To address these concerns, the USPTO is setting the response period at three months, which has the additional benefit of aligning response deadlines for these proceedings with those the USPTO intends to implement for Office actions in the examination of applications and post-registration submissions, thus making deadline management easier. The rule also provides for a one-month extension of the response deadline to a non-final Office action in expungement and reexamination proceedings, recognizing that there may be situations where a registrant may need an additional month to locate and supply the use evidence and information necessary to respond to the initial Office action. This rule also sets the same fee of $125 for filing a request for extension of time to file a response to a non-final Office action through TEAS in an expungement or reexamination proceeding as the Office is setting for extensions of time to respond to Office actions in the examination of applications and post-registration submissions. In addition, consistent with the regulation enacted herein permitting requests to extend the time to respond to Office actions issued prior to registration, the USPTO will not require a statement of good cause for extension

requests submitted in connection with responses to expungement/reexamination or to examination/post-registration Office actions.

Although the response and extension periods for responding to a non-final Office action in expungement and reexamination proceedings being set in the rule double the response timeframe from what was originally proposed, the USPTO believes that the additional time should result in registrants providing complete responses to the initial Office action and should not overly lengthen resolution of the proceedings. To balance the competing interests of providing more time for the registrant to respond against ensuring resolution of the proceedings is not unduly delayed by the registrant, the Office also is setting the deadline to request reconsideration or appeal after a final Office action at three months, but is not providing for any extension of those deadlines. The USPTO does not believe more time to respond is warranted because registrants are expected to file a complete response to the initial Office action and, unlike Office actions issued in the examination of applications that may raise multiple substantive refusals, the scope of Office actions in expungement and reexamination proceedings is limited to a single substantive issue—the mark's use in commerce for particular goods and/or services. The procedural requirements that may be made in Office actions issued in expungement and reexamination proceedings are similarly limited to straightforward and readily resolvable issues, such as a requirement to appoint counsel if the registrant is foreign-domiciled. If the registrant wishes to comply with any unsatisfied requirements or address any remaining issues raised in the final Office action, it now will have three months from the issuance of the final Office action to do so, one month more than initially proposed.

Regarding the request that the USPTO set aside a default when correspondence was not received that resulted in cancellation of the registration, the USPTO notes that the registrant must maintain a current and accurate correspondence address for itself and its attorney, if one is designated. 37 CFR 2.18(c). If any of these addresses change, a properly signed request to change the address must be promptly filed. *Id.* If the registrant did not receive an Office action and the registration was cancelled in whole or in part, the registrant may request reinstatement of the registration pursuant to a petition to the Director under § 2.146(c)(2). Consistent with USPTO practice in other ex parte matters, the failure to respond to an Office action is not set aside for good cause in the way that a default or notice of default may be cured in inter partes proceedings.

K. Burden and Standards of Proof

Comment 11: Regarding the submission of evidence to prove use, one commenter noted that the USPTO should not rely solely on statements of testimony but should require supporting documentary evidence to show that the use occurred in the United States, that the use occurred on or prior to the relevant date, and possibly that the use was more than a mere token use. Another commenter stated that vagueness exists in what evidence would be required to be submitted for expungement and reexamination issues and any responses related thereto, and that the USPTO should adopt general guidelines, with specific language and examples of acceptable evidence that an attorney or petitioner can follow without any legal knowledge of the process.

Response: The USPTO agrees with the commenter that testimonial evidence typically should be supported by corroborating documentary evidence, as stated in section I.H above. Further, § 2.93(b)(7) requires that any evidence of use of the mark in commerce be ''consistent with the definition of 'use in commerce' set forth in section 45 of the Act and is not limited in form to that of specimens under § 2.56.'' Evidence of use must be accompanied by a verified statement setting forth factual information about the use of the mark in commerce and the supporting evidence, including how the evidence demonstrates use of the mark in commerce as of any relevant date for the goods and/or services at issue. *Id.* Therefore, the registrant will be required to verify, under penalty of perjury, the dates of use and that such use was bona fide use in the ordinary course of trade and not merely to reserve a right in the mark.

Regarding the request for general guidelines, examples of acceptable evidence, and specific responses that a registrant could submit in response to an Office action issued in an expungement or reexamination proceeding, this final rule notes that expected documentary evidence of use in most cases will take the form of specimens of use, and that when specimens are no longer available, the registrant may be permitted to provide additional evidence and explanations supported by declaration to explain how the mark was used in commerce at the relevant time. The evidence of use will differ in each case, and the USPTO cannot provide examples of what might demonstrate sufficient evidence of use during the relevant time period for the vast array of goods and/or services that may be challenged in these proceedings. In addition, under 37 CFR 11.18(b), any registrant or attorney who presents a paper to the USPTO is certifying, among other things, that the statements made therein of the party's own knowledge are true, or are believed to be true; the legal contentions are warranted by existing law; and any allegations are supported by evidence. Therefore, it is incumbent upon the registrant or its attorney to be knowledgeable about the requirements for registering its mark, including the requirement to use the mark in commerce and what constitutes such use.

Comment 12: One commenter requested that the USPTO consider adding a provision allowing a registrant to designate certain information or documents submitted with its response as confidential and that such designated information or documents be excluded from the publicly viewable file.

Response: The USPTO appreciates that, in rare circumstances, there may be a need for confidentiality with regard to proof of use in commerce for certain goods and/or services. If a registrant believes that responding to an Office action issued in connection with an expungement or reexamination proceeding would require the submission of confidential information in order to prove use in commerce of the mark, the registrant may submit a response to the Office action with the confidential information redacted. However, if the redacted response is not sufficient to establish the required use in commerce for the challenged goods and/or services, the registrant may be required to submit to the Office a non-redacted form of the confidential information. In such a case, the registrant may petition the Director under § 2.146, requesting that the registrant be permitted to submit the information outside of TEAS and that it not be made part of the public record.

Comment 13: One commenter stated that the NPRM appeared to contemplate that nonuse is established by a preponderance of the evidence merely by the failure of the registrant to show sufficient use. The commenter requested that the USPTO clarify whether the USPTO considers the registrant's failure to show sufficient use in rebuttal to the prima facie case that led to institution of an expungement and/or reexamination proceeding as necessarily requiring a conclusion that nonuse has been shown by a preponderance of

evidence of nonuse, and whether the reference to a preponderance of the evidence standard applies only to Director-initiated proceedings.

Response: The registrant must rebut a prima facie case of nonuse by providing competent evidence of use of the mark on the challenged goods and/or services. If the USPTO determines that the registrant's evidence is not sufficient to rebut the evidence of nonuse, *i.e.,* that the preponderance of evidence shows nonuse, the registration will be cancelled, in whole or in part, as appropriate. If the registrant in either a petition-based or Director-instituted proceeding elects to appeal the decision to cancel the relevant goods and/or services, the ultimate determination of whether the USPTO met its burden of establishing nonuse by a preponderance of the evidence would be made by the TTAB or subsequently by a court.

L. Excusable Nonuse

Comment 14: One commenter inquired whether the provision in § 2.93(b)(5)(ii) regarding excusable nonuse in an expungement proceeding as to particular goods and/or services with a sole basis under section 44(e) or section 66(a) of the Act rescind current excusable nonuse protection for marks registered under section 1. The commenter also stated that the difference in treatment between domestic versus foreign registrations appears to put domestic trademark owners at a disadvantage versus foreign counterparts.

Response: The USPTO assures the commenter that the provision regarding excusable nonuse as to particular goods and/or services in a registration with a sole basis under section 44(e) or section 66(a) applies only to goods and/or services challenged in an expungement proceeding. The provision in § 2.161 regarding a claim of excusable nonuse in connection with an affidavit or declaration of use under section 8 of the Act remains unchanged. Regarding the comment that domestic owners are at a disadvantage because they cannot claim excusable nonuse in an expungement proceeding, the U.S. Congress explicitly provided that treaty entitlement in the TMA only for foreign owners whose marks were registered via the Paris Convention and Madrid Protocol. Therefore, the USPTO cannot eliminate or expand that provision to section 1 registrants through rulemaking. In addition, unlike registrations with a sole basis under section 44(e) or section 66(a) that may register prior to use in commerce, registrations under section 1 issue based on a sworn statement and proof that the mark is in use in commerce on or in connection with the goods and/or services. In the context of an expungement proceeding, requiring a showing that the mark was never used, allowing for an allegation of excusable nonuse, would conflict with the use requirement under section 1 for issuance of the registration.

M. Duty To Monitor Status

Comment 15: One commenter stated that the requirement to monitor in § 2.23(d)(3) would require an ongoing responsibility to regularly monitor the registration that is too burdensome and suggested that regular monitoring be required not more often than once a year. Another commenter opined that the new monitoring provisions may be costly for all, and cost-prohibitive for individual applicants and small businesses, and inquired whether this obligation applies retroactively to all existing registrants.

Response: After consideration of the comments, the USPTO will not include the requirement in § 2.23(d)(3) that registrants monitor the status of their registrations at least every six months following the issue date of the registration. Although this requirement is not included in the final rule, registrants are still encouraged to monitor the status of their registrations using TSDR every six months from the date of issuance. It is in the registrant's best interests to ensure that it is aware of any challenges to its registration submitted to the USPTO and that it does not miss any deadlines in connection with such challenges.

The USPTO also notes that all registrants must maintain a valid email address for themselves to ensure they receive correspondence from the USPTO relating to their registrations. *See* 37 CFR 2.23(b). If a registrant neglects to update its own email address, or to notify the USPTO of an assignment of its registration to another party, the new owner will not receive notifications from the USPTO regarding the filing of a petition for expungement or reexamination, the institution of one or both of those proceedings or of a Director-instituted proceeding, or the issuance of an Office action in connection with such a proceeding. In these situations, the owner would lose valuable time to begin collecting evidence to support its showing of use in commerce of the challenged goods and/or services. Further, if the owner does not timely respond to an Office action, the registration may be cancelled in whole or in part based upon the failure to respond. If a registrant does not receive USPTO correspondence because it failed to maintain a valid email address as required by the USPTO rules, and its registration is cancelled, its failure to comply with § 2.23(b) normally will preclude the registrant from establishing an extraordinary circumstance to waive the timing provisions for a petition to reinstate a registration under § 2.146(d)(2)(iv). Therefore, registrants should ensure that USPTO assignment records are updated and that email addresses are up-to-date so that USPTO correspondence concerning the registration is sent to the proper address, including notification of reexamination or expungement proceedings filed in registrations.

N. 30-Day Letter—Expungement/ Reexamination Proceeding

Comment 16: Several commenters responded to the USPTO's request for comments regarding whether to grant 30 days, or to the end of the response period, whichever is longer, when a timely response to an expungement or reexamination Office action is substantially complete, but consideration of some matter or compliance with a requirement has been omitted. Four commenters agreed with the proposal to issue a 30-day letter, with one commenter requesting that the USPTO clarify what is meant by a ''substantially complete'' response. One commenter stated that such a provision is not necessary, given that § 2.93(c) provides for a final action with the option to request reconsideration if there are outstanding issues. Another commenter stated that deficiencies in a response to an initial Office action should be addressed through a final action, rather than an additional 30-day response period and that the USPTO should apply the additional 30-day response period to timely requests for reconsideration.

Response: During the examination of an application for registration, examining attorneys have discretion to grant an applicant 30 days, or to the end of the time period for response to the Office action, whichever is longer, to perfect a response if: (1) The response was timely filed, (2) the response was a bona fide attempt to advance examination, (3) the response was a substantially complete response to the Office action, and (4) consideration of some matter or compliance with some requirement was omitted. Generally, such 30-day letters are issued only after submission of a response to a final action, and the response is considered to be ''substantially complete'' because the missing part could put the application in condition for publication or registration. *See* 37 CFR 2.65(a)(2).

Consistent with existing examination procedures, the USPTO proposed a similar procedure in connection with responses to initial or final actions in expungement or reexamination proceedings, or requests for reconsideration in such proceedings, to further its stated goal of making these proceedings faster and more efficient than pre- or post-registration processes. For example, if a registrant submits a response to an initial expungement or reexamination Office action that establishes use of the mark in commerce (or excusable nonuse, when applicable), but fails to provide the URL and date accessed or printed for any web pages, or submits an improperly signed response, the USPTO may issue a 30-day letter requiring the missing information or a response that is properly signed pursuant to § 2.193. If the registrant supplies the required information within the 30-day period (or the time remaining in the initial response period), the USPTO can terminate the proceeding faster and more efficiently because it will not have to issue a final action giving the registrant another three months to respond. In addition, registrants who are able to establish use will benefit by having the proceeding terminated at an earlier date than might otherwise occur. For these reasons, this final rule provides discretion to grant a registrant 30 days, or to the end of the time period for response to the previous Office action, whichever is longer, to perfect a response. However, granting the registrant additional time in such circumstances does not extend the time for filing an appeal to the TTAB or a petition to the Director.

O. Timeline for Proceedings and Combined Proceedings

Comment 17: One commenter stated that the USPTO should require that the Director issue a decision on an expungement or reexamination petition within a certain amount of time and specify the consequences to the petitioner, registrant, and subject registration if a timely decision is not rendered. The commenter also stated that the USPTO should provide that a petitioner may assert both expungement and reexamination bases in a single petition under § 2.92(a) for a single filing fee.

Response: The USPTO intends to review a petition for expungement or reexamination and to determine whether to institute a proceeding in a timely manner after receipt of the petition. It is in the interest of the USPTO to remove unused registrations from the trademark register as expeditiously as possible. However, the TMA does not impose a deadline for deciding such petitions, and the USPTO does not know how many petitions will be submitted within, for example, the first six months after implementation of this rule. Therefore, it is not possible to predict the level of staffing and the amount of time that will be required to review and make determinations regarding such petitions. However, the USPTO assures the commenter, and all interested parties, that the goal of these proceedings is faster and more efficient cancellation of registrations for marks not used with goods and/or services listed therein. As such, the USPTO's goal is to issue these decisions promptly.

As to allowing a petitioner to assert both expungement and reexamination grounds in a single petition, the USPTO does not believe that doing so would be an efficient way to implement these proceedings. The evidence required for each ground will differ based on the relevant time period, and combining them would complicate the review of evidence to determine what applies to which ground, and would not be the most efficient use of USPTO resources.

P. Post Registration Audit

Comment 18: The USPTO received several responses regarding its request for comments on whether a registration should be pre-selected for audit during any concurrent or subsequent review of a post-registration maintenance filing when a registrant fails to respond in an expungement or reexamination proceeding, leading to cancellation of some of the goods and/or services in the registration. Eleven commenters stated that a registration should not automatically be selected for audit in such circumstances. One of those commenters suggested that the USPTO wait until it can evaluate how many registrations would be impacted by such a procedure, and another commenter proposed specific criteria for selecting a registration for audit after failure to respond in an expungement or reexamination procedure. Some of the commenters also noted that the audit procedure is intended to be random; that selecting a registration for audit in this situation appears to be punitive; and that failure to respond, resulting in deletion of some goods and/or services, does not lead to a presumption that the remaining goods and/or services are not in use. Four commenters were in favor of selecting a registration for audit if a registrant's failure to respond leads to cancellation of some goods and/or services. One of those commenters also suggested that the Director evaluate whether there is sufficient evidence to institute an expanded proceeding against the entire registration.

Response: To promote the accuracy and integrity of the trademark register and preserve the register as a reliable reflection of marks in use in commerce, the USPTO conducts audits of section 8 and section 71 affidavits or declarations in which the mark is registered for more than one good or service per class. TMEP sections 1604.22, 1613.22. After careful consideration of the comments, the USPTO will not at this time automatically select a registration for audit because a registrant failed to respond to an expungement or reexamination Office action and its registration is cancelled in part. However, cancellation in part as a result of an expungement or reexamination proceeding, either for failure to respond to an Office action or failure to rebut a prima facie case of nonuse, does not shield a registration from being selected for audit under the current procedures after submission of a post-registration maintenance filing. Thus, a registration that still includes at least one class with four or more goods or services, or at least two classes with two or more goods or services, could be subject to audit following submission of a section 8 or section 71 affidavit or declaration. Regarding the suggestion of particular criteria for selecting a registration for audit, specifically, that registrations be selected for audit based upon the number of items in the original registration, the number of items in the expungement proceeding, and whether the registrant deletes items from the registration at or before the submission of a section 8 declaration, the USPTO declines to adopt a second set of criteria that would unnecessarily complicate the procedures for selecting registrations for audit.

Q. Estoppel

Comment 19: One commenter requested that the rule expressly state that the Director will have the burden of ensuring an expungement or reexamination proceeding is not initiated if estoppel applies. Another commenter: (1) Sought clarification as to whether the USPTO will automatically review petitions and registration records to determine whether estoppel should apply or whether the burden will be on the registrant to show it should apply; (2) suggested permitting registrants to petition the Director to prove that additional goods and/or services may be considered the ''same'' goods and/or services for purposes of estoppel where they are highly similar to previously challenged goods/services, but not

identical; (3) proposed adding a mechanism by which a registrant subject to an expungement proceeding can also show use as to the same goods/services at issue on or before the relevant date for a reexamination proceeding, so that future reexamination proceedings may also be estopped; and (4) requested clarification concerning the extent to which, or whether, termination of an expungement or reexamination proceeding in favor of the registrant may bar future nonuse cancellation actions with respect to the registration.

Response: Regarding the request that the rule expressly state that it is the Director's burden to ensure that an expungement or reexamination proceeding is not initiated if estoppel applies, the USPTO believes that such an express provision is not necessary. The TMA and § 2.92(d)(1) specifically prohibit institution of a later expungement proceeding as to goods and/or services when it has been established that a registered mark was used in commerce on or in connection with those goods and/or services at issue in a prior expungement proceeding. Section 2.92(d)(2) specifically prohibits institution of a later reexamination proceeding as to goods and/or services when it has been established that a registered mark was used in commerce on or in connection with any of those goods and/or services at issue in a prior reexamination proceeding. Because of these prohibitions, when the USPTO receives a petition to institute an expungement or reexamination proceeding, the USPTO examiner must review the entire record to determine whether there was a prior proceeding. If estoppel applies, no new proceeding will be instituted. However, the fee for the petition requesting expungement or reexamination will not be refunded in such circumstances. Therefore, it would be prudent for petitioners to ensure that estoppel does not apply to the goods and/or services identified in the petition prior to submitting a petition for expungement or reexamination.

Regarding the suggestion that registrants be permitted to petition the Director to prove that additional goods/services may be considered the ''same'' goods and/or services for purposes of estoppel where they are highly similar to previously challenged goods and/or services, but not identical, as noted above, the wording ''same goods and/or services'' refers to identical goods and/or services that are the subject of the pending proceeding or the prior determination. The registrant's burden in expungement and reexamination proceedings is to demonstrate use of its mark in commerce on the challenged goods and/or services. Although certain goods may be related, demonstrating acceptable use on one of the challenged goods listed in an identification does not establish use on other listed related goods. Further, the TMA and § 2.92(d)(1) and (2) specifically provide that no further expungement or reexamination proceedings may be instituted only as to those ''particular'' goods and/or services that were previously challenged and determined to be in use in commerce. Therefore, the wording ''particular'' cannot be read to include similar goods and/or services.

The commenter also requested that the USPTO add a mechanism by which a registrant subjected to an expungement proceeding can also show use as to the same goods and/or services at issue on or before the relevant date for a reexamination proceeding, so that future reexamination proceedings may also be estopped. A registrant in an expungement proceeding can include specific dates of use for each challenged good and/or service when it provides proof of use in commerce as to each. If a petition for reexamination of the same goods and/or services was submitted after the registrant prevailed in the expungement proceeding, the USPTO examiner would review the entire registration record, which would include any dates of use established in the prior proceeding, in order to determine whether institution of a reexamination proceeding would be appropriate.

Regarding the question about the extent to which, or whether, termination of an expungement or reexamination proceeding in favor of the registrant may bar future nonuse cancellation actions before the TTAB with respect to the registration, the USPTO clarifies here that termination of an expungement or reexamination proceeding in favor of the registrant does not bar future nonuse cancellation actions under § 2.111 with respect to the registration.

R. Flexible Response Periods

Comment 20: The USPTO received a significant number of comments on the proposal to implement flexible periods for responding to Office actions in the examination of applications and post-registration submissions. Some commenters favored the primary proposal to implement a three-month response period with an optional three-month extension, or some variation thereof. These commenters noted that this option would be administratively simpler to implement compared to the proposed alternatives and that the three-month response period would be adequate in most cases to provide a sufficient response. Other commenters opposed any reduction to the current six-month response deadline and urged the USPTO to retain the current response deadline framework. These commenters cited concerns that three months may be an insufficient amount of time to properly respond to some Office actions, especially if foreign applicants or substantive refusals are involved; that the change in deadlines creates an administrative burden on stakeholders, particularly with regard to updating and managing case docketing systems; and that a system involving extensions could increase costs for applicants.

Of the comments that opposed changing the current deadline framework, most indicated that if one of the three flexible response deadline options were to be implemented, the primary proposal of a three-month response period with a single optional three-month extension would be preferred.

Overall, the comments reflected little support for the two alternative flexible response proposals, namely, the two-phase examination option and the ''patent model'' option involving progressively higher extension fees for each successive monthly extension after two months. Comments about these proposals noted that they would be more burdensome and complicated than the primary proposal, and that they do not appear to support the USPTO's objectives in implementing flexible response periods.

Of those comments voicing an opinion on extensions of time to respond to an Office action, most expressed a preference for a single three-month extension. Regarding the proposed $125 fee (if filed through TEAS) for these extensions, some comments were in favor, while others opposed charging a fee or suggested that the fee be reduced.

One commenter supported the USPTO's proposal to implement flexible response periods only for applications based on section 1 or section 44 of the Act, while retaining the six-month deadline for applications based on section 66(a) of the Act, but others were concerned that such an implementation would disadvantage section 1 and section 44 applicants. To address this, a couple of commenters suggested that section 66(a) applicants should not be required to proactively seek extension requests, but should be required to pay the same fees based on the timing of the response.

Another commenter noted that the NPRM suggests that only applications with more complex issues would be permitted to obtain the optional extension and requested clarification on this point.

Finally, a number of commenters agreed that the USPTO should delay the implementation of flexible response periods until June 2022 or beyond, to enable the USPTO to gather additional stakeholder feedback.

Response: The USPTO appreciates the comments regarding flexible response periods and understands the concerns some of these expressed about the potential effects of reducing the current six-month deadline for responses to Office actions. However, based on a review of all the comments, the USPTO has determined that a three-month response deadline with a single optional three-month extension for a fee of $125 (if filed through TEAS) is the best option to promote efficiency in examination by shortening the overall prosecution timeline for applications and facilitating faster disposal of applications that may delay the disposition of later-filed applications. As some commenters noted, three months should be sufficient time to review an Office action and submit a response in many, if not most, cases, especially those with issues that are relatively easy to address. The USPTO's historical data on response times support this conclusion. For those applicants who need more time to respond, a full six months will still be available by requesting the three-month extension.

While the USPTO acknowledges the concerns some commenters expressed about imposing a $125 fee (if filed through TEAS) for the extension, and has considered them carefully, the USPTO believes that charging no fee or a nominal fee would undercut the USPTO's objective of encouraging applicants to respond sooner. If an extension were available at a low cost, or at no cost, many applicants and their attorneys would have no incentive to respond within the three-month period. The fee for an extension under this rule is set at a level to address this reality and is the same amount as the analogous fee for requesting an extension of time for filing a statement of use through TEAS.

Regarding the comments about retaining the six-month deadline for section 66(a) applications, while implementing flexible response deadlines for section 1 and section 44 applications, the USPTO has determined that this difference in implementation is appropriate, based on data showing that, in contrast with section 1 and section 44 applicants, only 11% of section 66(a) applicants filed a response to a non-final Office action with multiple grounds within three months, while 62% of Madrid applicants took six months to file a response. In short, as noted in the NPRM, the additional processing required for these applications, both at the USPTO and the IB, per article 5(2) of the Madrid Protocol, justifies maintaining the current six-month deadline.

As to the comment requesting clarification of the NPRM's statement that optional extensions would provide sufficient time for responses to Office actions with more complex issues, this statement was not intended to suggest that only Office actions with certain refusals or requirements would be eligible for an extension. Rather, the statement was intended to indicate that the extension option is available if the applicant or its attorney felt there were complex issues in an Office action that required more time to respond. To be clear, under this rule, an extension can be requested regardless of the type or level of complexity of the issues raised in the Office action.

Finally, the USPTO recognizes that changes to the deadline for responding to Office actions would require stakeholders to change their processes for reviewing, docketing, and submitting responses. Likewise, the USPTO must perform a significant amount of work and planning to adjust its IT systems and processes to accommodate new deadlines. Therefore, to allow sufficient time for this planning and work to be carried out by both the USPTO and its stakeholders, the USPTO has determined that the implementation of the rules regarding flexible deadlines for Office actions issued in connection with pending applications or post-registration maintenance documents should be delayed beyond the initially proposed effective date of June 27, 2022, to a new effective date of December 1, 2022.

S. Letters of Protest

Comment 21: The USPTO received a few comments on the proposed amendment to § 2.149 to add provisions from the TMA relating to the USPTO's letter-of-protest procedures. While the comments generally supported the proposed amendment, a couple of commenters expressed concerns about the TMA's provision that, within two months of submission of a letter of protest, the USPTO must determine whether the evidence submitted in the letter of protest should be included in the relevant application record. One commenter suggested that § 2.149 should specify a shorter time period for making that determination, because the two-month time period could lead to examining attorneys acting on applications before receiving relevant letter-of-protest evidence. Another commenter recommended that the USPTO should identify the consequences for the USPTO failing to meet the two-month requirement, specifically whether the letter-of-protest evidence will be entered into the record if the requirement is not met.

Response: The USPTO understands the desire to ensure timely forwarding of relevant letter-of-protest evidence to examining attorneys, which is, in fact, the objective of the TMA's two-month requirement. *See* H.R. Rep. No. 116–645, at 12 (2020). Any failure of the USPTO to meet the two-month requirement is subject to oversight by the U.S. Congress. The USPTO will dedicate appropriate resources to meet the requirement, taking into account letter-of-protest filing levels and examination pendency timelines.

The USPTO does not believe a shorter time frame for determining whether the evidence submitted in the letter of protest should be included in the relevant application record is necessary or administratively feasible, given the recent increases in application filings and the number of letters of protest the USPTO has historically received, particularly over the last year. Section 2.149 and the USPTO's current procedures allow for letter-of-protest evidence to be forwarded and considered even after an application is approved for publication, under appropriate circumstances. Thus, the fact that an examining attorney has already acted on an application does not necessarily preclude the examining attorney's consideration of relevant evidence included in a timely, properly filed letter of protest.

Regarding the comment suggesting that the USPTO specify the consequences for failing to meet the two-month requirement, the USPTO notes that the TMA imposes the two-month deadline on the USPTO, and the statute does not itself specify any consequences for failing to meet the requirement. *See* H.R. Rep. No. 116–645, at 12 (2020). In view of this and the USPTO's general obligation to meet the statutory mandate, the USPTO has determined that it is not necessary for § 2.149 to specify consequences for the USPTO for failing to meet the deadline. Nor would it be appropriate for the rule to establish any consequences affecting letter-of-protest filers, who have no

control over whether the USPTO meets the deadline. If a timely and properly filed letter of protest contains relevant evidence that should be included in the application record of a pending application, but the USPTO fails to make that determination within the required two months, the USPTO may still forward the evidence to the examining attorney for consideration, if possible under the circumstances.

T. Suspension of Proceedings

Comment 22: The USPTO received two comments regarding including expungement and reexamination proceedings among the types of proceedings for which suspension of action by the Office or the TTAB is authorized. One commenter supported suspension while expungement or reexamination proceedings are pending. The other commenter disagreed that inter partes proceedings should be suspended during the pendency of ex parte proceedings under any circumstances. The commenter stated further that unless ex parte proceedings are stayed while inter partes proceedings are pending, the ex parte proceedings will have the unintended consequence of undermining inter partes proceedings, because faster resolution of an ex parte proceeding resulting in cancellation of a registration potentially moots or impacts the more robust proceedings in inter partes forums and that the proposed rules depart from the Office's longstanding practice of staying the more jurisdictionally limited forum. Finally, the commenter proposed amending § 2.67 to provide for suspension when ''ownership'' was an issue in another pending proceeding.

Response: The USPTO appreciates the comment in support of the revision to §§ 2.67 and 2.117. Regarding the concerns of the other commenter, the USPTO notes that suspension of a Board proceeding pending the final determination of another proceeding is solely within the discretion of the Board. If a cancellation proceeding pending before the TTAB includes nonuse as basis for cancellation, and there is an expungement or reexamination proceeding involving some or all of the goods and/or services in the cancellation proceeding, the outcome of the expungement or reexamination proceeding may have a bearing on the Board proceeding. The expungement or reexamination may result in the cancellation of the registration at issue in the Board proceeding. Therefore, the TTAB may exercise its discretion to suspend. As the commenter noted, ex parte proceedings generally are less costly and time-consuming, and thus an ex parte proceeding may resolve a nonuse issue more efficiently. Suspending Board proceedings in favor of expungement and reexamination proceedings is consistent with the TMA's objective to provide a faster and more efficient alternative to address claims of lack of proper use.

The commenter expresses concern about suspending ''more robust proceedings'' at the TTAB in favor of ex parte proceedings. While the commenter refers to inter partes Board proceedings having larger evidentiary records and more thorough fact-finding, these characteristics primarily result from the broader scope of claims and issues addressed in inter partes Board proceedings, which range well beyond nonuse. The ex parte reexamination and expungement proceedings will address a more limited inquiry regarding lack of proper use of a registered mark, and within that context the proceedings are designed to provide the registrant a sufficiently robust, full and fair opportunity to be heard.

While the commenter characterized suspension of Board proceedings in favor of expungement or reexamination proceedings as a change in practice, the USPTO disagrees. As set forth in section 510.02(b) of the Trademark Trial and Appeal Board Manual of Procedure, the longstanding practice of the Board has been that ''[u]nless there are unusual circumstances, the Board will suspend proceedings in the case before it if the final determination of the other proceeding may have a bearing on the issues before the Board.'' Pursuant to this practice, the Board has suspended its proceedings in favor of many types of other proceedings, including arbitration proceedings, state court cases, and foreign actions. *Id.* The USPTO considers suspending Board proceedings in favor of expungement and reexamination proceedings under the same conditions to be a continuation of longstanding TTAB practice rather than a departure from it.

With regard to the addition of ''ownership'' as a reason to suspend, the wording as proposed is broad enough to include the issue of ownership and there is no need to list separately that specific issue pertaining to the initial or continued registrability of a mark.

U. Attorney Recognition

Comment 23: The USPTO received a significant number of comments regarding attorney recognition and withdrawal. The comments regarding the proposed amendments to § 2.17(g), providing for ongoing attorney recognition, were mixed. Several commenters supported ongoing recognition, while others preferred the USPTO continue to cease recognition under specified circumstances. One commenter noted that the existing rule was a ''familiar and practical approach'' to representation, while another noted that the change ''would simplify how an attorney can be removed from recognition.'' Some commenters expressed concern about how the transition from the current rules to the new rules would be implemented. Other commenters sought additional information regarding the specifics on the implementation of the role-based access control system intended to improve USPTO database security and integrity, which was referenced in the NPRM. One comment suggested that any rule change to implement such a system would be premature until the plans for the system could be discussed in detail.

Commenters also raised questions about the obligations imposed by the requirements for withdrawal under § 2.19, citing issues pertaining to attorney discharge and change of ownership.

Response: After carefully considering all of the comments, the USPTO has decided not to implement any of the NPRM's proposed changes to the rules governing attorney recognition and withdrawal at this time, except for § 2.17(b)(4), which provides that a false, fraudulent, or mistaken attorney designation will be considered ineffective; § 2.18(a)(1), which replaces ''representation'' with ''recognition''; § 2.18(a)(2), which indicates that, with respect to notices of institution of expungement and reexamination proceedings and ineffective attorney designations under § 2.17(b)(4), the Office may correspond directly with the applicant, registrant, or party to a proceeding; and § 2.19(d), which indicates that an attorney need not formally withdraw when recognition is not effective under § 2.17(b)(4).

While the USPTO may make changes to the attorney recognition and withdrawal rules in a future rulemaking, it has determined that additional work, planning, and stakeholder communications should be carried out before any such changes are made.

V. Court Orders Concerning Registrations

Comment 24: One commenter expressed concerns about proposed § 2.177, regarding action on court orders canceling or affecting a registration under section 37 of the Act, 15 U.S.C. 1119. Specifically, the commenter

requested that proposed § 2.177 be revised to remove the requirement that a party obtain and submit the certified copy of the court order to the USPTO, noting that the requirement adds an unnecessary burden on litigant parties. In addition, the commenter found the proposed rule's reference to ''a party'' to be vague because it does not identify which party to the litigation is responsible for submitting the court order, nor does it specify a penalty for failing to submit the order.

Response: The intent of § 2.177 is to codify the USPTO's longstanding procedures concerning action on court orders cancelling or affecting a registration under section 37, 15 U.S.C. 1119, that are currently set forth in TMEP section 1610. These procedures enable parties to litigation to properly notify the USPTO of a court order so that the USPTO may take appropriate action. Thus, § 2.177 imposes the obligation to file a certified court order only on those parties who wish for the USPTO to take action on the order. To address the concerns about possible ambiguity resulting from the wording ''a party,'' the text of § 2.177 has been amended to clarify that if a party wishes that the USPTO take action on a court order, that party must submit a certified copy of the order.

W. Paperwork Reduction Act—Respondent Burden Hours

Comment 25: One commenter expressed concerns about the USPTO's estimated burden hours for preparing petitions for expungement and/or reexamination and responses to Office actions issued in connection with such petitions. The commenter noted that accurate estimates are necessary for realistic assessments of the regulatory burden of complying with the rules and weighing the costs with the benefits of the rules. The commenter opined that it may generally take, on average, at least 12 hours or more, rather than the 1–1.5 hours posited by the USPTO.

Response: The USPTO appreciates the feedback regarding burden estimates. As these are new proceedings, it is difficult to predict the average amount of time that will be required to research, collect, and compile the evidence required for an expungement and/or reexamination petition or response to an Office action regarding such petition. However, upon consideration of the commenter's concerns, the USPTO agrees that its original estimate did not sufficiently account for the time burden to submit these petitions and responses. Therefore, the USPTO has adjusted the time burdens to 4.5 hours for petitions for expungement and/or reexamination and 4 hours for responses to Office actions issued in connection with such petitions. The USPTO does not believe more time is warranted because the scope of both the petitions and Office actions in expungement and reexamination proceedings is limited to a single substantive issue—the mark's use in commerce for particular goods and/or services. However, the USPTO will continue to consider public feedback regarding the burden estimates for these items and will raise the burden estimates as needed.

Changes From the NPRM

Based on the comments and responses above, the USPTO has made the following changes to the proposals in the NPRM. Section 2.6(a) is revised to include a request for extension of time for filing a response to a non-final Office action under § 2.93(b)(1) via TEAS, with a fee of $125.00. The proposed revisions to § 2.17(g) are not implemented in this rule. Section 2.18(a)(1) is revised to refer to ''recognition'' instead of ''representation.'' The proposed revisions regarding § 2.19(b) and (c) are not implemented in this rule. However, proposed § 2.19(d) is added as § 2.19(c). Section 2.93(b)(1) is revised to change the deadline for response from two months to three months and to provide for a one-month extension of time to respond to a non-final Office action, and § 2.93(c)(1) is revised to change the deadline for filing a response to a final Office action to three months.

Discussion of Rule Changes

The USPTO adds § 2.6(a)(26) to establish a fee of $400, per class, for filing a petition for expungement or reexamination under § 2.91. The USPTO adds § 2.6(a)(27) to establish a fee of $125 for filing through TEAS a request for an extension of time for filing a response to a non-final Office action under § 2.93(b)(1). The USPTO adds § 2.6(a)(28)(i) to establish a fee of $225 for filing on paper a request for an extension of time for filing a response to an Office action under § 2.62(a)(2), § 2.163(c), § 2.165(c), § 2.176, § 2.184(b)(2), or § 2.186(c), and § 2.6(a)(28)(ii) to establish a fee of $125 for filing through TEAS a request for an extension of time for filing a response to an Office action under § 2.62(a)(2), § 2.163(c), § 2.165(c), § 2.176, § 2.184(b)(2), or § 2.186(c).

The USPTO amends § 2.11(d) to add cross-references to §§ 2.93, 2.163, and 7.39, and amends § 2.11(f) to add a cross-reference to § 2.93(c)(1).

The USPTO adds § 2.17(b)(4) to specify that when a practitioner has been falsely, fraudulently, or mistakenly designated as a representative for an applicant, registrant, or party to a proceeding without the practitioner's prior authorization or knowledge, recognition of that practitioner shall be ineffective.

The USPTO amends § 2.18 to revise paragraphs (a)(1) and (2) to clarify the circumstances under which the Office will communicate directly with an applicant, registrant, or party to a proceeding.

The USPTO amends § 2.19 to add paragraph (c) to indicate that an attorney need not formally withdraw when recognition is not effective under § 2.17(b)(4).

The USPTO amends § 2.23 to revise paragraph (c) to clarify that certain submissions are not subject to the exemption allowing paper filing and to add paragraph (d)(3) to address the duty to monitor the status of a registration once an expungement or reexamination proceeding has been instituted.

The USPTO amends § 2.61 to remove paragraph (c).

The USPTO amends § 2.62 to revise paragraph (a) to provide for flexible response periods and extensions of time to respond and paragraph (c) to include a reference to requests for extensions of time to respond.

The USPTO amends § 2.63 to revise paragraph (b) to include a request for an extension of time to respond or appeal under § 2.62(a)(2) as a response option, and makes other minor stylistic changes; revises paragraph (c) to include a reference to requests for extensions of time to respond or appeal under § 2.62(a)(2), and makes other minor stylistic changes; and revises paragraph (d) to remove the wording ''six-month.''

The USPTO amends § 2.65 to revise paragraph (a) to replace ''six months from the date of issuance'' with ''the relevant time period for response under § 2.62(a)(1), including any granted extension of time to respond under § 2.62(a)(2).''

The USPTO amends § 2.66 to revise paragraph (b)(1) to replace the citation to § 2.6 with a citation to § 2.6(a)(15); revises paragraph (b)(3) by removing a portion of the current paragraph to add new paragraph (b)(5); and adds paragraph (b)(4) to include a provision for Office actions with a three-month response period.

The USPTO amends § 2.67 to codify the existing practice regarding suspension of proceedings before the USPTO and the TTAB.

The USPTO revises the undesignated center heading appearing before § 2.91 from ''CONCURRENT USE PROCEEDINGS'' to ''EX PARTE

EXPUNGEMENT AND REEXAMINATION.''

The USPTO adds § 2.91 to set forth the procedures for petitions for expungement or reexamination.

The USPTO adds § 2.92 to set forth the procedures for instituting ex parte expungement and reexamination proceedings.

The USPTO adds § 2.93 to set forth the procedures for conducting expungement and reexamination proceedings.

The USPTO adds § 2.94 to set forth the procedures for action after expungement or reexamination.

The USPTO adds the undesignated center heading ''CONCURRENT USE PROCEEDINGS'' before existing § 2.99.

The USPTO revises the undesignated center heading appearing before § 2.111 from ''CANCELLATION'' to ''CANCELLATION PROCEEDINGS BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD'' to differentiate cancellation proceedings before the TTAB from ex parte expungement and reexamination proceedings.

The USPTO amends § 2.111(b) to specify the time for filing a petition for cancellation with the TTAB on the ground specified in section 14(6) of the Act and to distinguish it from the timing of other nonuse claims.

The USPTO amends § 2.117(a) to include a reference to an expungement or reexamination proceeding instituted under § 2.92, to eliminate the limitation to other proceedings in which a party or parties are engaged, and to indicate that a civil action or proceeding is not considered to have been terminated until an order or ruling that ends litigation has been rendered and noticed and the time for any further review has expired with no further review sought.

The USPTO amends § 2.141 to revise the heading to ''Ex parte appeals''; adds the title ''Appeal from final refusal of application'' to paragraph (a) and replaces the six-month deadline with a reference to § 2.142(a)(1); adds a new paragraph (b) regarding expungement and reexamination appeals with the title ''Appeal from expungement or reexamination proceeding''; and renumbers current paragraph (b) as paragraph (c) and clarifies that (1) if the applicant or registrant does not pay the appeal fee for at least one class of goods or services before expiration of the time for appeal, the application will be abandoned or the proceeding will be terminated and (2) if the applicant or registrant does not submit the required fee or specify the class(es) being appealed from either a final refusal of an application or from an expungement or reexamination proceeding within the set time period, the TTAB will apply the fee(s) to the class(es) in ascending order, beginning with the lowest-numbered class.

The USPTO amends § 2.142 to revise paragraph (a) to replace the six-month deadline with a reference to the deadline for appeal from the final refusal of an application in paragraph (a)(1) and the deadline for appeal from an expungement or reexamination proceeding in paragraph (a)(2); adds wording in current paragraph (a) to new paragraph (a)(3); revises paragraph (b)(3) to include a reference to proceedings involving registrations; and revises paragraph (d) for clarity and adds paragraphs (d)(1) and (2) to address appeals from a refusal to register and appeals from an expungement or reexamination proceeding, respectively.

The USPTO amends § 2.145 to revise paragraph (a)(1) to include a reference to ex parte expungement or reexamination proceedings, to delete the heading from paragraph (a)(3) and add introductory text, and to revise paragraph (c)(1) to add an exception for ex parte expungement or reexamination proceedings.

The USPTO amends § 2.146 to include expungement and reexamination in paragraph (b); revises paragraph (c) to indicate that a petition requesting reinstatement of a registration cancelled in whole or in part for failure to timely respond to an Office action issued in an expungement and/or reexamination proceeding must include a response to the Office action, signed in accordance with § 2.193; and adds paragraph (d)(2)(iv) to specify the filing deadline for a petition in connection with an expungement or reexamination proceeding.

The USPTO amends § 2.149 to revise paragraph (a) to replace the word ''entry'' with ''inclusion'' and amends paragraph (i) for clarity and to replace the words ''not petitionable'' with ''final and non-reviewable, and a determination to include or not include evidence in the application record shall not prejudice any party's right to raise any issue and rely on any evidence in any other proceeding.''

The USPTO amends § 2.163 to revise paragraph (b) to specify a response deadline of three months; revise paragraph (c) to provide for extensions of time to respond; add paragraph (d) to address substantially complete responses; and add paragraph (e) to set forth the wording formerly in paragraph (c) with conforming revisions.

The USPTO amends § 2.165 to revise paragraph (a) to revise the internal citation to § 2.163(b)–(c); revise paragraph (b) to include a citation to the response deadlines in § 2.163(b)–(c); add new paragraph (c) to specify that a registration will be cancelled if a petition is not timely filed; and renumber previous paragraph (c) as paragraph (d).

The USPTO amends § 2.176 to revise the title to ''Consideration of above matters in §§ 2.171 through 2.175'' and to specify a response deadline of three months and to provide for an extension of time to respond.

The USPTO adds the undesignated center heading ''COURT ORDERS UNDER SECTION 37'' before § 2.177.

The USPTO adds § 2.177 to address procedures concerning action on court orders cancelling or affecting a registration under section 37 of the Act.

The USPTO amends § 2.184 to revise paragraph (b)(1) to specify a response deadline of three months; revise paragraph (b)(2) to provide for extensions of time to respond; add paragraph (b)(3) to address substantially complete responses; add paragraph (b)(4) to set forth wording formerly in paragraph (b)(1); and add paragraph (b)(5) to set forth wording formerly in paragraph (b)(2).

The USPTO amends § 2.186 to revise paragraph (b) to include a citation to the response deadlines in § 2.184(b); add new paragraph (c) to specify that a registration will expire if a petition is not timely filed; and renumber previous paragraph (c) as paragraph (d).

The USPTO amends § 2.193(e)(5) to include a reference to petitions for expungement or reexamination.

The USPTO amends § 7.6 to add paragraph (a)(9)(i) to establish a fee of $225 for a request for an extension of time for filing a response to an Office action under § 7.39(b) or § 7.40(c) on paper and to add paragraph (a)(9)(ii) to establish a fee of $125 for a request for an extension of time for filing a response to an Office action under § 7.39(b) or § 7.40(c) via TEAS.

The USPTO amends § 7.39 to revise paragraph (a) to specify a response deadline of three months; revise paragraph (b) to provide for extensions of time to respond; revise paragraph (c) to address substantially complete responses; revise paragraph (d) to set forth wording formerly in paragraph (b); add paragraph (e) to set forth wording formerly in paragraph (c); and add paragraph (f) to set forth wording formerly in paragraph (d).

The USPTO amends § 7.40 to revise paragraph (a) to revise the internal citation to § 7.39(a)–(c); revise paragraph (b) to include a citation to the response deadlines in § 7.39(a)–(c); add new paragraph (c) to specify that a registration will be cancelled if a

petition is not timely filed; and renumber previous paragraph (c) as paragraph (d).

Rulemaking Requirements

A. Administrative Procedure Act: The changes in this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. See *Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals are procedural where they do not change the substantive standard for reviewing claims); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive).

Accordingly, prior notice and opportunity for public comment for this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A))). However, the USPTO chose to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act: The USPTO publishes this Final Regulatory Flexibility Analysis (FRFA), as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), to examine the impact of the Office's changes to trademark fees on small entities. Under the RFA, whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish an NPRM, the agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA), unless the agency certifies under 5 U.S.C. 605(b) that the rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605. The USPTO published an IRFA, along with the NPRM, on May 18, 2021 (86 FR 26862). The USPTO received no comments from the public directly applicable to the IRFA, as stated below in Item 2.

Items 1–6 below discuss the six criteria specified in 5 U.S.C. 604(a)(1)–(6) to be addressed in a FRFA. Item 6 discusses alternatives considered by the Office.

1. Succinct statement of the need for, and objectives of, the rule:

The USPTO amends the rules of practice in trademark cases to implement provisions of the (TMA), Public Law 116–260, Div. Q, Tit. II, Subtit. B, section 228 (Dec. 27, 2020). The TMA sets a deadline of December 27, 2021, for the USPTO to promulgate rules governing letter-of-protest procedures and implementing ex parte expungement and reexamination proceedings for cancellation of a registration when the required use in commerce of the registered mark has not been made. In addition, the TMA authorizes the USPTO to promulgate rules to provide for flexible Office action response periods. The USPTO also sets fees for petitions requesting the institution of ex parte expungement and reexamination proceedings and for requests to extend Office action response deadlines, as required or authorized by the TMA, and to amend the rules concerning the suspension of USPTO proceedings and the rules governing attorney recognition in trademark matters.

As required or authorized by the TMA, the objective of the rule is to implement the provisions of the TMA by: (1) Establishing ex parte expungement and reexamination proceedings for cancellation of a registration when the required use in commerce of the registered mark has not been made, to ensure an accurate trademark register that supports and promotes commerce; (2) amending the rules governing the USPTO's letter-of-protest procedures, which allow third parties to submit evidence to the USPTO regarding a trademark's registrability during the initial examination of the trademark application, to provide that the decision whether to include such evidence in the application record is final and non-reviewable and that such a determination shall not prejudice any party's right to raise any issue and rely on any evidence in any other proceeding; and (3) implementing flexible response periods, along with optional extensions of time, to promote efficiency in examination by shortening the prosecution timeline for applications with issues that are relatively simple to address, while providing sufficient time for response to Office actions with more complex issues. In addition, this rule also formalizes existing practice regarding the suspension of proceedings before the Office and the TTAB; specifies when recognition of a practitioner shall be ineffective; and adds a new rule to address procedures regarding court orders cancelling or affecting registrations. Finally, the rule establishes fees for the ex parte expungement and reexamination proceedings and for extensions of time to respond to an Office action.

2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments:

The USPTO did not receive any public comments in response to the IRFA. However, the Office received comments about particular fees, and their impact on small entities, that are further discussed in the preamble.

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments:

The USPTO did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

4. Description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available:

The USPTO does not collect or maintain statistics in trademark cases on small- versus large-entity applicants, and this information would be required in order to determine the number of small entities that would be affected by the rule. The rule would apply to all persons who are filing a response to an Office action, are represented by an attorney, are seeking to submit a petition requesting institution of an expungement or reexamination proceeding, or are providing a response in such a proceeding. However, as noted above, based on information already collected, many of the applications and registrations in which nonuse may be an issue are owned by individuals or small-volume filers. Therefore, the USPTO anticipates that a significant portion of the expungement and reexamination proceedings instituted will be brought against registrants who are considered small enterprises. If so, this fact alone would not indicate that the process was unfairly impacting this group. However, the USPTO will carefully review the data to be collected for the above-referenced report, along with the data to be collected by the STF, which should provide additional insight to allow the USPTO to assess the impact of these

proceedings on registrants and make adjustments if necessary.

The rule includes provisions for flexible response periods to respond to Office actions. Under this rule, all filers would have an option to file a no-cost response if they do so within three months of the Office action's issue date. The changes would benefit all trademark owners by encouraging faster prosecution of applications and review of post-registration maintenance documents, and the USPTO believes this three-month response period is reasonable for all applicants and registrants, including small entities, given the efficiencies of current practices utilizing electronic filing and email notification of all documents.

In addition, the provisions governing the ex parte expungement and reexamination proceedings created under the TMA will benefit all parties, including small entities, by helping to ensure the accuracy of the USPTO's trademark register by cancelling registrations, in whole or in part, for which the required use of the registered mark in commerce has not been made. Moreover, these proceedings will provide a more efficient and less costly alternative to contested inter partes proceedings before the TTAB or civil litigation in the courts. This should decrease or eliminate the potential costs that otherwise would have been incurred to litigate in proceedings to cancel a registration or resolve a dispute over a mark, or to change business plans to avoid the use of a chosen mark when the required use has not been made.

5. Description of the reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record:

The final rule will require the creation of new online forms to submit a request to institute an expungement or reexamination proceeding, to respond to Office actions issued during such proceedings, and to request extensions of time to respond to Office actions, as further described in the preamble of this proposed rule.

The USPTO does not anticipate the rule to have a disproportionate impact upon any particular class of small or large entities. Any entity that has a pending trademark application or a registered trademark could potentially be impacted by this rule.

The professional skills necessary for completion of the online forms are not more burdensome than the skills necessary for completion of current USPTO reporting requirements and would not be disproportionately burdensome for small entities.

6. Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected:

The TMA mandates the framework for many of the procedures in this rulemaking, particularly with respect to changes to the letter-of-protest procedures and most of the procedures for the new ex parte expungement and reexamination proceedings, except for those indicated below. Thus, the USPTO has little to no discretion in the rulemaking required to implement those procedures. Accordingly, the discussion below addresses only those provisions for which alternatives were possible because the TMA provided the Director discretion to implement regulations. In those cases, the USPTO chose the option that best balanced the need to achieve the stated objectives with the need to create processes that are the least burdensome on all parties.

Fees: As authorized by the TMA, the rule establishes fees for petitions requesting ex parte expungement or reexamination of a registration and for extensions of time to respond to an Office action. After the USPTO considered the comments received regarding the proposed fee of $600 per class for a petition requesting ex parte expungement or reexamination of a registration, and as discussed in the preamble, this rule sets a fee of $400 per class for such petitions, with the intent to balance the need for cost recovery with the objective of providing a lower-cost alternative for third parties to seek cancellation of registered marks for which the required use in commerce has not been made. The USPTO considered alternative fee proposals for these newly created ex parte proceedings. One option was to charge $250 per petition, which is the same amount as the current fee for electronically filed petitions to the Director under § 2.146. However, that amount was determined to be insufficient for cost recovery because petitions for expungement or reexamination are different proceedings than other petitions to the Director, and reviewing these petitions and conducting any resulting proceeding will require more time and resources. Therefore, these petitions are likely to incur higher processing costs. In addition, the USPTO considered setting the fee at $1,000 per class of goods or services involved in the petition. However, this amount was deemed too high in view of the USPTO's objective to provide an inexpensive mechanism for cancellation of a registration when the required use in commerce of the registered mark has not been made.

This rule sets a fee of $125 for electronically filed requests for extensions of time to respond to an Office action issued in connection with an application or a post-registration maintenance filing and a fee of $225 for such extensions that are filed on paper. The rule also sets a fee of $125 for requests for extensions of time to respond to a non-final Office action issued in connection with an expungement or reexamination proceeding, which are required to be filed electronically. These fees are consistent with the current fees for requesting an extension of time to file a statement of use and are intended to recover associated costs while incentivizing applicants to respond to Office actions within the initial three-month deadline. The USPTO considered the alternative of not charging a fee for such extensions, but that option would not aid in cost recovery and would not provide an incentive to respond earlier, undermining the purpose of the flexible response periods.

Limit on petitions requesting expungement or reexamination: This rule does not limit the number of petitions for expungement or reexamination that can be filed against a registration. However, the Office did consider such a limit of petition-initiated proceedings against a registration that had already been the subject of instituted proceedings in order to provide a definite end to challenges, leaving any further challenges to TTAB cancellation proceedings. Considering that there are already safeguards in place to prevent abuse, the Office was concerned that imposing artificial limitations might undermine the utility of the proceedings to clear the register of unused marks. In addition, the USPTO considered the alternatives of limiting the number of petitions a particular petitioner or real party in interest may file, but those options did not further the ultimate purpose of the expungement or reexamination proceeding, which is to cancel a registration in whole or in part when evidence shows that use of the mark in commerce has not been made.

Reasonable investigation and evidence: Under the TMA and this rule, a petition for expungement or

reexamination must include a verified statement that sets forth the elements of the reasonable investigation the petitioner conducted to determine that the mark was never used in commerce (for expungement petitions) or not in use in commerce as of the relevant date (for reexamination petitions) on or in connection with the goods and/or services identified in the petition. The rule defines a ''reasonable investigation'' as one that is based on available information and must include searches calculated to return information about the underlying inquiry from reasonably accessible sources where evidence concerning use of the mark during the relevant time period on or in connection with the relevant goods and/or services would normally be found. The rule indicates that a sufficient, reasonable investigation will depend on the individual circumstances, but includes a non-exhaustive list of sources of evidence for a reasonable investigation. These include State and Federal trademark records, internet websites, records from State and Federal agencies, litigation records, knowledge of marketplace activities, and any other reasonably accessible source with information relevant to whether the mark at issue was used in commerce.

The USPTO considered an alternative approach of providing a more exhaustive list of the types of evidence that would meet the burden for these newly created proceedings. However, the USPTO acknowledges that the types of evidence will vary by industry and the types of goods and/or services being challenged. Therefore, it is not practical to create a complete list in the rule that would apply in all situations. Instead, the USPTO opted to identify a standard in line with the statute and legislative history, and to include a non-exhaustive list of efforts and evidence that may meet the standard. This alternative provides guidance to filers while not limiting them to specific types of evidence listed in the rule.

Director-initiated proceedings: The TMA authorizes Director-initiated expungement and reexamination proceedings. In addition to the requirements in the TMA, the rule provides that the Director may institute a proceeding that includes additional goods and/or services identified in the subject registration on the Director's own initiative and consolidate consideration of the new proceeding with the pending proceeding. The USPTO considered an alternative approach that involved not allowing the consolidation of proceedings in this circumstance, but this option would hinder proper and efficient management of multiple related proceedings.

Response time periods in new ex parte proceedings: The rule sets a deadline of three months for responding to a non-final Office action and for requesting reconsideration of or appealing from a final Office action issued in a reexamination and/or expungement proceeding, making the periods the same as the response period the USPTO intends to implement for Office actions in the examination of applications and post-registration submissions. The rule also provides an option for a one-month extension of time to respond to a non-final Office action. The USPTO considered a number of alternatives to this response deadline framework. These alternatives included a two-month response period with an optional one-month extension, a three-month response period for the initial Office action and a three-month response period for the final Office action, and different response periods for the initial Office action and the final Office action.

In weighing these options, the Office considered the fact that, once an Office action has been received by a registrant, the registrant will need time to review the content of the Office action, hire counsel if needed, and conduct fact-finding and evidence gathering in order to provide a response. The Office also considered the fact that a traditional six-month response period maximizes the time for the registrant to engage in these necessary activities but could potentially result in prolonged review, which is contrary to the objective to provide a faster and more efficient alternative to addressing claims of lack of proper use.

The selected three-month response period with an option for a one-month extension of the period for a non-final Office action balances the Office's objectives with the registrant's need for time to engage in the necessary activities to provide a response to the Office action. Furthermore, the USPTO plans to provide a courtesy notification to the registrant that a petition has been filed so as to facilitate early notice of a possible proceeding.

Flexible response periods: The TMA authorizes the USPTO to establish flexible response periods to respond to Office actions. The rule sets a period of three months for responding to an Office action in applications under sections 1 and/or 44 of the Act, but provides an option for applicants to request a single three-month extension of this three-month deadline, for a total response time of up to six months. The same response deadline framework also applies to post-registration Office actions issued in connection with the examination of registration maintenance documents. This alternative was selected because it is supported by the USPTO's data analytics regarding average response times, is the option with the least burden and lowest costs for filers, and avoids uncertainty in filing deadlines by providing consistent deadlines for responses.

The USPTO considered three alternatives to the proposals to implement flexible response periods. The first alternative was to maintain six-month response periods for any Office action that contains a substantive refusal and provide a shorter response period for any Office action that contained only formal requirements, because responses for these typically require less time. This alternative was rejected because it may require some discretion by examining attorneys to decide which response period applies if, for example, it is not clear whether the Office action contains a substantive refusal. Additionally, public feedback indicated that this approach results in the length of the response period being unknown until the Office action is received and would require the monitoring of multiple possible deadlines.

A second alternative considered was to offer shorter response periods for all Office actions, but to offer an initial response period of two months, with one-month extensions with a corresponding fee, to reach the full six months. The fee for extension would be progressively higher, depending on when the response and extension request were filed. For example, responses filed in the third, fourth, fifth, or sixth month would, respectively, have an extension fee of $50, $75, $125, and $150. An application would be abandoned when a response is not received within the two-month period or such other extended deadline as requested and paid for by applicant, not to exceed six months from the Office action issue date. This alternative added more complexity to the trademark Office action response process than the other proposed options and was not adopted.

Finally, the USPTO considered a two-phase examination system. Under this approach, a USPTO examiner could review application formalities and issue a formalities Office action with a shortened response period of two months, extendable in two-month increments to a full six months upon request and payment of a fee. Once the formalities were addressed, the application could enter the second phase of the examination, whereby an

examiner would issue an Office action containing any substantive refusals that identifies a response deadline of three months, extendable for another three months to a total of six months, upon request and payment of a fee. Due to the significant time and system changes it would take to implement a phased examination system, the USPTO decided against pursuing this alternative at this time.

Suspension of proceedings: The rule amends the rules concerning the suspension of proceedings to align them with current practice and to clarify that the new ex parte expungement and reexamination proceedings are among the types of proceedings for which suspension of action by the Office or the TTAB is authorized.

The alternative was to take no action in amending these rules, but that option would result in a continued misalignment of the rules and USPTO practice, and could hinder proper and efficient management of multiple related proceedings.

Attorney recognition: The rule provides that when a practitioner has been mistakenly, falsely, or fraudulently designated as a representative for an applicant, registrant, or party to a proceeding without the practitioner's prior authorization or knowledge, recognition of that practitioner shall be ineffective.

The USPTO considered not updating the current rules on attorney recognition. However, leaving the regulations as they are currently written would potentially hinder the USPTO's ability to combat misleading solicitations sent to trademark applicants and registrants as well as other improper activities.

C. Executive Order 12866 (Regulatory Planning and Review): This rule has been determined to be Significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the USPTO has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing an NPRM, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

E. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes, (2) impose substantial direct compliance costs on Indian tribal governments, or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not affect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this rule are not expected to result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rule is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of $100 million (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of $100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. See 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act of 1969: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. See 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act of 1995: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act of 1995: In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), some of the paperwork and other information collection burdens discussed in this rulemaking have been approved under Office of Management and Budget (OMB) Control Numbers 0651–0040 (Trademark Trial and Appeal Board (TTAB) Actions), 0651–0050 (Response to Office Action and Voluntary Amendment Forms), and 0651–0055 (Trademark Post Registration). This rulemaking does not impose additional costs or revisions to the burden estimates for the previously mentioned existing information collections.

The new reporting requirements and fees associated with this rulemaking, which were filed under OMB Control Number 0651–0086 (Changes To Implement Provisions of the Trademark Modernization Act of 2020), have been

submitted to OMB for approval. For reference, the following is a summary of that information collection's data:

Estimated Annual Number of Respondents: 14,931.

Estimated Time per Response: The USPTO estimates that it takes the public approximately between .25 hours (15 minutes) and 4.5 hours, to complete the information in this information collection. This includes the time to gather the necessary information, prepare the appropriate documents, and submit the completed responses to the USPTO.

Estimated Total Annual Burden Hours: 36,908.

Estimated Total Annual Non-Hour Cost Burden: $2,421,403.

Affected Public: Private sector; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

Approved information collection requests may be viewed at *www.reginfo.gov/public/do/PRAMain.* If approval is denied, the USPTO will publish a document in the **Federal Register** providing notice of what action(s) the USPTO plans to take.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information has a valid OMB control number.

P. E-Government Act Compliance: The USPTO is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Kimberly Hardy, USPTO Information Collection Officer, via email at *Information.Collection@uspto.gov* or via telephone at 571–270–0968.

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Courts, Lawyers, Trademarks.

37 CFR Part 7

Administrative practice and procedure, Trademarks.

For the reasons stated in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the USPTO amends parts 2 and 7 of title 37 as follows:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for part 2 is revised to read as follows:

Authority: 15 U.S.C. 1113, 1123; 35 U.S.C. 2; sec. 10, Pub. L. 112–29, 125 Stat. 284; Pub. L. 116–260, 134 Stat. 1182, unless otherwise noted. Sec. 2.99 also issued under secs. 16, 17, 60 Stat. 434; 15 U.S.C. 1066, 1067.

■ 2. Amend § 2.6 by adding paragraphs (a)(26) and (27) to read as follows:

§ 2.6 Trademark fees.

(a) * * *

(26) *Petition for expungement or reexamination.* For filing a petition for expungement or reexamination under § 2.91, per class—$400.00.

(27) *Extension of time for filing a response to a non-final Office action under § 2.93(b)(1).* For filing a request for extension of time for filing a response to a non-final Office action under § 2.93(b)(1) via TEAS—$125.00.

* * * * *

■ 3. Effective December 1, 2022, amend § 2.6 by adding paragraph (a)(28) to read as follows:

(a) * * *

(28) *Extension of time for filing a response to an Office action under § 2.62(a)(2), § 2.163(c), § 2.165(c), § 2.176, § 2.184(b)(2), or § 2.186(c).* (i) For filing a request for extension of time for filing a response to an Office action under § 2.62(a)(2), § 2.163(c), § 2.165(c), § 2.176, § 2.184(b)(2), or § 2.186(c) on paper—$225.00.

(ii) For filing a request for extension of time for filing a response to an Office action under § 2.62(a)(2), § 2.163(c), § 2.165(c), § 2.176, § 2.184(b)(2), or § 2.186(c) via TEAS—$125.00.

* * * * *

■ 4. Amend § 2.11 by revising paragraphs (d) and (f) to read as follows:

§ 2.11 Requirement for representation.

* * * * *

(d) Failure to respond to requirements issued pursuant to paragraphs (a) through (c) of this section is governed by §§ 2.65, 2.93, and 2.163 and § 7.39 of this chapter, as appropriate.

* * * * *

(f) Notwithstanding §§ 2.63(b)(2)(ii) and 2.93(c)(1), if an Office action maintains only requirements under paragraphs (a), (b), and/or (c) of this section, or only requirements under paragraphs (a), (b), and/or (c) of this section and the requirement for a processing fee under § 2.22(c), the requirements may be reviewed only by filing a petition to the Director under § 2.146.

■ 5. Amend § 2.17 by adding paragraph (b)(4) to read as follows:

§ 2.17 Recognition for representation.

* * * * *

(b) * * *

(4) *False, fraudulent, or mistaken designation.* Regardless of paragraph (b)(1) of this section, where a practitioner has been falsely, fraudulently, or mistakenly designated as a representative for an applicant, registrant, or party to a proceeding without the practitioner's prior authorization or knowledge, such a designation shall have no effect, and the practitioner is not recognized.

* * * * *

■ 6. Amend § 2.18 by revising paragraphs (a)(1) and (2) to read as follows:

§ 2.18 Correspondence, with whom held.

(a) * * *

(1) If an attorney is not recognized as a representative pursuant to § 2.17(b)(1), the Office will send correspondence to the applicant, registrant, or party to the proceeding.

(2) If an attorney is recognized as a representative pursuant to § 2.17(b)(1), the Office will correspond only with that attorney, except as set forth in paragraphs (a)(2)(i) through (iv) of this section. A request to change the correspondence address does not revoke a power of attorney. The Office will not correspond with another attorney from a different firm and, except for service of a cancellation petition and notices of institution of expungement or reexamination proceedings, will not correspond directly with the applicant, registrant, or a party to a proceeding, unless:

(i) The applicant or registrant files a revocation of the power of attorney under § 2.19(a) and/or a new power of attorney that meets the requirements of § 2.17(c);

(ii) The attorney has been suspended or excluded from practicing in trademark matters before the USPTO;

(iii) Recognition of the attorney has ended pursuant to § 2.17(g); or

(iv) The attorney has been falsely, fraudulently, or mistakenly designated under § 2.17(b)(4).

* * * * *

■ 7. Amend § 2.19 by adding paragraph (c) to read as follows:

§ 2.19 Revocation or withdrawal of attorney.

* * * * *

(c) *Recognition ineffective.* If recognition is not effective under § 2.17(b)(4), then revocation under paragraph (a) of this section or

withdrawal under paragraph (b) of this section is not required.

■ 8. Amend § 2.23 by revising paragraphs (c) and (d) to read as follows:

§ 2.23 Requirement to correspond electronically with the Office and duty to monitor status.

* * * * *

(c) Except for submissions under §§ 2.91, 2.93, and 2.149, if the applicant or registrant is a national of a country that has acceded to the Trademark Law Treaty, but not to the Singapore Treaty on the Law of Trademarks, the requirements of paragraphs (a) and (b) of this section do not apply.

(d) Notices issued or actions taken by the USPTO are displayed in the USPTO's publicly available electronic systems. Applicants and registrants are responsible for monitoring the status of their applications and registrations in the USPTO's electronic systems during the following time periods:

(1) At least every six months between the filing date of the application and issuance of a registration;

(2) After filing an affidavit of use or excusable nonuse under section 8 or section 71 of the Act, or a renewal application under section 9 of the Act, at least every six months until the registrant receives notice that the affidavit or renewal application has been accepted; and

(3) After notice of the institution of an expungement or reexamination proceeding under § 2.92, at least every three months until the registrant receives a notice of termination under § 2.94.

§ 2.61 [Amended]

■ 9. Amend § 2.61 by removing paragraph (c).

■ 10. Effective December 1, 2022, amend § 2.62 by revising paragraphs (a) and (c) to read as follows:

§ 2.62 Procedure for submitting response.

(a) *Deadline.* Each Office action shall set forth the deadline for response.

(1) *Response periods.* Unless the applicant is notified otherwise in an Office action, the response periods for an Office action are as follows:

(i) Three months from the issue date, for an Office action in an application under section 1 and/or section 44 of the Act; and

(ii) Six months from the issue date, for an Office action in an application under section 66(a) of the Act.

(2) *Extensions of time.* Unless the applicant is notified otherwise in an Office action, the time for response designated in paragraph (a)(1)(i) of this section may be extended by three months up to a maximum of six months from the Office action issue date, upon timely request and payment of the fee set forth in § 2.6(a)(28). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the Office action.

* * * * *

(c) *Form.* Responses and requests for extensions of time to respond must be submitted through TEAS pursuant to § 2.23(a). Responses and requests for extensions of time to respond sent via email or facsimile will not be accorded a date of receipt.

■ 11. Effective December 1, 2022, amend § 2.63 by revising paragraphs (b) introductory text, (b)(1) and (2), (c), and (d) to read as follows:

§ 2.63 Action after response.

* * * * *

(b) *Final refusal or requirement.* Upon review of a response, the examining attorney may state that any refusal to register or requirement is final.

(1) If the examining attorney issues a final action that maintains any substantive refusal to register, the applicant may respond by timely filing:

(i) A request for reconsideration under paragraph (b)(3) of this section that seeks to overcome any substantive refusal to register, and comply with any outstanding requirement, maintained in the final action;

(ii) An appeal to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142; or

(iii) A request for extension of time to respond or appeal under § 2.62(a)(2).

(2) If the examining attorney issues a final action that contains no substantive refusals to register, but maintains any requirement, the applicant may respond by timely filing:

(i) A request for reconsideration under paragraph (b)(3) of this section that seeks to comply with any outstanding requirement maintained in the final action;

(ii) An appeal of any requirement to the Trademark Trial and Appeal Board under §§ 2.141 and 2.142;

(iii) A petition to the Director under § 2.146 to review any requirement, if the subject matter of the requirement is procedural, and therefore appropriate for petition; or

(iv) A request for extension of time to respond or appeal under § 2.62(a)(2).

* * * * *

(c) *Denial of petition.* A requirement that is the subject of a petition decided by the Director may not subsequently be the subject of an appeal to the Trademark Trial and Appeal Board. If a petition to the Director under § 2.146 is denied, the applicant will have the later of the following periods to comply with the requirement:

(1) The time remaining in the period for response to the Office action that repeated the requirement or made it final;

(2) The time remaining after the filing of a timely request for extension of time to respond or appeal under § 2.62(a)(2); or

(3) Thirty days from the date of the decision on the petition.

(d) *Amendment to allege use.* If an applicant in an application under section 1(b) of the Act files an amendment to allege use under § 2.76 during the response period after issuance of a final action, the examining attorney will examine the amendment. The filing of such an amendment does not stay or extend the time for filing an appeal or petition.

■ 12. Effective December 1, 2022, amend § 2.65 by revising paragraph (a) to read as follows:

§ 2.65 Abandonment.

(a) An application will be abandoned if an applicant fails to respond to an Office action, or to respond completely, within the relevant time period for response under § 2.62(a)(1), including any granted extension of time to respond under § 2.62(a)(2). A timely petition to the Director pursuant to §§ 2.63(a) and (b) and 2.146 or notice of appeal to the Trademark Trial and Appeal Board pursuant to § 2.142, if appropriate, is a response that avoids abandonment (see § 2.63(b)(4)).

(1) If all refusals and/or requirements are expressly limited to certain goods and/or services, the application will be abandoned only as to those goods and/or services.

(2) When a timely response by the applicant is a bona fide attempt to advance the examination of the application and is a substantially complete response to the examining attorney's action, but consideration of some matter or compliance with a requirement has been omitted, the examining attorney may grant the applicant 30 days, or to the end of the time period for response to the action to which the substantially complete response was submitted, whichever is longer, to explain and supply the omission before the examining attorney considers the question of abandonment.

* * * * *

■ 13. Effective December 1, 2022, amend § 2.66 by revising paragraph (b) to read as follows:

§ 2.66 Revival of applications abandoned in full or in part due to unintentional delay.

* * * * *

(b) *Petition to revive application abandoned in full or in part for failure to respond to an Office action.* A petition to revive an application abandoned in full or in part because the applicant did not timely respond to an Office action must include:

(1) The petition fee required by § 2.6(a)(15);

(2) A statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional; and

(3) A response to the Office action, signed pursuant to § 2.193(e)(2), or a statement that the applicant did not receive the Office action or the notification that an Office action issued. If the applicant asserts that the unintentional delay is based on non-receipt of an Office action or notification, the applicant may not assert non-receipt of the same Office action or notification in a subsequent petition.

(4) If the Office action was subject to a three-month response period under § 2.62(a)(1), and the applicant does not assert non-receipt of the Office action or notification, the petition must also include the fee under § 2.6(a)(28) for a request for extension of time to respond under § 2.62(a)(2).

(5) If the abandonment was after a final Office action, the response is treated as a request for reconsideration under § 2.63(b)(3), and the applicant must also file:

(i) A notice of appeal to the Trademark Trial and Appeal Board under § 2.141 or a petition to the Director under § 2.146, if permitted by § 2.63(b)(2)(iii); or

(ii) A statement that no appeal or petition is being filed from any final refusal or requirement.

* * * * *

■ 14. Revise § 2.67 to read as follows:

§ 2.67 Suspension of action by the Patent and Trademark Office.

Action by the Office may be suspended for a reasonable time for good and sufficient cause. The fact that a proceeding is pending before the Office or a court that is relevant to the issue of initial or continued registrability of a mark and that proceeding has not been finally determined, or the fact that the basis for registration is, under the provisions of section 44(e) of the Act, registration of the mark in a foreign country and the foreign application is still pending, will be considered prima facie good and sufficient cause. An Office or court proceeding is not considered finally determined until an order or ruling that ends the proceeding or litigation has been rendered and noticed, and the time for any appeal or other further review has expired with no further review sought. An applicant's request for a suspension of action under this section, filed within the response period set forth in § 2.62(a), may be considered responsive to the previous Office action. The Office may require the applicant, registrant, or party to a proceeding to provide status updates and information relevant to the ground(s) for suspension, upon request.

■ 15. Revise the undesignated center heading preceding § 2.91 to read as follows:

EX PARTE EXPUNGEMENT AND REEXAMINATION

■ 16. Add § 2.91 to read as follows:

§ 2.91 Petition for expungement or reexamination.

(a) *Petition basis.* Any person may file a petition requesting institution of an ex parte proceeding to cancel a registration of a mark, in whole or in part, on one of the following bases:

(1) Expungement, if the mark is registered under sections 1, 44, or 66 of the Act and has never been used in commerce on or in connection with some or all of the goods and/or services recited in the registration; or

(2) Reexamination, if the mark is registered under section 1 of the Act and was not in use in commerce on or in connection with some or all of the goods and/or services recited in the registration on or before the relevant date, which for any particular goods and/or services is determined as follows:

(i) In an application for registration of a mark with an initial filing basis of section 1(a) of the Act for the goods and/or services listed in the petition, and not amended at any point to be filed pursuant to section 1(b) of the Act, the relevant date is the filing date of the application; or

(ii) In an application for registration of a mark with an initial filing basis or amended basis of section 1(b) of the Act for the goods and/or services listed in the petition, the relevant date is the later of the filing date of an amendment to allege use identifying the goods and/or services listed in the petition, pursuant to section 1(c) of the Act, or the expiration of the deadline for filing a statement of use for the goods and/or services listed in the petition, pursuant to section 1(d), including all approved extensions thereof.

(b) *Time for filing.* The petition must be filed while the registration is in force and:

(1) Where the petition requests institution of an expungement proceeding under paragraph (a)(1) of this section, at any time following the expiration of 3 years after the date of registration and, for petitions made after December 27, 2023, before the expiration of 10 years following the date of registration; or

(2) Where the petition requests institution of a reexamination proceeding under paragraph (a)(2) of this section, at any time not later than 5 years after the date of registration.

(c) *Requirements for complete submission.* Petitions under this section must be timely filed through TEAS. Only complete petitions under this section will be considered by the Director under § 2.92, and, once complete, may not be amended by the petitioner. A complete petition must be made in writing and must include the following:

(1) The fee required by § 2.6(a)(26);

(2) The U.S. trademark registration number of the registration subject to the petition;

(3) The basis for petition under paragraph (a) of this section;

(4) The name, domicile address, and email address of the petitioner;

(5) If the domicile of the petitioner is not located within the United States or its territories, a designation of an attorney, as defined in § 11.1 of this chapter, who is qualified to practice under § 11.14 of this chapter;

(6) If the petitioner is, or must be, represented by an attorney, as defined in § 11.1 of this chapter, who is qualified to practice under § 11.14 of this chapter, the attorney's name, postal address, email address, and bar information under § 2.17(b)(3);

(7) Identification of each good and/or service recited in the registration for which the petitioner requests that the proceeding be instituted on the basis identified in the petition;

(8) A verified statement signed by someone with firsthand knowledge of the facts to be proved that sets forth in numbered paragraphs:

(i) The elements of the reasonable investigation of nonuse conducted, as defined under paragraph (d) of this section, where for each source of information relied upon, the statement includes a description of how and when the searches were conducted and what the searches disclosed; and

(ii) A concise factual statement of the relevant basis for the petition, including any additional facts that support the allegation of nonuse of the mark in

commerce on or in connection with the goods and services as specified in paragraph (a) of this section; and

(9) A clear and legible copy of all documentary evidence supporting a prima facie case of nonuse of the mark in commerce and an itemized index of such evidence. Evidence that supports a prima facie case of nonuse may include, but is not limited to:

(i) Verified statements;

(ii) Excerpts from USPTO electronic records in applications or registrations;

(iii) Screenshots from relevant web pages, including the uniform resource locator (URL) and access or print date;

(iv) Excerpts from press releases, news articles, journals, magazines, or other publications, identifying the publication name and date of publication; and

(v) Evidence suggesting that the verification accompanying a relevant allegation of use was improperly signed.

(d) *Reasonable investigation of nonuse.* A petitioner must make a bona fide attempt to determine if the registered mark was not in use in commerce or never in use in commerce on or in connection with the goods and/or services specified in paragraph (c)(7) of this section by conducting a reasonable investigation.

(1) A reasonable investigation is an appropriately comprehensive search, which may vary depending on the circumstances but is calculated to return information about the underlying inquiry from reasonably accessible sources where evidence concerning use of the mark during the relevant time period on or in connection with the relevant goods and/or services would normally be found.

(2) Sources for a reasonable investigation may include, but are not limited to:

(i) State and Federal trademark records;

(ii) internet websites and other media likely to or believed to be owned or controlled by the registrant;

(iii) internet websites, other online media, and publications where the relevant goods and/or services likely would be advertised or offered for sale;

(iv) Print sources and web pages likely to contain reviews or discussion of the relevant goods and/or services;

(v) Records of filings made with or of actions taken by any State or Federal business registration or regulatory agency;

(vi) The registrant's marketplace activities, including, for example, any attempts to contact the registrant or purchase the relevant goods and/or services;

(vii) Records of litigation or administrative proceedings reasonably likely to contain evidence bearing on the registrant's use or nonuse of the registered mark; and

(viii) Any other reasonably accessible source with information establishing nonuse of the mark as specified in paragraph (a) of this section.

(3) A petitioner need not check all possible appropriate sources for its investigation to be considered reasonable.

(e) *Director's authority.* The authority to act on petitions made under this section is reserved to the Director, and may be delegated.

(f) *Oral hearings.* An oral hearing will not be held on a petition except when considered necessary by the Director.

(g) *No stay.* The mere filing of a petition for expungement or reexamination by itself will not act as a stay in any appeal or inter partes proceeding that is pending before the Trademark Trial and Appeal Board, nor will it stay the period for replying to an Office action in any pending application or registration.

(h) *Real party in interest.* The Director may require that the real party or parties in interest be identified in connection with any petition filed under this section.

■ 17. Add § 2.92 to read as follows:

§ 2.92 Institution of ex parte expungement and reexamination proceedings.

Notwithstanding section 7(b) of the Act, the Director may institute a proceeding for expungement or reexamination of a registration of a mark, either upon petition or upon the Director's initiative, upon determining that information and evidence supports a prima facie case of nonuse of the mark for some or all of the goods or services identified in the registration. The electronic record of the registration for which a proceeding has been instituted forms part of the record of the proceeding without any action by the Office, a petitioner, or a registrant.

(a) *Institution upon petition.* For each good and/or service identified in a complete petition under § 2.91, the Director will determine if the petition sets forth a prima facie case of nonuse to support the petition basis and, if so, will institute an ex parte expungement or reexamination proceeding.

(b) *Institution upon the Director's initiative.* The Director may institute an ex parte expungement or reexamination proceeding on the Director's own initiative, within the time periods set forth in § 2.91(b), and for the reasons set forth in § 2.91(a), based on information that supports a prima facie case for expungement or reexamination of a registration for some or all of the goods or services identified in the registration.

(c) *Director's authority.* (1) Any determination by the Director whether to institute an expungement or reexamination proceeding shall be final and non-reviewable.

(2) The Director may institute an expungement and/or reexamination proceeding for fewer than all of the goods and/or services identified in a petition under § 2.91. The identification of particular goods and/or services in a petition does not limit the Director from instituting a proceeding that includes additional goods and/or services identified in the subject registration on the Director's own initiative, under paragraph (b) of this section.

(d) *Estoppel.* (1) Upon termination of an expungement proceeding under § 2.93(c)(3), including after any appeal, where it has been determined that the registered mark was used in commerce on or in connection with any of the goods and/or services at issue in the proceedings prior to the date a petition to expunge was filed under § 2.91 or the Director-initiated proceedings under this section, no further expungement proceedings may be instituted as to those particular goods and/or services.

(2) Upon termination of a reexamination proceeding under § 2.93(c)(3), including after any appeal, where it is has been determined that the registered mark was used in commerce on or in connection with any of the goods and/or services at issue, on or before the relevant date established in the proceedings, no further expungement or reexamination proceedings may be instituted as to those particular goods and/or services.

(3) With respect to a particular registration, once an expungement proceeding has been instituted and is pending, no later expungement proceeding may be instituted with respect to the same goods and/or services at issue in the pending proceeding.

(4) With respect to a particular registration, while a reexamination proceeding is pending, no later expungement or reexamination proceeding may be instituted with respect to the same goods and/or services at issue in the pending proceeding.

(e) *Consolidated proceedings.* (1) The Director may consolidate expungement and reexamination proceedings involving the same registration. Consolidated proceedings will be considered related parallel proceedings.

(2) If two or more petitions under § 2.91 are directed to the same registration and are pending

concurrently, or the Director wishes to institute an ex parte expungement or reexamination proceeding on the Director's own initiative under paragraph (b) of this section concerning a registration for which one or more petitions under § 2.91 are pending, the Director may elect to institute a single proceeding.

(3) Unless barred under paragraph (d) of this section, if any expungement or reexamination proceeding is instituted while a prior expungement or reexamination proceeding directed to the same registration is pending, the Director may consolidate the proceedings.

(f) *Notice of Director's determination whether to institute proceedings.* (1) In a determination based on a petition under § 2.91, if the Director determines that no prima facie case of nonuse has been made and thus no proceeding will be instituted, notice of this determination will be provided to the registrant and petitioner, including information to access the petition and supporting documents and evidence.

(2) If the Director determines that a proceeding should be instituted based on a prima facie case of nonuse of a registered mark as to any goods and/or services recited in the registration, or consolidates proceedings under paragraph (e) of this section, the Director's determination and notice of the institution of the proceeding will be set forth in an Office action under § 2.93(a). If a proceeding is instituted based in whole or in part on a petition under § 2.91, the Office action will include information to access any petition and the supporting documents and evidence that formed the basis for the Director's determination to institute. Notice of the Director's determination will also be provided to the petitioner.

(g) *Other mark types.* (1) Registrations subject to expungement and reexamination proceedings include collective trademarks, collective service marks, and certification marks.

(2) The use that is the subject of the inquiry in expungement and reexamination proceedings for these mark types is defined in § 2.2(k)(2) for collective trademarks and collective service marks, and § 2.2(k)(4) for certification marks.

■ 18. Add § 2.93 to read as follows:

§ 2.93 Expungement and reexamination procedures.

(a) *Office action.* An Office action issued to a registrant pursuant to § 2.92(f)(2) will require the registrant to provide such evidence of use, information, exhibits, affidavits, or declarations as may be reasonably necessary to rebut the prima facie case of nonuse by establishing that the required use in commerce has been made on or in connection with the goods and/or services at issue as of the date relevant to the proceeding. The Office action may also include requirements under §§ 2.11, 2.23, and 2.189, as appropriate.

(b) *Response*—(1) *Deadline.* Unless the registrant is notified otherwise in an Office action, the registrant's response to an Office action must be received by the Office within three months from the issue date. The time for response to a non-final Office action may be extended by one month upon timely request and payment of the fee set forth in § 2.6(a)(27). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the non-final Office action. If the registrant fails to timely respond to a non-final Office action or timely submit a request for extension of time, the proceeding will terminate, and the registration will be cancelled as to the relevant goods and/or services.

(2) *Substantially complete response.* When a timely response is a bona fide attempt to advance the proceeding and is a substantially complete response to the outstanding Office action, but consideration of some matter or compliance with a requirement has been omitted, the registrant may be granted 30 days, or to the end of the time period for response to the action to which the substantially complete response was submitted, whichever is longer, to explain and supply the omission.

(3) *Signature.* The response must be signed by the registrant, someone with legal authority to bind the registrant (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(2).

(4) *Form.* Responses and requests for extensions of time must be submitted through TEAS. Responses sent via email or facsimile will not be accorded a date of receipt.

(5) *Response in an expungement proceeding.* In an expungement proceeding, an acceptable response consists of one or more of the following:

(i) Evidence of use, in accordance with paragraph (b)(7) of this section, establishing that use of the mark in commerce occurred on or in connection with the goods and/or services at issue either before the filing date of the relevant petition to expunge under § 2.91(a)(1) or before the date the Director-initiated proceeding was instituted by the Director under § 2.92(b), as appropriate;

(ii) Verified statements signed by someone with firsthand knowledge of the facts to be proved and supporting evidence to establish that any nonuse as to particular goods and/or services with a sole basis under section 44(e) or section 66(a) of the Act is due to special circumstances that excuse such nonuse; and/or

(iii) Deletion of some or all of the goods and/or services at issue in the proceeding, if appropriate, subject to the provisions of paragraph (d) of this section.

(6) *Response in a reexamination proceeding.* In a reexamination proceeding, an acceptable response consists of one or more of the following:

(i) Evidence of use, in accordance with paragraph (b)(7) of this section, establishing that use of the mark in commerce occurred on or in connection with each particular good and/or service at issue, on or before the relevant date set forth in § 2.91(a)(2); and/or

(ii) Deletion of some or all of the goods and/or services at issue in the proceeding, if appropriate, subject to the provisions of paragraph (d) of this section.

(7) *Evidence of use.* Evidence of use of the mark in commerce on or in connection with any particular good and/or service must be consistent with the definition of ''use in commerce'' set forth in section 45 of the Act and is not limited in form to that of specimens under § 2.56. Any evidence of use must be accompanied by a verified statement signed by someone with firsthand knowledge of the facts to be proved, setting forth in numbered paragraphs factual information about the use of the mark in commerce, including a description of the supporting evidence and how the evidence demonstrates use of the mark in commerce as of any relevant date for the goods and/or services at issue. Evidence must be labeled, and an itemized index of the evidence must be provided such that the particular goods and/or services supported by each item submitted as evidence of use are clear.

(c) *Action after response.* After response by the registrant, the Office will review the registrant's evidence of use or showing of applicable excusable nonuse, and/or arguments, and determine compliance with any requirement.

(1) *Final Office action.* If the registrant's timely response fails to rebut the prima facie case of nonuse or fully comply with all outstanding requirements, a final Office action will issue that addresses the evidence,

includes the examiner's decision, and maintains any outstanding requirement. After issuance of a final Office action, the registrant may respond by filing within three months from the issue date of the final Office action:

(i) A request for reconsideration of the final Office action that seeks to further address the issue of use of the mark in commerce and/or comply with any outstanding requirement maintained in the final action; or

(ii) An appeal to the Trademark Trial and Appeal Board under § 2.141.

(2) *Time for filing a request for reconsideration or petition to the Director.* (i) A request for reconsideration must be filed prior to the expiration of time provided for an appeal in § 2.142(a)(2). Filing a request for reconsideration does not stay or extend the time for filing an appeal or a petition under paragraph (c)(2)(ii) of this section.

(ii) Prior to the expiration of time for filing an appeal to the Trademark Trial and Appeal Board under § 2.142(a)(2), a registrant may file a petition to the Director under § 2.146 for relief from any outstanding requirement under §§ 2.11, 2.23, and 2.189 made final. If the petition is denied, the registrant will have 3 months from the date of issuance of the final action that contained the final requirement, or 30 days from the date of the decision on the petition, whichever date is later, to comply with the requirement. A requirement that is the subject of a petition decided by the Director may not subsequently be the subject of an appeal to the Trademark Trial and Appeal Board.

(3) *Termination of proceeding.* (i) If, upon review of any timely response, the Office finds that the registrant has rebutted the prima facie case of nonuse and complied with all outstanding requirements, the proceeding will terminate and a notice of termination shall be issued under § 2.94.

(ii) If, after issuance of the final action, the registrant fails to timely comply with any outstanding requirement, or the Office finds that the registrant has failed to rebut the prima facie case of nonuse of the mark on or in connection with any of the goods and/or services at issue in the proceeding, the proceeding will terminate, and a notice of termination shall be issued under § 2.94 after the time for appeal has expired or any appeal proceeding has terminated, pursuant to §§ 2.142 through 2.145.

(d) *Deletion of goods and/or services.* The registrant may respond to an Office action under this section by requesting that some or all of the goods and/or services at issue in the proceeding be deleted from the registration. No other amendment to the identification of goods or services in a registration will be permitted in a response.

(1) An acceptable deletion requested in a response under this section shall be immediate in effect, and reinsertion of goods and/or services or further amendments that would add to or expand the scope of the goods and/or services shall not be permitted. Deletion of goods and/or services in an expungement or reexamination proceeding after the submission and prior to the acceptance of an affidavit or declaration under section 8 or 71 of the Act will result in a fee under § 2.161(c) or § 7.37(c) of this chapter.

(2) A submission other than one made under this section, including a request to surrender the subject registration for cancellation under § 2.172 or a request to amend the registration under § 2.173, filed after the issuance of an Office action under this section, does not constitute a sufficient response to an Office action under this section. The registrant must notify the Office of such submission in a timely response.

(3) Deletion of goods and/or services at issue in a pending proceeding in a response, a surrender for cancellation under § 2.172, an amendment of the registration under § 2.173, or any other accepted submission, shall render the proceeding moot as to those goods and/or services, and no further determination will be made regarding the registrant's use of the mark in commerce as to those goods and/or services.

■ 19. Add § 2.94 to read as follows:

§ 2.94 Action after expungement or reexamination.

Upon termination of an expungement or reexamination proceeding, the Office shall issue a notice of termination that memorializes the final disposition of the proceeding as to each of the goods and/or services at issue in the proceeding. Where appropriate, the registration will be cancelled, in whole or in part.

■ 20. Add an undesignated center heading preceding § 2.99 to read as follows:

CONCURRENT USE PROCEEDINGS

■ 21. Revise the undesignated center heading preceding § 2.111 to read as follows:

Cancellation Proceedings Before the Trademark Trial and Appeal Board

■ 22. Amend § 2.111 by revising paragraph (b) to read as follows:

§ 2.111 Filing petition for cancellation.

* * * * *

(b) Any person who believes that he, she, or it is or will be damaged by a registration may file a petition, addressed to the Trademark Trial and Appeal Board, for cancellation of the registration in whole or in part. The petition for cancellation need not be verified, but must be signed by the petitioner or the petitioner's attorney, as specified in § 11.1 of this chapter, or other authorized representative, as specified in § 11.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c) are required for petitions submitted electronically via ESTTA. The petition for cancellation may be filed at any time in the case of registrations on the Supplemental Register or under the Act of 1920, or registrations under the Act of 1881 or the Act of 1905, which have not been published under section 12(c) of the Act, on any ground specified in section 14(3) or section 14(5) of the Act, or at any time after the three-year period following the date of registration on the ground specified in section 14(6) of the Act. In all other cases, including nonuse claims not specified in section 14(6), the petition for cancellation and the required fee must be filed within five years from the date of registration of the mark under the Act or from the date of publication under section 12(c) of the Act.

* * * * *

■ 23. Amend § 2.117 by revising paragraph (a) to read as follows:

§ 2.117 Suspension of proceedings.

(a) Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a civil action, another Board proceeding, or an expungement or reexamination proceeding may have a bearing on a pending case, proceedings before the Board may be suspended until termination of the civil action, the other Board proceeding, or the expungement or reexamination proceeding. A civil action or proceeding is not considered to have been terminated until an order or ruling that ends litigation has been rendered and noticed and the time for any appeal or other further review has expired with no further review sought.

* * * * *

■ 24. Revise § 2.141 to read as follows:

§ 2.141 Ex parte appeals.

(a) *Appeal from final refusal of application.* After final refusal by the trademark examining attorney, an applicant may appeal to the Trademark Trial and Appeal Board, upon payment of the prescribed fee for each class in the application for which an appeal is

taken, within the time provided in § 2.142(a)(1). A second refusal on the same grounds may be considered as final by the applicant for the purpose of appeal.

(b) *Appeal from expungement or reexamination proceeding.* After issuance of a final Office action in an expungement or reexamination proceeding under § 2.93, a registrant may appeal to the Trademark Trial and Appeal Board, upon payment of the prescribed fee for each class in the registration for which the appeal is taken, within the time provided in § 2.142(a)(2).

(c) *Appeal fee required.* The applicant or registrant must pay an appeal fee for each class for which the appeal is taken. If an appeal fee is not paid for at least one class of goods or services before the expiration of the time for appeal, when the appeal is from a final refusal of an application, the application will be abandoned or, when the appeal is from an expungement or reexamination proceeding, the Office will terminate the proceeding. When a multiple-class application or registration is involved, if an appeal fee is submitted for fewer than all classes, the applicant or registrant must specify the class(es) for which the appeal is taken. If the applicant or registrant timely submits a fee sufficient to pay for an appeal in at least one class, but insufficient to cover all the classes, and the applicant or registrant has not specified the class(es) to which the fee applies, the Board will issue a written notice setting a time limit in which the applicant or registrant may either pay the additional fees or specify the class(es) being appealed. If the applicant or registrant does not submit the required fee or specify the class(es) being appealed within the set time period, the Board will apply the fee(s) to the class(es) in ascending order, beginning with the lowest numbered class.

■ 25. Amend § 2.142 by revising paragraphs (a), (b)(3), and (d) to read as follows:

§ 2.142 Time and manner of *ex parte* appeals.

(a)(1) An appeal filed under the provisions of § 2.141(a) from the final refusal of an application must be filed within the time provided in § 2.62(a).

(2) An appeal filed under the provisions of § 2.141(b) from an expungement or reexamination proceeding must be filed within three months from the issue date of the final Office action.

(3) An appeal is taken by filing a notice of appeal, as prescribed in § 2.126, and paying the appeal fee.

(b) * * *

(3) Citation to evidence in briefs should be to the documents in the electronic record for the subject application or registration by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record.

* * * * *

(d) The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.

(1) In an appeal from a refusal to register, if the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

(2) In an appeal from an expungement or reexamination proceeding, no additional evidence may be included once an appeal is filed, and the Board may not remand for further examination.

* * * * *

■ 26. Amend § 2.145 by revising paragraphs (a)(1) and (3) and (c)(1) to read as follows:

§ 2.145 Appeal to court and civil action.

(a) * * * (1) An applicant for registration, a registrant in an ex parte expungement or reexamination proceeding, any party to an interference, opposition, or cancellation, or any party to an application to register as a concurrent user, hereinafter referred to as inter partes proceedings, who is dissatisfied with the decision of the Trademark Trial and Appeal Board, and any registrant who has filed an affidavit or declaration under section 8 or section 71 of the Act, or filed an application for renewal under section 9 of the Act, and is dissatisfied with the decision of the Director (§§ 2.165 and 2.184 and § 7.40 of this chapter), may appeal to the United States Court of Appeals for the Federal Circuit. It is unnecessary to request reconsideration before filing any such appeal; however, any request to reconsider the decision must be made before filing a notice of appeal.

* * * * *

(3) The following requirements must also be satisfied:

(i) The notice of appeal shall specify the party or parties taking the appeal and shall designate the decision or part thereof appealed from.

(ii) In inter partes proceedings, the notice of appeal must be served as provided in § 2.119.

* * * * *

(c) * * * (1) Any person who may appeal to the United States Court of Appeals for the Federal Circuit (paragraph (a) of this section), except for a registrant subject to an ex parte expungement or reexamination proceeding, may have remedy by civil action under section 21(b) of the Act. It is unnecessary to request reconsideration before filing any such civil action; however, any request to reconsider the decision must be made before filing a civil action.

* * * * *

■ 27. Amend § 2.146 by:

■ a. Revising paragraphs (b) and (c);

■ b. Removing the word ''or'' at the end of paragraph (d)(2)(ii);

■ c. Removing the citation ''§ 7.13'' and the period at the end of paragraph (d)(2)(iii) and adding ''§ 7.13 of this chapter'' and ''; or'', respectively, in their places; and

■ d. Adding paragraph (d)(2)(iv).

The revision and addition read as follows:

§ 2.146 Petitions to the Director.

* * * * *

(b) Questions of substance arising during the ex parte prosecution of applications, or expungement or reexamination of registrations, including, but not limited to, questions arising under sections 2, 3, 4, 5, 6, 16A, 16B, and 23 of the Act of 1946, are not appropriate subject matter for petitions to the Director.

(c)(1) Every petition to the Director shall include a statement of the facts relevant to the petition, the points to be reviewed, the action or relief requested, and the fee required by § 2.6. Any brief in support of the petition shall be embodied in or accompany the petition. The petition must be signed by the petitioner, someone with legal authority to bind the petitioner (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(5). When facts are to be proved on petition, the petitioner must submit proof in the form of verified statements signed by someone with firsthand knowledge of the facts to be proved, and any exhibits.

(2) A petition requesting reinstatement of a registration cancelled in whole or in part for failure to timely respond to an Office action issued in an expungement and/or reexamination proceeding must include a response to the Office action, signed in accordance with § 2.193, or an appeal.

(d) * * *

(2) * * *

(iv) Where an expungement or reexamination proceeding has been instituted under § 2.92, two months after the date of actual knowledge of the cancellation of goods and/or services in a registration and not later than six months after the date the trademark electronic record system indicates that the goods and/or services are cancelled.

* * * * *

■ 28. Amend § 2.149 by revising paragraphs (a) and (i) to read as follows:

§ 2.149 Letters of protest against pending applications.

(a) A third party may submit, for consideration and inclusion in the record of a trademark application, objective evidence relevant to the examination of the application for a ground for refusal of registration if the submission is made in accordance with this section.

* * * * *

(i) Any determination whether to include evidence submitted under this section in the record of an application is final and non-reviewable, and a determination to include or not include evidence in the application record shall not prejudice any party's right to raise any issue and rely on any evidence in any other proceeding.

* * * * *

■ 29. Effective December 1, 2022, amend § 2.163 by revising paragraphs (b) and (c) and adding paragraphs (d) and (e) to read as follows:

§ 2.163 Acknowledgment of receipt of affidavit or declaration.

* * * * *

(b) A response to the refusal must be filed within three months of the date of issuance of the Office action, or before the end of the filing period set forth in section 8(a) of the Act, whichever is later. The response must be signed by the owner, someone with legal authority to bind the owner (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(2).

(c) Unless notified otherwise in the Office action, the three-month response period designated in paragraph (b) of this section may be extended by three months up to a maximum of six months from the Office action issue date, upon timely request and payment of the fee set forth in § 2.6(a)(28). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the Office action.

(d) When a timely response is a bona fide attempt to advance the examination of the affidavit or declaration and is a substantially complete response to the outstanding Office action, but consideration of some matter or compliance with a requirement has been omitted, the owner may be granted 30 days, or to the end of the time period for response to the action to which the substantially complete response was submitted, whichever is longer, to explain and supply the omission before the cancellation is considered.

(e) If no response is filed within the time periods set forth in paragraphs (b) through (d) of this section, the registration will be cancelled, unless time remains in the grace period under section 8(a)(3) of the Act. If time remains in the grace period, the owner may file a complete new affidavit.

■ 30. Effective December 1, 2022, revise § 2.165 to read as follows:

§ 2.165 Petition to Director to review refusal.

(a) A response to the examiner's initial refusal to accept an affidavit or declaration is required before filing a petition to the Director, unless the examiner directs otherwise. See § 2.163(b) and (c) for the deadline for responding to an examiner's Office action.

(b) If the examiner maintains the refusal to accept the affidavit or declaration, the owner may file a petition to the Director to review the action within the time periods specified in § 2.163(b) and (c).

(c) If no petition is filed within the time periods set forth in paragraphs (a) and (b) of this section, the registration will be cancelled and a notice of cancellation will issue.

(d) A decision by the Director is necessary before filing an appeal or commencing a civil action in any court.

■ 31. Effective December 1, 2022, revise § 2.176 to read as follows:

§ 2.176 Consideration of matters in §§ 2.171 through 2.175.

The matters in §§ 2.171 through 2.175 will be considered in the first instance by the Post Registration examiners, except for requests to amend registrations involved in inter partes proceedings before the Trademark Trial and Appeal Board, as specified in § 2.173(a), which shall be considered by the Board. If an action of the examiner is adverse, the owner of the registration may petition the Director to review the adverse Office action under § 2.146. If the owner does not respond to an adverse Office action within three months of the issue date of the action, the matter will be considered abandoned. Unless notified otherwise in the adverse Office action, the three-month response period may be extended by three months up to a maximum of six months from the adverse Office action issue date, upon timely request and payment of the fee set forth in § 2.6(a)(28). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the adverse Office action.

■ 32. Add an undesignated center heading and § 2.177 to read as follows:

Court Orders Under Section 37

§ 2.177 Action on court order under section 37.

(a) *Requesting USPTO action on an order.* If a Federal court has issued an order concerning a registration under section 37 of the Act, a party to the court action who is requesting that the USPTO take action on the order must make the request in writing and include the following:

(1) Submit a certified copy of the order to the Director, addressed to the Office of the General Counsel, as provided in § 104.2 of this chapter; and

(2) If the party is aware of proceedings concerning the involved registration that are pending or suspended before the Trademark Trial and Appeal Board, file a copy of such order with the Trademark Trial and Appeal Board via ESTTA.

(b) *Time for submission.* A submission under paragraph (a) of this section should not be made until after the court proceeding has been finally determined. A court proceeding is not considered finally determined until an order or ruling that ends the litigation has been rendered and noticed, and the time for any appeal or other further review has expired with no further review sought.

(c) *Action after submission.* After the court proceeding has been finally determined, appropriate action on a court order submitted under this section will normally be taken by the Office without the necessity of any further submission by an interested party. In circumstances where the Director or the Trademark Trial and Appeal Board, if the order under section 37 involves a registration over which the Board has jurisdiction, determines that it would be helpful to aid in understanding the scope or effect of the court's order, a show cause or other order may issue directing the registrant, and if appropriate, the opposing parties to the action from which the order arose, to respond and provide information or arguments regarding the order. The Director may also request clarification of

the order from the court that issued the order.

■ 33. Effective December 1, 2022, amend § 2.184 by revising paragraph (b) to read as follows:

§ 2.184 Refusal of renewal.

* * * * *

(b)(1) The registrant must file a response to the refusal of renewal within three months of the date of issuance of the Office action or before the expiration date of the registration, whichever is later.

(2) Unless notified otherwise in the Office action, the three-month response period designated in paragraph (b)(1) of this section may be extended by three months up to a maximum of six months from the Office action issue date, upon timely request and payment of the fee set forth in § 2.6(a)(28). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the Office action.

(3) When a timely response is a bona fide attempt to advance the examination of the renewal application and is a substantially complete response to the outstanding Office action, but consideration of some matter or compliance with a requirement has been omitted, the owner may be granted 30 days, or to the end of the time period for response to the action to which the substantially complete response was submitted, whichever is longer, to explain and supply the omission before the expiration is considered.

(4) If no response is filed within the time periods set forth in paragraphs (b)(1) through (3) of this section, the registration will expire, unless time remains in the grace period under section 9(a) of the Act. If time remains in the grace period, the registrant may file a complete, new renewal application.

(5) The response must be signed by the registrant, someone with legal authority to bind the registrant (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(2).

* * * * *

■ 34. Effective December 1, 2022, amend § 2.186 by revising paragraphs (b) and (c) and adding paragraph (d) to read as follows:

§ 2.186 Petition to Director to review refusal of renewal.

* * * * *

(b) If the examiner maintains the refusal of the renewal application, a petition to the Director to review the refusal may be filed. The petition must be filed within the time periods specified in § 2.184(b).

(c) If no petition is filed within the time periods set forth in paragraphs (a) and (b) of this section, the renewal application will be abandoned and the registration will expire.

(d) A decision by the Director is necessary before filing an appeal or commencing a civil action in any court.

■ 35. Amend § 2.193 by revising paragraph (e)(5) introductory text to read as follows:

§ 2.193 Trademark correspondence and signature requirements.

* * * * *

(e) * * *

(5) *Petitions to Director under § 2.146 or § 2.147 or for expungement or reexamination under § 2.91.* A petition to the Director under § 2.146 or § 2.147 or for expungement or reexamination under § 2.91 must be signed by the petitioner, someone with legal authority to bind the petitioner (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the following guidelines:

* * * * *

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

■ 36. The authority citation for part 7 is revised to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, Pub. L. 116–260, 134 Stat. 1182, unless otherwise noted.

■ 37. Effective December 1, 2022, amend § 7.6 by adding paragraph (a)(9) to read as follows:

§ 7.6 Schedule of U.S. process fees.

(a) * * *

(9) *Extension of time for filing a response to an Office action under § 7.39(b) or § 7.40(c).* (i) For filing a request for extension of time for filing a response to an Office action under § 7.39(b) or § 7.40(c) on paper—$225.00.

(ii) For filing a request for extension of time for filing a response to an Office action under § 7.39(b) or § 7.40(c) via TEAS—$125.00.

* * * * *

■ 38. Effective December 1, 2022, revise § 7.39 to read as follows:

§ 7.39 Acknowledgment of receipt of and correcting deficiencies in affidavit or declaration of use in commerce or excusable nonuse.

The Office will issue a notice as to whether an affidavit or declaration is acceptable, or the reasons for refusal.

(a) A response to the refusal must be filed within three months of the date of issuance of the Office action, or before the end of the filing period set forth in section 71(a) of the Act, whichever is later. The response must be signed by the holder, someone with legal authority to bind the holder (*e.g.,* a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(2) of this chapter.

(b) Unless notified otherwise in the Office action, the three-month response period designated in paragraph (a) of this section may be extended by three months up to a maximum of six months from the Office action issue date, upon timely request and payment of the fee set forth in § 7.6(a)(9). To be considered timely, a request for extension of time must be received by the Office on or before the deadline for response set forth in the Office action.

(c) When a timely response is a bona fide attempt to advance the examination of the affidavit or declaration and is a substantially complete response to the outstanding Office action, but consideration of some matter or compliance with a requirement has been omitted, the holder may be granted 30 days, or to the end of the time period for response to the action to which the substantially complete response was submitted, whichever is longer, to explain and supply the omission before the cancellation is considered.

(d) If no response is filed within this time period, the extension of protection will be cancelled, unless time remains in the grace period under section 71(a)(3) of the Act. If time remains in the grace period, the holder may file a complete, new affidavit.

(e) If the affidavit or declaration is filed within the time periods set forth in section 71 of the Act, deficiencies may be corrected after notification from the Office, as follows:

(1) *Correcting deficiencies in affidavits or declarations timely filed within the periods set forth in sections 71(a)(1) and 71(a)(2) of the Act.* If the affidavit or declaration is timely filed within the relevant filing period set forth in section 71(a)(1) or section 71(a)(2) of the Act, deficiencies may be corrected before the end of this filing period without paying a deficiency surcharge. Deficiencies may be

corrected after the end of this filing period with payment of the deficiency surcharge required by section 71(c) of the Act and § 7.6.

(2) *Correcting deficiencies in affidavits or declarations filed during the grace period.* If the affidavit or declaration is filed during the six-month grace period provided by section 71(a)(3) of the Act, deficiencies may be corrected before the expiration of the grace period without paying a deficiency surcharge. Deficiencies may be corrected after the expiration of the grace period with payment of the deficiency surcharge required by section 71(c) of the Act and § 7.6.

(f) If the affidavit or declaration is not filed within the time periods set forth in section 71 of the Act, the registration will be cancelled.

■ 39. Effective December 1, 2022, revise § 7.40 to read as follows:

§ 7.40 Petition to Director to review refusal.

(a) A response to the examiner's initial refusal to accept an affidavit or declaration is required before filing a petition to the Director, unless the examiner directs otherwise. See § 7.39(a) through (c) for the deadline for responding to an examiner's Office action.

(b) If the examiner maintains the refusal of the affidavit or declaration, the holder may file a petition to the Director to review the examiner's action. The petition must be filed within the time periods specified in § 7.39(b) and (c).

(c) If no petition is filed within the time periods set forth in paragraphs (a) and (b) of this section, the registration will be cancelled.

(d) A decision by the Director is necessary before filing an appeal or commencing a civil action in any court.

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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